REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU
Civil Appeal 65 of 2006

NKANATA NTANDU …….....…….....…….. 1ST APPELLANT

WANGU EMBORI FARM CO. LTD…….....…….....……2ND APPELLANT

VERSUS

ISINDORO KIRARA M'ARAMI suing as father and administratrix of the estate of

JULIUS KIOGORA (deceased)…….……...……..... RESPONDENT

R U L I N G

1. The Appeal herein arises from a judgment in Meru CMCC No. 4/2002 (Hon. Omburah SRM) and the record shows that the same was filed on 21/7/2006 but there is controversy as to when payment for it was done, a matter I will briefly touch on later. In any event, on 17.11.2006 some four(4) months after the Appeal was filed, the Appellant by a Notice of Motion under Order XLI Rule 4 of the Civil Procedure Rules sought orders of stay of execution of the decree in the suit aforesaid pending hearing and determination of the Appeal.

2. In the grounds in support of the Application, the affidavits of Thuranira Atheru, Advocate sworn on 16.11.2006 and Dr. Ndegwa J.K. sworn on 18.4.2007, a number of matters are raised viz;

(i) That the judgment now on appeal was for payment of Ksh.348,540/- to the Respondent and that whereas had Ksh.277,255/- has been paid into a joint interest earning account pending further orders of the lower court, orders were made on 15.11.2006 for release of that money to the Respondent. That order is challenged as having been made ex-parte and without reason save that the lower court declined to grant any orders of stay of execution of the decree.

(ii) That payment of Ksh.120,000/- made earlier was done under duress and to avoid execution which was unlawfully threatened.

(iii) That if the execution proceeds as is claimed or the money now deposited is released to the Respondent, the Applicant will suffer substantial loss and damage.

(iv) That the application was made without delay and

(v) That the money already deposited is sufficient security.

3. Mr. Mwanzia for the Applicant reiterated these points but added the issue of the filing of the Appeal, payments for it and a controversial receipt issued in payment thereof. I will leave the latter issue for a

moment and return to it later.

4. In response, the Respondent , Isidero Kirara M'arimi in a Replying Affidavit sworn on 24.11.2006 depones that the Applicant was only employing delaying tactics because Dr. Ndegwa, General Manager of the 2nd Appellant had accepted and agreed to pay the balance of the decretal amount and did prepare "**an agreement in liquidation of decretal sum**" dated 22.7.2006 and it is now an afterthought when he reneges on that agreement and seeks orders of stay of execution. I have also seen the Affidavits of Kirimi Mbogo Advocate and Ken Muriuki Advocate on the events leading to the payment of Ksh.120,000/- as part settlement of the decretal amount by the 2nd Appellant. The sum total of what they deponed to is that the payment was made voluntarily and that there was no duress on the part of the Auctioneer or the Respondent's advocates and the Applicants are now acting in bad faith when they turn round and renege on the agreement to pay the balance of the decretal sum.

5. In his submissions, Mr. Muriuki relies on the decision of this court in Ronald Enock vs Charles Wanjama Wachira, HCCA 58/2006 (Meru) to argue that where no substantial loss is shown (and he says that none has), then orders of stay of execution cannot issue. He also submits that the Respondent is a man of straw and cannot ever repay the decretal sum if the Appeal succeeds.

6. I agree with both parties that an Applicant who has come to this court to seek an order of stay pending appeal must fit his circumstances within the conditions envisaged by Order XLI Rule 4 (2) of the Civil Procedure Rules. In the instant Application, there is no doubt that the Applicants came to this court timeously and only a couple of days after stay of execution was refused by the lower court. It cannot also be an issue for debate that the Respondent has received Ksh.90,000/- as part-payment of the decretal sum and a further Ksh.277,255/- is safely in an account in the names of the advocates for the parties, jointly. That is by all means enough security depending on the final orders of this court as regards the Application under consideration. Before addressing the remaining issue of substantial loss, i should return to the controversy about a receipt on record in purported payment of fees for the filing of the memorandum of Appeal. Much has been said of it by both parties but I have now read the Affidavits of David Mwenda Kanyamu sworn on 26.4.2007 and that of Josphat Irungu sworn on 25.4.2007. Without evidence that Josephat Irungu otherwise acted illegally and/or improperly on the issuance of the receipt and the anomaly having been explained, I think the matter should be considered as spent and I should take that the court stamp on the memorandum of Appeal being authentic, indicates the correct date of filing of the Appeal. The Appeal was filed in time and there is no more to say.

7. Has the Applicants shown that they will suffer substantial loss if the decree is executed? As I understand it, the loss the Applicant may suffer includes deprivation of a substantial amount of money. (See New Stanley Hotel Ltd vs Arcade Tobacconists Ltd [1986] KLR 757 where Porter J. granted an order of stay pending appeal where the amount of mesne profits was found to be a considerable sum). In the present case the amount in issue is Ksh.277,255/- which cannot be said to be little money. It has also been argued that the loss may be compounded because the Respondent is a man of straw and may never repay the money if called upon to do so, should the Appeal succeed. I quite agree with the view of Emukule J. regarding this point as expressed in Deposit Protection Fund vs Panachand Jivraj Shah and others HCCC 1529/2001 (Milimani) where the learned judge said that the evidence that the Respondent is a man of straw must spring from the Affidavits and other evidence on record and that "**a bald statement from the bar or indeed in an affidavit by the judgment debtor that he will suffer substantial loss unless a stay of execution is ordered unbacked by evidence of the matter carries no weight of persuasion"** in the courts mind.

8. There is no evidence on record save the deposition at paragraph 9 of the Affidavit of Dr. Ndegwa sworn on 18.4.2007 that the "**Respondent is a poor man with no known means as he testified in court that he entirely depended on his son now deceased for his upkeep**." That in my view is not sufficient a reason to say that he cannot repay the money if the Appeal succeeds.

9. I would have looked at the amount of money in issue and said that there is risk of substantial loss but the Respondent's conduct says otherwise. I have seen the document earlier referred to in which one Dr.Ndegwa agreed to pay the decretal amount within seven (7) days after 22.7.2006. The words that are

immediately relevant are;

"**I undertake to effect settlement of the balance……within seven days**."

It smirks of bad faith to make such an undertaking and then go behind it and refuse to honour the same. An "**undertaking**" is defined as "**assurance commitment, pledge**, **promise**, **solemn word**, **vow, word of honour**," Concise Thesaurus, Collins, 2000 – edition. How can a court of equity allow such solemn words to be trashed by a party who now seeks favour before the same court?

10. Clearly, the Application dated 17.11.2006 would otherwise have been allowed but the sword of equity necessitates other orders which are that the Application is made in bad faith and is best dismissed with costs to the Respondent.

Orders accordingly.

Dated, signed and delivered in open court at Meru this 3rd . Day of July 2007.

ISAAC LENAOLA

JUDGE

In the presence

Mr. Mwanzia Advocate for the Appellants/Applicants

N/A Advocate for the Respondent

ISAAC LENAOLA

JUDGE