



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 4 of 2006

(FORMER BUNGOMA HCCA. NO. 52 OF 2005)

CHANNAN AGRICULTURAL CONTRACTORS (K) LTD.APPELLANT

V E R S U S

NICODEMUS MUGARARESPONDENT

R U L I N G

Channan Agricultural Contractors (K) Ltd., the Appellant/Applicant herein, applied on 2-2-06 for an order of stay of execution of the decree in Kakamega SPMCC No.309 of 2004 pending the hearing and determination of the appeal herein. The application by chamber summons dated 2-2-06 was premised on the grounds, inter alia, that the appeal raises arguable points of law and has overwhelming chances of success and further that the respondent, Nicodemus Mugara, “is a man of straw and shall not be able to reimburse the appellant the colossal sum awarded in the event the appeal succeeds.”

The affidavit of Simiyu Makokha the advocate for the appellant, sworn in support of the application shows that the Respondent was awarded Shs.2 million in general damages plus costs of the suit. In his lengthy affidavit sworn in reply to the application, the Respondent admits having received Shs.500,000/= in part-payment of the decretal dues. In paragraph 10 and 11 of the affidavit, the Respondent states-

10. “that this compelled me to sell all my grains and livestock to raise the further Court fees in order to execute the decree through Eshikhoni Agency, who proceeded to proclaim the Appellant’s property on 30th January, 2006. (Annexed and marked “NM3” is a copy of the proclamation.”

11. “that the injuries I sustained are so serious and threatening to my life and I am in dire need of the decretal amount to cater for my treatment and at least provide for my family as I am the sole bread winner and now totally incapacitated by the injuries.”

The factors to be considered by the court in deciding whether to grant an order for stay under Order 41 Rule of the Civil Procedure Rules which the applicant must satisfy are:-

- (1) *that he has filed an appeal and*
- (2) *that the appeal is arguable and*
- (3) *that there is sufficient cause for the order for stay to be granted, and*
- (4) *that substantial loss may result to the applicant unless stay is granted and*

(5) *that the application for stay was made without unreasonable delay and*

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

Where however an applicant shows that a respondent would be unable to refund the decretal dues, if the appeal succeeds, it can be argued that that would result in substantial loss to the applicant under rule 4(2) (a) of Order XLI. The evidential burden of showing that this is not the case must be discharged by the Respondent as this is a matter peculiarly within his knowledge. If the Respondent does not satisfy the court that he has the means or resources to repay the decretal dues, the effect is that the parameter set out in Rule(2)(a) that substantial loss may result to the applicant unless stay is ordered is not dislodged.

Of his own volition, the Respondent clearly shows that he will not be able to refund the decretal dues. Already, Shs.500,000 has been paid to him. The decree was issued in a suit in which the Respondent suffered serious injuries following an accident. He is apprehensive the hearing and determination of the appeal may drag while he ails and suffers.

After weighing one thing with another, I allow the application and order stay of execution pending the hearing and determination of the appeal. I direct that the appeal be placed before the resident judge for admission once the lower court record is to hand and if admitted to hearing should set down on priority basis in cause of this year.

The costs of the application shall be in the appeal.

Dated, signed and delivered at Kakamega this 5th day of April, 2006.

G. B. M. KARIUKI

J U D G E