



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L SUIT NO. 253 OF 2012

[FORMERLY ELDORET HCCC NO. 56OF 2006]

KEIYO TEACHERS

CO-OPERATIVE SAVINGS AND CREDIT SOCIETY.....PLAINTIFF

VERSUS

ANDREW OJAL.....1ST DEFENDANT

DISHON NDIMULI.....2ND DEFENDANT

HOSEA BETT.....3RD DEFENDANT

KENNEDY TOMNO.....4TH DEFENDANT

HON. COMMISSIONER OF PRISONS.....5TH DEFENDANT

HON. ATTORNEY GENERAL.....6TH DEFENDANT

THE BOARD OF TRUSTEE –

NATIONAL SOCIAL SECURITY FUND.....7TH DEFENDANT

THE MOI TEACHING & REFERRAL

HOSPITAL LIMITED.....8TH DEFENDANT

RULING

[NOTICE OF MOTION UNDER CERTIFICATE OF URGENCY BY 7TH DEFENDANT DATED 21ST APRIL, 2020]

1. The 7th Defendant vide the Motion dated 21st April, 2020 seeks for an order of stay of execution of the judgment and decree of this Court pending the hearing and determination of its appeal to the Court of Appeal. The application is based on the sixteen (16) grounds on its face marked (a) to (p) and is supported by the affidavit of **Austin Ouko**, the Acting General Manager Corporate Affairs and Company Secretary of the 7th Defendant, sworn on the 21st April, 2020.

2. The application is opposed by the Plaintiff through the replying affidavit sworn by **Christopher K. Cheruiyot**, the Chief Executive Officer with the Plaintiff, sworn on the 29th April, 2020.

3. That temporary stay of execution in terms of prayer (b) was granted exparte on the 22nd April, 2020 when directions on service of the application, filing and exchange of written submissions were also given. That subsequently, the learned Counsel for the 7th Defendant and Plaintiff filed their submissions dated the 29th April, 2020 and 5th May, 2020 respectively.

4. (a) The 7th Defendant's case is that it is aggrieved with the judgment of the Court delivered on the 9th April, 2020 to the effect that it refunds the Plaintiff the purchase price of Kshs.50,111,880 plus interest at court's rates from the date of filing of this suit and costs. That it is also aggrieved with the finding for the 1st to 6th Defendants in their counterclaim. That the 7th Defendant is a government institution that takes care of workers' savings while the Plaintiff's financial position is unknown and is unlikely to refund the decretal sum in the event the appeal succeeds. That stay of execution should be granted as the application was filed without delay. That it should not be required to provide security for the due performance of the decree as it is financially sound as a government institution. The learned Counsel referred the Court to the following superior court's decisions in their submissions;

- *Jaribu Holdings Ltd Vs Kenya Commercial Bank Ltd, Civil Application No. 314 of 2007,*
- *Kenya Airports Authority Vs Mitu-Bell Welfare Society & 2 Others [2016],eKLR,*
- *Socfinaf Ltd (Ruera Estate) Vs Abisagi Igoki [2018] eKLR,*
- *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another, Nairobi Civil Application No. 238 of 2005,*
- *Equity Bank Ltd Vs Taiga Adams Company Ltd [2006] eKLR, and*
- *Feisal Amin Janmohammed T/A Dunya Forwarders Vs Shami Trading Co. Ltd [2014] eKLR.*

(b) That the Plaintiff's case is that the Plaintiff was an innocent purchaser for value and should be allowed to get back the purchase price paid with interest and costs as ordered by the Court. That alternatively, the 7th Defendant should be ordered to deposit the decretal sum in an interest earning account in their joint names as security for the due performance of the decree. That the application brought under **Order 42 Rule 6 of Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** is an abuse of the Court's process as the said provisions deals with appeals from the Lower Court to this Court. That the application for appeals of decision of this Court to the Court of Appeal should be brought under **Rule 5(2), 41 and 42 of Court of Appeal Rules.**

5. The following are the issues for the Court's determinations;

(a) Whether the application is competent.

