



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Civil Appeal 18 of 2007**

**(Being an appeal from the judgment of Mr. G. Oyugi, Ag SRM Tigania Law Courts  
delivered on 13<sup>th</sup> February, 2007)**

**KANJARU FARMERS CO-OPERATIVE SOCIETY ..... APPELLANT**

**VERSUS**

**RAHAB KAIMURI ..... RESPONDENT**

**RULING**

The applicant was sued in the Magistrate's court at Tigania by the respondent for the recovery of unpaid allowances.

The court awarded Kshs.404, 455.30 to the respondent. The respondent has instructed auctioneers who have proclaimed the applicant's weighing machines, coffee processing machines and other goods. The applicant has come to this court claiming that unless execution is stayed its members numbering 1000 will suffer as the applicant's operations shall be crippled.

Given the value of the attached goods and the decretal sum, the applicant argues that the respondent being a woman of straw will not be able to restitute should the sale proceed and this appeal allowed. On the other hand the applicant asserts that it is a profit making concern with enough funds and assets to offset any claim by the respondent.

The respondent in her replying affidavit has argued that the applicant has not complied with the provisions of Order 41 rule 4(2) of the Civil Procedure Rules as to undertaking to provide security. That was the only ground out of 15 paragraphs in the replying affidavit that directly challenges the application.

From the onset I would like to observe that both the applicant and the respondent have spent more time and energy arguing the merits of their respective cases and the likelihood or unlikelihood of success of the appeal filed herein.

It must be made clear that the jurisdiction of the High Court in matters of stay of execution pending appeal is exercised exclusively under Order 41 Rule 4(2) of the Civil Procedure Rules. Under these provisions the court is guided by three principles in considering whether or not to grant a stay, namely;

- (i) it must be satisfied that substantial loss may result to the applicant unless the order of stay is made
- (ii) it must also be satisfied that the application for stay has been brought without unreasonable delay,

and finally

(iii) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given by the applicant.

These are the only consideration. Whether or not the appeal is frivolous, arguable or not, are matters for consideration under the jurisdiction of the Court of Appeal Rules – under Rule 5(2) (b).

This distinction has been discussed in the case of Mukuma V Abuoga (1988) KLR 645. It is therefore a misdirection on the part of the counsel to have argued as though this court ought to consider the merit of the applicant's appeal.

Secondly, I would like to observe that although the Chamber Summons brought by the applicant is seeking stay of execution, it does not specify execution in which cause. The affidavit in support is equally silent on this.

As I have said the pre-occupation of the applicant is the strength of its appeal. Be that as it may from the annexures I have been able to glean the details of the suit whose execution is sought to be stayed.

Turning to the application the applicant's goods have been proclaimed to satisfy a decree of Kshs.404, 455.30. The items proclaimed, the applicant has argued, if attached and sold, the applicant and its members will suffer substantial loss. It is further argued for the applicant that should execution proceed and its appeal were to succeed after execution, the appeal will be rendered nugatory and the respondent will not be able to refund the decretal sum.

The court in considering an application for stay must ensure two things; that the appeal must not be rendered nugatory and substantial loss is prevented by preserving the status quo.

The applicant has filed an appeal to challenge the decision of the magistrate's court. It is apprehensive that should execution proceed that appeal will not only be rendered nugatory should it be successful but also it will suffer substantial loss as the respondent is a lady of straw. That is the loss that must be prevented. Having questioned the respondents pecuniary capability to refund the decretal sum, it was upon the respondent to rebut these allegations of her impecuniness by leading evidence of her means. She has not tried to do this in her replying affidavit with the result that the applicant's assertion is not challenged.

See ABN AMRO BANK, N.V. V Le Monde Foods Ltd Civil Application No.Nai 15 of 2002 (U.R 11/02) in which the case of Kenya

and Telecommunication Corporation V Paul Gachanga Ndarua, Civil Application No.Nai.367 of 2001(1994/2001 UR) was cited with approval. The court in latter case stated in the relevant part that;

“Of course, ordinarily the burden was on the Corporation to show that were its appeal to succeed, the success would be rendered nugatory because the respondent would be unable to restore the decretal sum if that sum was immediately paid out to the respondent. But in a case such as this where it is alleged that the respondent has no known assets, the evidential burden must shift to him to show that he has assets from which he can refund the decretal sum.

That must be so because the property a man has is a matter so peculiarly within his knowledge that an applicant such as the Corporation may not reasonably be expected to know them.

He did not do so”

The respondent in this application has failed to discharge that burden. The second matter for consideration is whether this application was brought without unreasonable delay.

The decision with which the applicant is aggrieved was made on 13<sup>th</sup> February 2007 and this application filed on 10<sup>th</sup> April, 2007. I find that a delay of two months is not unreasonable. For the reasons stated I allow the application and order that there shall be a stay of execution in RMCC No.34 of 2005 pending the hearing and determination of this appeal. That stay shall be subject to the applicant depositing, within 30 days of this order, the decretal sum in a joint interest-earning account to be opened by both counsel for the applicant and respondent with a reputable bank, failing which execution to proceed.

Orders accordingly.

DATED AND DELIVERED AT MERU THIS 15<sup>TH</sup> DAY OF JUNE, 2007

W. OUKO

JUDGE