



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL 30 OF 2016

KITHUNGURURU FARMERS CO-OPERATIVE SOCIETY LTD.....APPELLANT

VERSUS

HARRISON K. NJAGE T/A H.K. ENTERPRISES (K).....RESPONDENT

RULING

1. This is an application for stay of the trial proceedings in Embu CM civil suit No. 184 of 2014, Harrison Njage trading as H. K. Enterprises (K) v. Kithungururu Farmers Co-operative Society Ltd, pending the hearing and determination of an interlocutory appeal namely Embu Civil Appeal No. 30 of 2016, Kithungururu Farmers' Co-operative Society Ltd v. Harrison Njage trading as H. K. Enterprises (K).
2. The application is brought under sections 1A, 1B, 3, 3A, 63 (e) of the Civil Procedure Act (Cap. 21) Laws of Kenya and under Article 159 (2) of the 2010 Constitution of Kenya and under all other enabling provisions of the law.
3. The application is supported by the grounds on the face of the notice of motion dated 30th September, 2016. In ground 1 the applicant has stated that the learned trial Magistrate declined to grant an order of stay of the trial proceedings on 27th September, 2016. In ground 2 the applicant has stated that the learned trial Magistrate directed that the trial proceedings be continued with on 18th November, 2016 after declining to grant an order of stay.
4. In ground 3 the applicant has stated that the learned trial Magistrate dismissed a preliminary objection dated 20th May, 2016 on the ground that the application was meant to waste the court's time and that it was the dismissal of the preliminary objection that has given rise to this interlocutory appeal.
5. The applicant has further stated that it is necessary to have this appeal heard and determined before setting down for hearing the proceedings in the magisterial subordinate court. Furthermore, the applicant has stated that if the suit were to proceed to hearing before the appeal is heard and determined, the said appeal may be rendered nugatory. The applicant has finally stated that its appeal has overwhelming chances of success and is based on fundamental issues of law which may render the suit before the lower court a nullity.
6. In addition to the foregoing the applicant's application is anchored in its 14 paragraph supporting affidavit sworn to by its treasurer dated 30th September 2016. He has deponed majorly to the following matters. He has deponed that their counsel filed a preliminary objection dated 20th May, 2015, which was dismissed on 20th April, 2016. He has further deponed that the society was aggrieved by the said dismissal and as a result they appealed against the said dismissal vide Embu High Court Civil Appeal No. 30 of 2016.

7. He has further deponed that notwithstanding the filing of the said appeal, the learned Magistrate went ahead and fixed the original suit for continuation of the trial. He has also deponed that the society's application for stay before the trial court was dismissed on 8th July 2016 on the ground the application was lacking in merit. He has also deponed that the trial court then proceeded to fix the suit for continuation of proceedings on 18th November 2016. Finally, he has deponed that it is in the interests of justice that the said appeal be heard and determined before said civil suit is set down for hearing.

8. Counsel for the appellant/applicant has filed an 11 paragraph written submissions in support of the application for stay. He has cited *David Morton Silverstein v. Atsango Chegoni*, (2002) eKLR, in which the Court of Appeal held in considering to grant an order of stay under rules 5 (2) (b) of the Court of Appeal Rules, a court is required to take into account whether the appeal is arguable, and is not frivolous and that unless there is stay of the court proceedings, the intended appeal if successful would be rendered nugatory.

9. Furthermore, counsel has also cited *Carter & Sons Ltd v. Deposit Protection Fund Board and 2 others* Court of Appeal Civil Appeal No. 209 of 1997 in which that Court held that the purpose of application for stay is to preserve the rights of an appellant who is exercising his undoubted right of appeal so that if the appeal is successful it is not rendered nugatory.

10. The respondent has deponed to a 12 paragraph replying affidavit in opposition to the application. He has majorly deponed to the following matters. He has deponed that the application is frivolous, unmerited and an abuse of the court process. He has further deponed that the main intention of the applicant is to delay the conclusion of the case in the trial court. He has further deponed that order 42 rule 6 of 2010 Civil Procedure Rules do not apply to the instant application, which is in relation to the stay of trial proceedings. He also deponed that even if the applicant's appeal succeeds, the trial court proceedings will have no legal effect and the appeal will not be rendered nugatory. He has finally deponed that the appellant/applicant has not demonstrated that he has an arguable appeal to warrant the stay orders that he now seeks and that for that reason, the instant application should be dismissed with costs.

11. Counsel for the respondent has filed a 4 page written submissions. He has cited *Lucy Waithera Kimanga & 2 others v. John Waiganjo Gichuvi* (2015) eKLR in opposition to the application.

12. Finally he has urged this court to be guided by the provisions of Article 159 (2) (b) of the 2010 Constitution of Kenya, which authorizes the court to administer substantive justice without undue regard to technicalities and rules of procedure.

13. I have considered the affidavit evidence of both parties and the submissions of both counsel. I find the issues for determination are as follows. First, whether the appellant/applicant has an arguable appeal. Second, whether the appellant/applicant has demonstrated that the proceedings in the trial court are frivolous, vexatious or harassing or to be manifestly groundless. Third and additionally, whether he has also demonstrated that there is clearly no cause of action in law or in equity on the basis of the pleadings and the facts of the case. Fourth, who should bear the costs of this application.

14. I find that the suit was filed on 2nd June 2016 by the respondent/plaintiff. I also find that the applicant/defendant was not served with summons until the year 2013, which was seven years after it was filed. The provisions of **Orders 3 rule 2, order 4 rule 6 order 5 rule 1 and order 5 rule 2 of the 2010 Civil Procedure rules** are coached in mandatory language and ought to have been followed.

15. In his memorandum of appeal the applicant has raised the issue issuance of summons in his grounds of appeal. It appears that the issue of service of summons was not addressed by the trial court, which is to be served at most within two years, failing which the suit may be rendered a nullity. In the circumstances I find that the appellant has an arguable appeal. It is therefore in the interests of justice that an order of stay be granted pending the hearing and determination of this appeal. In the right of the foregoing matters, I hereby grant an order staying the trial proceedings in the lower court pending the hearing and determination of this appeal in terms of prayer (c) of the Notice of Motion dated 30th

September 2016.

16. Costs of this application will be costs in course.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **4th** of **JANUARY 2017**.

In the presence of Mr Kariuki holding brief for Mr. Muriuki for the applicant and in the presence of the respondent in person.

Court clerk Njue

J.M. BWONWONGA

JUDGE

04.01.17