



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 15 OF 2007

KENYA INDUSTRIAL ESTATES LTD.....APPELLANT

*Versus*

FRANCIS MURERIA.....RESPONDENT

*(Being an application out of an appeal from the Judgment of E. J. Osoro, Senior Resident Magistrate in Chief Magistrate's Civil Case No. 530 of 2005 at Nyeri, dated 2<sup>nd</sup> November 2006)*

RULING

The Appellant has filed a Notice of Motion dated 19<sup>th</sup> March 2007 brought under *Order XL1 Rule 4* of the Civil Procedure Rules. The application seeks stay of the execution of Nyeri CMCC NO. 530 of 2005 pending the hearing and determination of an appeal it has preferred to this court.

The claim at the subordinate court related to the facility granted to the Respondent by the Appellant. The Respondent purchased a shed from the Appellant by means of finance facility provided by the Appellant. It was alleged by the Appellant that the Respondent defaulted in the repayments of that facility. The Appellant proceeded to sell the shed. The Respondent sued the Appellant for that sale which he alleged was wrongful. The subordinate court found for the Respondent and awarded him judgment for amount of installment payments made to the Appellant. The Appellant was aggrieved by that judgment and has filed this appeal.

In support of the application for stay the Appellant stated that the Respondent has, through appointed auctioneers, proclaimed the Appellant's goods. Further that the Respondent is not a person likely to reimburse the Applicant if that execution is carried out since he had failed to pay installments of the financial facility granted to him. That the amount of judgment is Ksh.1.2 million and since the Appellant is a Government institution, it would be able to satisfy the decree if the appeal did not succeed. Counsel for the Appellant submitted that the Appellant, by its Memorandum of Appeal, had shown that its appeal is arguable, which he said was a requirement in an application such as this. In this regard he laid reliance on the case of **RUBEN & 9 OTHERS -V- NDERITO & ANOTHER (1989) KLR 459**. He further argued that even if the decree was a money decree, stay can be granted. He relied on the case of **INDUSTRIAL AND COMMERCE DEVELOPMENT CORPORATION -V- DABER ENTERPRISES LTD. (1999) 2 E.A. 112** where the Court of Appeal held as follows:

*"If the circumstances of the case so demand, a stay of execution can be granted even in respect of money decrees. In this case, the respondent had not shown that it had known assets and would be able to refund the decretal amount if subsequently required"*.

Counsel for the Appellant argued that if indeed the Respondent failed to repay the amount if the appeal was successful this would result in substantial loss. He relied on the case of **NEW STANLEY HOTEL LIMITED -V- ARCADE TOBACCONIST LTD. (1986) KLR**.

In response the Respondent argued that the appeal is incompetent and has not shown high chances of success. The counsel did not elaborate on his argument in that regard. He, however, relied on two authorities which stated that stay could not be granted where the appeal did not show high chances of

success, namely **NYERI HCCA NO. 94 of 2004 OTHAYA FARMERS CO-OP SOCIETY LTD. -V- MWANGI WA KIHUNI and CIVIL APPEAL NO. 374 of 2001 (COURT OF APPEAL) PAUL WATHIRU NGURE =AND= PHILIP NJOROGE NGURE AND ANOTHER.**

I have considered the application before me, the affidavit, submissions of counsel and their authorities. The conditions of granting stay pending appeal are well set out in *Order KL1 Rule 4*. That rule states that for sufficient cause a court may order stay pending appeal. *Sub Rule (2)* however, provides that no stay shall be issued unless; (1) the applicant satisfies the court that he will suffer substantial loss; (2) the application is made without undue delay and (3) the court may order that security be provided. The Appellant's argument that in view of the Respondent's history of failing to pay installments when they were due it was likely to suffer substantial loss since the Respondent may fail to refund on appeal being successful was not rebutted by the Respondent and I do therefore find that the Appellant may suffer loss if stay is not granted. I however find that the Appellant did file the application for stay within reasonable time after leave was granted to it to file the appeal out of time. It is also the finding of this court that sufficient cause is shown why stay is granted for, I am of the view that there is an arguable appeal by the Appellant. In listening to the Appellant's argument it is clear that the Appellant is not concerned with the amount of the judgment of the subordinate court but rather its concern is that the Respondent may not refund the amount if the appeal is successful. I am, in view of that stand, going to order that the Appellant provide security for stay which the court will grant hereof. The court therefore grants the following orders:

1. That stay of execution is hereby granted in respect of Nyeri CMCC NO. 530 of 2005 pending the hearing and determination of the appeal HCCA No. 15 of 2007 (NYERI).
2. That such stay in (1) above is conditional on the Appellant providing within 30 days the amount of Ksh.1Million which amount shall be paid into court. If that amount is not paid within 30 days stay of execution will automatically be discharged.
3. The costs of the Notice of Motion dated 19<sup>th</sup> March 2007 shall abide with the appeal.

***Dated and delivered at Nyeri this 8<sup>th</sup> day of June 2007.***

**MARY KASANGO**

**JUDGE**