



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 354 of 2005

**GITHUNGURI DAIRY FARMERS CO-OPERATIVE SOCIETY LIMITED.....
.....APPELLANT**

VERSUS

MARY NJOKI MBUGUA..... RESPONDENT

R U L I N G

The Notice of Motion herein, dated 3/8/05 under Order 41 Rule 4(1) of the Civil Procedure Rules seeks:

- 1.
2.Already spent
3. **Stay of execution of the Judgment of 11/5/05 in Kiambu, CMCC 319/05, pending the appeal herein.**
4. **Costs of the application in the cause.**

The grounds for the application are, inter alia; the decretal sum was K.Shs.959,000/- plus costs and interest; On 19/7/05, the Subordinate Court granted stay of execution on condition that within 7 days the appellant/applicant deposit half of the decretal sum in a joint account; on 27/7/05 appellant forwarded a cheque of the required sum together with the joint opening Account from which the Respondent returned on 29/7/05 on the basis that the appellant had failed to comply with the court order of 19/7/05 and threatened to execute.

The other condition of stay of execution, by the Lower Court was that failure to comply with order No. 1 above, the application for stay would stand dismissed.

The Lower Court's order not having been complied with by close of business on 27/7/05, the orders granted therein were rendered inconsequential as the application dated 10/6/95 stood dismissed; that unless this application is granted the appeal would be nugatory, occasioning substantial loss and irreparable loss to the appellant/applicant; that the application is brought without undue delay.

In their Replying Affidavit, the Respondents aver that; the cheque for the K.Shs.479,500/- together

with the Account Opening Forms were delivered to his lawyers offices at 4.50p.m. on 27/7/05 when the Banks were closed and hence he could not comply with the court order and he thus informed the lawyer to return the same and proceed with the execution, that the appeal is meant to delay the enjoyment of judgment by the beneficiaries of the estate of the deceased whom he has to cater for single handedly that the application is incompetent and bad in law and fatally defective.

There is a Supplementary Affidavit by George Murugu Muthui, dated 30/8/05, in which he avers that he went to Kiambu on 27/7/05 taking with him the cheque and the Bank Opening account Forms, but found the offices of the Respondent's Counsel closed, and failed to trace him that day up to 3p.m. This is according to the Affidavit deponed by Muthui why the order was not complied with.

In the course of hearing the application herein, the validity of Mr. Murugu Muthui's affidavit, and his conduct, that led to a pupil having to sign court documents, featured and led to Mr. Murugu, an Advocate of this court, being put on the witness box for cross-examination on his affidavit.

On 29/11/05, this court disposed of the main application but left the issue of Mr. Murugu's conduct to be ruled upon separately. This Ruling is on that aspect alone.

The court has closely perused the documentation on this matter, and has reached the following findings and conclusions. Mr. Murugu Muthui, on 29/11/05, under oath taken before me, in this court, contradicted himself in a manner that left this court with no doubt that he was telling this court the truth, nor could he be trusted to do so. This is serious because the court in all interlocutory applications, goes by affidavit evidence. This is on the trust that counsels, as officers of this court are trustworthy and the court goes by what they say and what has been deponed before them by their respective clients.

Further, the court operates on the basis that its officers – advocates – observe the oath they took and abide by the ethical conduct binding on them.

Unfortunately, that does not seem to be the case with respect to Mr. Murugu Muthui, at least in this case.

Mr. Murugu Muthui began by saying, on oath, taken before me, on 29/11/05, that the Supplementary Affidavit dated 30/8/05 in support of an affidavit to show that he went to Mr. Jomo Njenjga's offices in Kiambu on 27/7/05, was deponed and signed by him. Unfortunately, the signature by him as deponent and by him as before Commissioner of Oaths – not clear how the same person can act as his own Commissioner of Oaths – differ so much. That is why he was summoned for cross-examination as a Deponent.

Ultimately, and after 1½ hours of intensive cross-examination, he admitted that the signature was that of pupil in his law firm.

I have no doubt in my mind that a pupil is not an officer of this court, and he/she is not competent to sign such weighty documents on which the court relies on in Affidavit evidence.

Earlier on, Mr. Murugu Muthui has told a lie, under oath, that he had attempted to serve the Respondent with an Affidavit and tried to deliver a cheque on Mr. Njomo Njenga, in compliance with this Court's Order, vide Lady Justice Koome's order.

That, turned out to be untrue, and that is what led to the cross-examination of Murugu Muthui, as a deponent of the Affidavit.

All said and done, it came out clearly that Mr. Murugu Muthui, rather than run his office, entrusted that task to a pupil by the name Benson Milimo. And to cover the untruths deponed in his affidavits, he heaped more lies upon earlier lies.

The worst part of it is that through the lies and non-disclosures by Mr. Murugu Muthui, this court vide

Lady Justice Koome, had been misled to grant interim stay orders, with serious consequences.

The foregoing are serious in fractious of the code of conduct expected of an officer of this court. They deserve severe reprimand, which I do. A more fitting punishment would be striking of Mr. Murugu Muthui from the Roll of Advocates, which this court is empowered to do in the firm belief and conviction that this court deserves better officers than the caliber of Mr. Murugu Muthui.

However, taking everything into account and tampering the law with a human face and compassion, this court orders as follows:-

1. Mr. Murugu Muthui should submit to this court an appropriate and acceptable written apology for his unbecoming and deplorable conduct, within 14 days from today's date. Such an apology to be detailed in disclosure of the ethical conduct which Mr. Murugu Muthui has infringed.
2. Mr. Murugu to promise this court that will re-dedicate himself to the ethical conduct and rules he swore to abide by when he was first called to the bar.
3. This court will take drastic measures against any disrespect of conduct that falls below expectations by the Learned Counsel.
4. Mention on 16th November, at 3p.m. to appraise the status of the apology herein above referred to.

DATED and delivered at Nairobi, this 6th Day of November, 2006.

O.K. MUTUNGI

JUDGE