



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO. 2 OF 2020

THE COMMITTEE MEMBERS -

NGOE BUYING CENTRE.....1ST APPELLANT /APPLICANT

KIRU TEA FACTORY LIMITED.....2ND APPELLANT /APPLICANT

VS

EPHANTUS NGETHE GICHUKI.....RESPONDENT

RULING

1. This Motion filed on the 18/2/2020 is brought under Order 42 Rule 6(1), Order 50 Rule 1 of the Civil Procedure Rules. The Applicant sought the following orders;

a. Spent

b. That the Court be pleased to order stay of execution of the orders made by the Hon Principal Magistrate in CMELC NO 31 of 2019 pending the hearing of the application interpartes.

c. That the Court be pleased to order stay of execution of the orders made by the Hon Principal Magistrate in CMELC NO 31 of 2019 pending the hearing and determination of the Appeal .

d. Costs of the application.

2. The application is supported by the grounds adduced thereto in addition to the supporting affidavit of the deponent, Monicah Njeri Munene who depones that the learned trial Magistrate issued an order restraining the Appellants from collecting distributing and or using Ngoe Tea Buying center pending the hearing and determination of the suit. That the 1st Appellants represent 36 tea growers who deliver tea to the 2nd Appellants through the tea buying centre which is constructed on a road reserve and not on the LR LOC14/KIRU/1815 (suit land). That the Respondent has no locus to represent Jamleck Wachira, the registered owner of the suit land who is deceased for want of letters of representation. That the Respondent had no authority from the Government of Kenya to clear the road reserve by demolishing the tea centre belonging to the 1st Appellant. That the Respondent did not meet the threshold set in the celebrated case in **Giella Vs Cassman Brown EA 358 (1973)**.

3. Further that the Respondent has without any colour of right put up a tea collection centre blocking him from completely accessing the land. That the Applicants have already filed a memorandum of Appeal which Appeal has high chances of success. That the order for injunction will greatly prejudice the Appellants as their tea will go to waste if they are unable to deliver the same tea to a far tea buying centre and that unless the stay of execution is granted the Appellants will continue to suffer and their suffering is not likely to be adequately compensated by damages.

4. In addition, that the Appellants being aggrieved by the injunction as the order will greatly prejudice them as their tea will go to waste if they are unable to deliver to the same tea buying centre and their suffering is not likely to be compensated with damages. That the Applicants are ready to abide by any terms on security as may be ordered.

5. The Respondent did not oppose the application despite being served with the same.

6. Ms Mwai, the Learned Counsel for the Appellants submitted orally in open Court that the application has been brought timeously.

7. In respect to substantial loss she stated that the 1st Applicant represent 36 tea growers who deliver green leave to the tea buying centre and

their produce being a perishable crop will go to waste if the same is not delivered to the tea buying centre or if they are forced to deliver to a farther tea buying centre. There will also be time lost for picking the teas as the farmers will be spending time ferrying the tea to far away collection centres. That the damages they are likely to suffer will not be compensated.

8. In regard to the security for the performance of the decree, the Applicants through their learned Counsel on record submitted that they are willing and ready to abide by such security terms as set by the Court.

9. The issues for determination are; whether the orders of stay of execution should be granted; who meets the cost of the motion.

10. Stay of execution is guided by Order 42 Rule 6 of the Civil Procedure Rules, thus:-

“(1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except Appeal case of 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, and whether the application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, 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.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

(3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an Appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of Appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its 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.”

11. Stay of execution is an equitable relief, which is exercised at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and upon the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an application for stay of execution, the following must be satisfied, that:-

a. The application was brought without delay;

b. Substantial loss may result to the Applicant unless the stay is granted; and

c. Security for the due performance of the order or decree has been provided.

12. It is borne out of the record that the Ruling by the Hon learned Principal Magistrate was delivered on the 4/2/2020 and this application was filed on the 18/2/2020, a period of 14 days which in my view was timeously without any delay whatsoever.

13. In respect to the 2nd requirement of proof of substantial loss, the Applicants have explained that by restraining them from collecting green tea at the buying centre, means that their produce being a perishable crop will go to waste. In the alternative they are being forced to deliver the tea to far collection centres thus losing time on the way and the risk of the green leaves withering is high. That the time for plucking the tea will be diminished as tea plucking is a timely exercise before the same is picked by the tea factory at the agreed times in the day.

14. I find that the Applicants have without doubt established the substantial loss that they are likely to suffer if the stay of execution is not granted, their produce being a perishable crop. The Respondent did not file any response and therefore there is no indication that the Respondent will be able to compensate them for the losses. This in my view is the loss that cannot be reversed.

15. In respect to the security for the performance of the decree, it is on record that the Applicants have intimated their willingness to abide by the security set by the Court. I find no necessity to impose a security given that the Respondent did not oppose the application.

16. In the end the application is meritorious and it is granted on the following terms;

a. The Ruling of the Hon Learned Principal Magistrate issued on the 4/2/2020 in CMELC NO 31 of 2019 be and is hereby stayed pending the hearing and determination of the Appeal.

b. The costs of the application shall be met by the Applicant.

11. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 14TH DAY OF MAY 2020

J G KEMEI

JUDGE