(b) Whether the 7th Defendant has established a reasonable case for stay of execution order to issue pending appeal.

(c) Who pays the costs of the application.

6. The Court has carefully considered the grounds on the Motion, the two parties' affidavit evidence, the learned Counsel's submissions, the cited superior court's decisions, provisions of the Constitution and statute cited and come to the following findings;

(a) That on whether or not the application is competently grounded under the provisions cited, it is important to set out **Order 42 Rule 6(1) and (6) of the Civil Procedure Rules**, which provides as follows;

“6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order....the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application...and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(6) Notwithstanding, anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

That the plain reading of the provisions set out above leaves no doubt that this Court being the one that made the decision that the 7th Defendant has signaled they are aggrieved with by filing the Notice of Appeal dated the 16th April, 2020 and received by the Registrar on the 17th April, 2020 is with jurisdiction to hear and determine the application for stay of execution order, pending hearing and determination of the appeal preferred to the Court of Appeal. That indeed, the Court of Appeal is itself with original jurisdiction to hear and determine an application for stay pending the hearing and determination of the appeal preferred before it under **Rules 5(2)(b) of the Court of Appeal Rules, 2010**. That it goes without saying that this court also has jurisdiction to hear and determine an application for stay of execution pending hearing and determination of appeals preferred before it from the Lower Court and tribunals. That accordingly, the Court finds and holds that the 7th Defendant's Motion is competent and not an abuse of the Court's process.

(b) That there is no dispute that the 7th Defendant has filed the Notice of Appeal showing that it *“intends to appeal to the Court of Appeal against the whole judgment of the Court”* delivered on the 9th April, 2020. That even though the decree has not been extracted and or issued, the bill of costs has not been filed or taxed, and no application to execute has been filed, the 7th Defendant is apprehensive that execution may be undertaken while the appeal was pending. That such execution is likely to prejudice its financial position as the Plaintiff's financial standing is unknown. That the Plaintiff has not discharged its duty under **Section 112 of the Evidence Act Chapter 80 of Laws of Kenya** to show the resources at its disposal that are capable to meet a refund of the decretal sum should they lose in the appeal. The Court of Appeal in **National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another Nairobi Civil Application No. 238 of 2005**, found that *“once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden then shifts to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”* That the Plaintiff's response that its ability to pay the purchase price, and to prosecute the suit for 14 years since 2006 suffices to show its ability is insufficient to confirm its financial or resource

standing as of today. That the amount payable to the Plaintiff by the 7th Defendant under the judgment delivered on the 9th April, 2020 is above Kshs.50,000,000 [**fifty million**], which is not petty cash, but a substantial amount that the 7th Defendant would suffer should the Plaintiff execute, and thereafter, the appeal succeeds and the Plaintiff be unable to refund.

(c) That the application was filed on the 22nd April, 2020 which is about twelve days after the judgment was delivered. That the 7th Defendant had filed the Notice of Appeal on the 16th April, 2020, and applied for proceedings, and paid the deposit on the 20th April, 2020. That the foregoing shows that the 7th Defendant moved the Court without undue delay.

(d) That there has been no challenge of the 7th Defendant's financial or resources standing, and being a government body the Court finds it has sufficient resources to meet the decretal sum should its appeal fail.

(e) That though the 7th Defendant has succeeded in their application, the Court finds it would be just to order that the costs of the application abide the outcome of the appeal to the Court of Appeal, notwithstanding the provisions of **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

7. That in view of the foregoing, the Court finds merit in the 7th Defendant's Motion under Certificate of Urgency dated the 21st April, 2020. The application is hereby allowed in terms of prayer (c) with costs to abide the outcome of the appeal.

Orders accordingly.

Delivered and signed at Eldoret this 20th day of May, 2020

S. M. KIBUNJA

JUDGE

Ruling read in the absence of all Parties/Counsel and is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.

Court Assistant: Christine