

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 645 of 2007

WILSON K. MBANYA.....APPELLANT

VERSUS

INOI FARMERS COOP. SOCIETY LTD.....RESPONDENT

R U L I N G

1. Wilson K. Mbanya, the appellant herein is dissatisfied with the ruling made by the Cooperative Tribunal on 26th June, 2007 in Tribunal Case No.3 of 2004. He has filed a memorandum of appeal raising 4 grounds. The appellant has now brought a chamber summons under Order XXI Rule 22 and Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking an order of stay of execution of the judgment of the Cooperative Tribunal delivered on 26th June, 2007 and the subsequent ruling dated 18th September, 2008 pending the hearing of his appeal.
2. The appellant further prays that he be allowed to deposit title No.Inoi/Kiaga/1116 with the court as security for the decretal sum. The appellant contends that the respondent Inoi Farmers Cooperative Society Ltd, has filed an application dated 1st July, 2008 seeking prohibitory orders and sale of the appellant's parcel of land and therefore unless order of stay of execution is granted, the appellant's appeal will be rendered nugatory.
3. In its ruling delivered on 18th September, 2008, the Tribunal allowed execution against the appellant and ordered attachment and sale of his property known as Inoi/Kiaga/1116. The appellant has not availed a copy of the ruling or order of the Tribunal made on 26th June, 2007 which is subject of his appeal. It would appear however, that, that ruling is subject of the decree which was allowed to be executed vide the order of 18th September, 2008. The appellant therefore contends that unless the orders of 26th June 2007 and 18th September, 2008 are stayed his appeal will be rendered nugatory. The appellant will also suffer substantial loss as he will be unable to recover his land if sold.
4. The respondent, objects to the application through a replying affidavit sworn by its chairman, Stanley Chore Njagi, in which it is averred *inter alia*, that a surcharge order was issued against the appellant on 1st December, 2003 in accordance with the Cooperative Societies Act 1997, and that the appellant did not appeal in accordance with the provisions of that Act. It was contended that the appellant's appeal to the High Court was incompetent. His application based on that appeal was therefore an abuse of the court process. It was further contended that the applicant not having made any application to the Tribunal for stay of execution of the orders, the application for stay of execution made before this court is incompetent. It is maintained that the appellant has been indolent in bringing the application as the ruling of the Tribunal was delivered on 26th June, 2007.
5. Counsel for the respondent submitted that the appellant has not demonstrated any substantial loss that he is likely to suffer if the order for stay of execution is not granted. In this regard counsel relied on *HCCA No.830 of 2003 Triton Petroleum Company Ltd vs Kirinyaga Construction (K) Ltd*. He submitted that the decree was a monetary decree, which was being executed by way of sale of land. It was maintained that losing the land was not substantial loss as the land was not subject of the appeal. With regard to the appellant's offer to deposit title deed as security, it was submitted that no valuation of the

land was provided.

6. Having carefully considered the application, the affidavit in support and the submissions of counsel, I find that the order subject of the appellant's appeal was made on 25th July, 2007. The appellant did not bring the current application until 28th October, 2008. That means that the application was made about 14 months after the order appealed against. The appellant has not provided any reasonable explanation for the inordinate delay in bringing his application. It would appear that his application is an afterthought and only actuated by the orders made by the Tribunal on the 18th September, 2008, allowing execution of the judgment issued on 25th July, 2007 by way of attachment and sale of the appellant's land. The appellant had an opportunity to show cause to the Tribunal as to why the orders of attachment should not issue against him. Apparently he failed to do so.

7. Under Order XLI Rule 4(2) of the Civil Procedure Rules, it is imperative that an applicant for an order of stay of execution pending appeal, satisfies the court that substantial loss will result to him unless the orders sought are granted. In this case, the appellant's only plea is that his land will be sold and that will cause him substantial loss. However, the court has the responsibility to balance the interest of the appellant against that of the respondent who has a valid decree in its favour. The appellant has an option to avoid the sale of his land by satisfying the decree. Moreover, the appellant has not satisfied this court that the respondent will not be able to refund the decretal sum if the appellant is successful in its appeal.

8. For the above reasons I find that the appellant has failed to satisfy the conditions upon which an order of execution pending appeal can be issued. His application lacks merit and is accordingly dismissed with costs.

9. Following the agreement by counsels that this suit i.e. HCA No.645 of 2007 be consolidated with HCA No.646 of 2007 for purposes of determining chamber summons dated 28th October, 2008 in HCA No.646 of 2007, and it being evident that the circumstances of that application is similar to the application dated 28th October, 2008, for reasons stated herein, that application is also dismissed with costs.

Dated and delivered this 18th day of December, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Wati H/B for Gatumuta for the appellant

Ms Munene for the respondent