



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI  
H.C. MISC. APPLICATION NO. 822 OF 1993

KANYEKI FARMERS CO-OPERATIVE SOCIETY LIMITED .....  
PLAINTIFF

V E R S U S

MBURU KIMANI..... DEFENDANT

R U L I N G

On 8th November, 2002 I dismissed an application for an order of review made in this suit.

The application now before me is filed under Order XLI Rule 4 (1) of Civil Procedure Rules amongst other provisions.

Only prayer which remains to be determined by me is that of stay of execution of my aforesaid ruling, and of course the cost thereof. The application is based on grounds stated therein and on an affidavit sworn by Mr. David Karaya Thuo the learned counsel for the applicant.

It is trite law that when considering the application under the aforesaid provisions, the court has to consider whether substantial loss shall result to the applicant and whether the application is made without unreasonable delay. I need not repeat here provisions of Order XLI rule 4 (2). Mr. Thuo submitted from Bar that the applicant is ready and willing to comply with court's order as to security.

There is an averment and is also substantiated that Notice of appeal was filed on 13th November, 2002. However, no leave to file such appeal was obtained from this court.

Order XLII Rule g (1) does not envisage an appeal as of right from orders made in applications under order XLI Rule (1). It was urged by Respondent's counsel that the application was filed under the said provision and thus the application is misconceived. However, I shall hesitate to do so because of provision of Order XLIV Rule (3), under which the order of dismissal was made.

I shall thus turn to the merits of the application. Mr. Thuo in paragraph (7) of his affidavit in support has this to aver.

*“That I have also established from the court file that the plaintiff claims a sum of Kshs.1,096,641.70 from the Defendant which is a colossal sum of money and the Defendant is therefore likely to suffer substantial loss.”*

It cannot be overemphasised that the substantial loss has to be specifically averred with some kind of probable supporting evidence. Which sum is colossal and which is not, remain purely a personal and subjective fact varying from litigant to litigant. Here Mr. Thuo just makes a sweeping statement without any basis for such averment.

Secondly this application is filed on 26th March, 2003 more than five months from Notice of Appeal having been filed.

There is not a single averment or explanation for this delay.

Once again Mr. Thuo submitted from Bar that the delay is not inordinate.

I also note that my ruling simply dismissed the prayer of review of earlier order. Hence it did not envisage any execution, which need to be stayed. Hence the order prayed shall be one in vain.

Least I say about such prosecution of the application, better it is. Suffice it shall be if I find that the applicant has failed to satisfy me in any of the limbs of the requirements of law before I consider granting the application.

The application is dismissed with costs.

Dated and delivered at Nairobi this 9th day of April, 2002.

K. H. RAWAL

JUDGE