



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
Civil Appeal 77 of 2008

MAGWAGWA FARMERS CO-OPERATIVE SOCIETY LTDAPPLICANT/APPELLANT

VERSUS

JASHON OKARI NYATARO RESPONDENT

(An appeal from the Ruling in the Senior Resident Magistrate's Court

at Nyamira Civil Case No.165 of 2007 by HON. LOIS KOMINGOI – S.R.M)

RULING

This ruling arises from a decision by the Senior Resident Magistrate's Court at Nyamira, **Civil Case No.165 of 2007, Jashon Okari Nyataro vrs. Magwagwa F.C.S. Ltd.** In the plaint the respondent/plaintiff stated that he was a former employee of the appellant/defendant. The Respondent's services were terminated and he sued for recovery of Kshs.272,214/= and interest thereon as balance of his terminal benefits.

The appellant filed a statement of defence and denied the respondent's claim. The appellant further stated that the court did not have jurisdiction to hear and determine the suit. Thereafter the appellant filed a Preliminary Objection stating that the court did not have jurisdiction by virtue of the provisions of **section 76 of the Co-operative Societies Act, 1997.** The Preliminary Objection was argued and in a considered ruling delivered on 4th June 2008 the same was dismissed with costs.

The respondent filed an application for summary judgment as prayed in the plaint. The appellant opposed the application. The same was argued and judgment was entered as prayed. Execution proceedings were instituted and M/S. Odongo Investment proclaimed the appellant's goods on 8th October 2008. This prompted the appellant to file before the subordinate court an application under certificate of urgency for stay of execution pending appeal. The appellant had on 12th June 2008 filed an appeal before this court against the ruling of the subordinate court dismissing the preliminary objection on the issue of its jurisdiction. No appeal has been filed against the ruling in respect of the summary judgment that was entered in favour of the respondent.

When the appellant's application for stay of execution was placed before the learned trial magistrate she rightly pointed out that there was no appeal that had been preferred against her ruling delivered on 30th July 2008 wherein summary judgment was entered in favour of the respondent.

She therefore stated that the matter was not urgent and directed that a hearing date for the said application be taken at the registry.

The appellant moved to this court and filed an application under **OXL1 rule 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act.** The application was made by way of chamber summons and sought the following orders:

"1. This application be certified as urgent in the first instance and prayer 2 be granted instant. (sic)

2. That there be order of stay of execution of the warrants of attachment of the proclaimed properties and warrant of sale pending the hearing and determination of this application

3. That pending the hearing and determination of the appeal herein honourable court (sic) be pleased to set aside the judgment and all consequential orders herein.”

The application was supported by an affidavit sworn by Hezekiah Obao T. Nyasamba, the Chairman of the appellant Co-operative Society.

Mr. Sagwe for the appellant submitted that if the application was not allowed the appellant's proclaimed goods which included a coffee weighing machine and 200 bags of coffee would be sold and the appeal will be rendered nugatory. He added that the appellant stood to suffer substantial loss if the orders sought were not granted. In his view, the appeal had high chances of success.

The respondent filed grounds of opposition and Mrs. Asati for the respondent sought to rely on the same. The respondent's counsel stated that appellant's application was fatally defective, misconceived and an abuse of the court process. She pointed out that the application was brought by way of Chamber Summons as opposed to a notice of motion.

Secondly, there was no prayer for stay of execution pending hearing and determination of the appeal, prayer 2 as above only sought stay of execution pending hearing and determination of the application. Thirdly, counsel submitted that there was no application for stay of execution that had been argued and refused by the subordinate court before the current application was filed before this court as required under **Order XL1 rule 4(1)** of the **Civil Procedure Rules**. Counsel further submitted that no appeal had been preferred against the ruling by the subordinate court wherein summary judgment was entered. The execution that was being undertaken by the respondent was in respect of the summary judgment that was lawfully entered.

With regard to the appeal that was filed by the appellant, counsel submitted that the same was not arguable since the respondent was neither a current member or a past member or officer of the appellant Co-operative Society. Therefore she asked the court to dismiss the application with costs.

I have considered the above submissions. I agree that the appellant's application ought to have been made by way of a notice of motion but in my view, that defect alone is not fatal to the application and therefore I will proceed to consider the same on its merits.

The appellant has not preferred any appeal against the summary judgment that is now being executed. No reason has been advanced for that omission. Prayer 3 in the appellant's application that seeks **“judgment and all the consequential orders”** pending the hearing and determination of the appeal is totally misplaced. Such a prayer cannot be made in an application that is essentially seeking stay of execution pending appeal. If there is no appeal against the summary judgment that was entered, how can an application for stay be sustained?

The appellant's prayer 2 is not for stay of execution pending hearing and determination of the appeal but seeks stay pending hearing and determination of this application.

The conditions for grant of stay of execution pending appeal are well established. It must be shown that there is sufficient cause, that substantial loss will be occasioned to the applicant if stay is not granted, that there was no unreasonable delay in making the application and that such security as the court may order is provided, see **VISHRAM RAVJI HALAI VS. THORNTON AND TURPIN**, Civil application No. Nai. 15 of 1990.

Mr. Sagwe argued that if stay of execution is not granted the appeal would be rendered nugatory and that will cause substantial loss to the appellant. In **KENYA SHELL LTD VS BENJAMIN KARUGA** 1KAR 1018 it was held that it is not normal for an appeal to be rendered nugatory in a monetary decree if payment is made. In this case, the respondent obtained judgment in his favour in the sum of Kshs.272,214/= plus costs and interest. The decree shows a sum of Kshs.462,763.80. There is no averment that if the appellant was to pay the aforesaid sum its operations would grid to a halt. Substantial loss has thus not been demonstrated.

It is not enough for an applicant to simply allege that he will suffer substantial loss if stay of execution is not granted, he must clearly demonstrate so in a detailed manner.

Both parties spent considerable time arguing about the merits or otherwise of the appeal. With respect, those arguments were misguided in an application for stay of execution before this court. That may be an important requirement in the Court of Appeal but that is not one of the requirements under **Order XL1 rule 4**. But even if I were to accept that the

appeal is arguable, it was not alleged that the respondent would be unable to repay the decretal sum in the event that the appeal was successful.

All in all, for the reasons aforesaid, I find that the appellant's application is bad in law and lacking in merits. It is dismissed with costs.

DATED, SIGNED and DELIVERED at KISII this 31st day of October, 2008.

D. MUSINGA

JUDGE.

Delivered in the open court in the presence of:

1. Mr. Sagwe for the Appellant
2. Mrs. Asati for the Respondent.

D. MUSINGA

JUDGE.