



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**Civil Appeal 25 of 2007**

**FRANCIS M.M. ACHIYENZA**

**BENETA ACHIYENZA :::::::::::::::::::::::::::::::::::APPELLANTS**

**VERSUS**

**RAPHAEL SHIKUNDI :::::::::::::::::::::::::::::::::::RESPONDENT**

**R U L I N G**

The application before me is of an interlocutory nature, as it seeks the release of money pending the hearing and determination of an appeal.

The applicant is the appellant. He describes himself as being a jobless peasant farmer, who depends on sugarcane farming.

He says that he was experiencing financial difficulties because Mumias Sugar Company Limited had declined to release to him, the proceeds from the sale of sugarcane which he sold and supplied to the said company.

The decision by Mumias Sugar Company Limited is said to be due to the fact that the company misunderstood the orders made by the Chief Magistrate's Court, Kakamega, in CMCC No. 55 of 2006.

As a result of the company's refusal to release the proceeds to the applicant, it is the applicant's case that his children had been thrown out from school, due to outstanding fees.

Meanwhile, it is the applicant's understanding that it would take more than a year before his appeal could come up for hearing. That being the position, the applicant deemed it necessary to bring this interlocutory application, hoping that through it, this court would make orders which would alleviate his suffering.

It is the applicant's case that the sugarcane whose proceeds he is asking for, was harvested from parcel No. 1351, which is registered to his name. He also pointed out that he has a contract with Mumias Sugar Company Limited, which confirms that he was the owner of parcel No. 1351.

Therefore, the applicant believes that the respondent would not be prejudiced at all, if the proceeds of sale were released to him, because the respondent only lays claim to parcel No. 1352.

It was the applicant's contention that this court, in its appellate capacity, has such powers as are available to the trial court. That authority is said to flow from section 78(2) of the Civil Procedure Act.

In answer to the application, the respondent submitted that the applicant was trying to have the appeal determined summarily, albeit through the application before me.

He pointed out that the trial court had directed that the Account No. 72762, which was currently in the applicant's name, be transferred to the respondent. Therefore, the respondent's understanding was that the proceeds of the sugarcane, which were in that account would be transferred to him.

Of course, the said decision is being challenged through the appeal before the High Court: that fact is conceded by the respondent. However, for that very reason, the respondent believes that if the proceeds of the sale of the sugarcane were paid over to the applicant, before the appeal was heard and determined, the appeal would have been determined.

It was the respondent's further submission that his case all along had been that the sugarcane had been planted on parcel No. 1352, whilst the applicant's case had been that the sugarcane was on parcel No. 1351.

To my mind, the dispute before the trial court was in relation to 2 issues, namely;

i) Whether or not the applicants before me ought to be

be restrained from using parcel No. 1352; and

ii) if the applicants' names ought to be deleted from the

"cane contract A/C No.72762"; to be replaced by the names of the respondent.

Having heard the case, the learned trial magistrate held that the applicants herein had no proprietary rights in relation to parcel No. 1352. He ordered that they be;

*"evicted from the land in dispute and also that cane contract*

*Account Number 72762 be registered in the names of the*

*plaintiff RAPHAEL SHIKUNDI."*

By necessary implication, the trial court must be deemed to have been satisfied that the applicants herein were in occupation of parcel No. 1352, hence the order for their eviction.

If that be the case, it would follow that the proceeds of the sugarcane, which were in account No. 72762 belonged to the respondent. It can only be because of that reason that the trial court ordered that the Account be registered in the respondent's name.

If that were to be done, the applicants would have no claim over the money in that account, until and unless he were to be successful in his pending appeal. For now, I cannot understand how it could be possible to release the funds to the applicants without negating the order requiring the Account to be registered in the respondent's name.

The applicants did not demonstrate the distinction, if any between the Account Number 72762 and the proceeds of the sugarcane which he wishes to have released to him.

It is noteworthy that in the substantive appeal the applicants herein will be seeking the quashing or setting aside of the judgment and the orders of the trial court. One of those orders was that the account be registered in the names of the respondent.

Therefore, if this court were to reverse that order at that stage, I find that an integral part of the appeal would have been determined summarily. I have not been given any good reason to warrant the

interlocutory orders sought.

Accordingly, the application dated 15<sup>th</sup> April 2008 is dismissed with costs. I find no justification, at this interlocutory stage, to exercise the authority vested in an appellate court by section 78(2) of the Civil Procedure Act.

I believe that the said authority will be exercised by the court during the hearing and determination of the substantive appeal.

Finally, I order that the appeal herein be set down for hearing on a priority basis.

*Dated, Signed and Delivered at Kakamega, this 16<sup>th</sup> day of October, 2008.*

**FRED A. OCHIENG**

**J U D G E**