



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CIVIL APPEAL NO. 27 OF 2015**

*(Being an Appeal from Narok CMCC No. 170 of 2014)*

**AMOS NKAATE TANYAENG.....APPELLANT**

**-VERSUS-**

**MANN WHEAT FARM LIMITED.....RESPONDENT**

**RULING**

1. The background to the Appellant's Notice of Motion filed on 18/4/2016 is as follows. The Appellant was the Defendant in the Chief Magistrate's Civil Suit No. 170 of 2014 **Mann Wheat Farm Limited –Vs- Amos Tanyaeng**. Seemingly, a defence was filed on his behalf by a firm of advocates **M/s Ochego Onduso & Co.**, but subsequently a summary judgment was entered against the Appellant. When the execution process commenced, the Applicant unsuccessfully tried through a different firm of advocates to set aside the said summary judgment.
2. The application having been dismissed, the Appellant filed an appeal against the ruling of the lower court. The present Notice of Motion was filed on 18/4/2015 and is expressed to be brought, primarily, under Order 42 Rule 6 (1) of the Civil Procedure Rules. The only live prayer in the Notice of Motion is prayer 3 that seeks stay of execution of the decree of the lower court pending appeal.
3. Prayer 4 is superfluous as the real subject in contention is the judgment giving rise to the decree, and the court's ruling by itself conferred no further rights on the Respondent. Prayer 5 is the subject of the appeal and cannot be granted at this stage. Ditto prayer 6. Prayer 1 and 2 are spent.
4. The gist of the Applicant's grounds and supporting affidavit is that he was condemned without a hearing as an advocate, who purported to act for him, had no instructions because the Applicant was unaware of the suit. He contends that he will suffer substantial loss if the decree issued upon the entry of a summary judgment against him is executed. He argues that he has a good defence to the Respondent's claim.
5. In opposing the application, the Respondent filed an affidavit sworn by one **Maggar Singh Mall Singh**, a director of the Respondent. The deponent takes issue with claims that the Applicant did not instruct the firm of **Ms Ochego Onduso** to act for him, holding up the memorandum of appearance and defence filed in the suit as evidence of such appointment. That the Applicant cannot hide behind the advocates as he was duly served with pleadings and the application is an abuse of the court process, preceded by many unfulfilled promises by the Applicant to settle the Respondent's claim.

6. The Appellant's submissions emphasise the element of substantial loss. In this regard the Appellant points out that warrants for attachment have been issued against him on application by the Respondent on the basis of the decree. He argues that a third party **Mann Wheat Farm Limited** and not the Respondent entered into the written undertaking that resulted in the summary judgment.
7. For their part the Respondents accuse the Appellant of abuse of the process of the court. They contend that the Appellant was duly represented by counsel in the lower court suit, and the summary judgment was properly entered.
8. This court having considered all the canvassed material takes the following view. The cornerstone of the exercise of the court's discretion under Order 46 Rule 6 (2) of the Civil Procedure Rules is a consideration whether an Applicant has demonstrated substantial loss (**See Kenya Shell Limited -Vs- Kibiru [1986] KLR 410**).
9. In this case the Applicant claims that the advocate who acted for him in the lower court had no instructions. It does seem that beyond filing a defence the advocate did not defend the application for summary judgment, whether the said advocate had the Appellant's instructions or not. And while it is true that the party who instructs an advocate remains responsible to follow up on his case, a court of law would be averse to driving a litigant away from the seat of justice without a hearing.
10. The Appellant's complaint that he was not accorded a hearing, with regard to the application for summary judgment cannot be dismissed in a peremptory manner. If indeed it turns out to be true, such a denial would by itself constitute substantial injustice, and compound the monetary loss occasioned by the execution process.
11. On the other hand the Respondent, rightly or wrongly, has a decree in his favour and should not be denied the fruits of his judgment. Balancing the competing interests, I am inclined to grant a conditional stay of execution pending appeal, that will secure the performance of the decree eventually, but also the Appellant's right to pursue his appeal.
12. In this regard, I do grant prayer 3 of the Notice of Motion on condition that within 7 days of today's date, the Appellant Applicant will deposit a sum of Shs 300,000/= (Three Hundred Thousand) into court as security. Costs will abide the outcome of the appeal.

Delivered and signed at Narok this **1<sup>st</sup>** day of **July, 2016**.

In the presence of:-

Mr. Kamwaro for Applicant

Mr. Kiptoo for the Respondent

Court Assistant : Barasa

**C. W. MEOLI**

**JUDGE**