



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO 218 OF 2014**

**STEPHEN KIBOWEN .....PLAINTIFF**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION.....DEFENDANT**

**RULING**

***(Application for stay pending appeal; principles to be applied; applicant having sold land by public auction but refusing to transfer same to purchaser; purchaser successfully suing for transfer; applicant intending to prefer an appeal; substantial loss; no loss to applicant demonstrated; application disallowed; land to be transferred but there be no further dealings thereafter pending determination of appeal)***

**RULING**

1. The Application before me is that dated 8 April 2015 filed by the unsuccessful defendant. It is an application inter alia brought pursuant to the provisions of Order 42 Rule 6 (1) and 8 of the Civil Procedure rules and seeks stay of execution pending appeal. The application is strongly opposed. Before I go to the gist of the application, I think it is important that I lay down the background to this application.

2. The defendant, Agriculture Finance Corporation (AFC) is a state corporation created by the Agriculture Finance Act, CAP 323, and whose mandate is to provide loans to farmers. In the course of business, the defendant did provide financial facilities to one Jeruto Tengekyon who owned the land parcel Lembus/Kilombe/157 (the suit land) which land was then charged to AFC. There was default, and in exercise of its statutory power of sale, AFC did offer the suit land for sale by way of public auction. The auction was duly held with the plaintiff being declared the highest bidder. The plaintiff paid all monies due and expected the defendant to forward to it the requisite title documents and transfer instruments so that the property may be transferred to the plaintiff. The defendant however refused to forward these documents and instead unilaterally revoked the sale, on the ground that the auction was conducted without there first being a current valuation report of the property. Irked by the actions of the defendant, the plaintiff filed this suit, inter alia seeking orders that the defendant be compelled to transfer the property to him. I heard the matter and delivered judgment on 19 March 2015. I held for the plaintiff and issued an order compelling the defendant to transfer the property to the plaintiff. Being aggrieved by the judgment, on 2 April 2015, the defendant filed a Notice of Appeal, within the required 14 days, and later filed this application for stay pending appeal.

3. In its application, the defendant has averred that unless stay is granted, the appeal will be rendered nugatory. In the supporting affidavit sworn by Richard Singa, it is deposed inter alia that the appeal

raises arguable issues and has overwhelming chances of success and various grounds are listed. It is his view that the intended appeal will be rendered nugatory if stay is not granted. It is further stated that the applicant is ready and willing to abide by any order for security.

4. The plaintiff has filed a Replying Affidavit to oppose the application. Inter alia, it is stated that the applicant has not tabled anything to demonstrate that it will suffer substantial loss unless the orders herein are granted. He has deposed that the subject matter is land, to be used for commercial farming, and if the same is transferred to him, it will still be available in the event that the defendant succeeds on appeal. He has further deposed that the defendant is not in occupation of the suit land. He further deposed that there is no proper appeal on record as the Notice of Appeal has not yet been served as required by the Court of Appeal Rules.

5. I took in the submissions of Mr. Mabonga for the applicant and Mr. Konosi for the respondent and I take the following view of the matter.

6. This is an application for stay pending appeal to the Court of Appeal and therefore the provisions of Order 42 apply. With regard to stay pending appeal, Rule 6 of Order 42, provides as follows :-

- (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, 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.*

7. It will be noted from Order 42 Rule 6 (2), that three elements need to be proved for one to succeed in an application for stay pending appeal. The applicant needs to demonstrate that :-

- (i) The application has been filed without undue delay.
- (ii) That he stands to suffer substantial loss unless the order of stay is granted; and
- (iii) That he is ready to offer security.

8. A lot was said about the strength of the appeal, but this is not a consideration as may be observed from a reading of Order 42 Rule 6 above.

9. It should also be noted that stay will not be granted unless the court is convinced that there is a valid

appeal.

10. Before I address the three requirements of Order 42 Rule 6, I think I first need to address myself on whether or not there is a valid appeal, as Mr. Konosi for the respondent, argued that there is none. He submitted that the Notice of Appeal has not yet been served upon his offices contrary to the provisions of the Court of Appeal Rules, and I believe that he had in mind the provisions of Rule 77 (1) of the Court of Appeal Rules which requires the Notice of Appeal to be served within 7 days. I am not too sure of when exactly, if at all, the Notice of Appeal was served, for Mr. Mabonga in his submissions, stated that the Notice of Appeal was served within time. I will therefore not dwell too much on this point, which in any case, as will be seen shortly, does not adversely affect the respondent.

11. Let me now address the three issues laid down in Order 42 Rule 6 and I opt to start with the issue of delay. Judgment was delivered on 19 March 2015. Upon delivery of judgment, an oral application for stay pending the filing of a formal application for stay pending appeal was made and allowed, and interim stay was granted for 30 days. This application was filed on 13 April 2015 before expiry of the 30 days and I do not think that it can be argued that the application has been filed after unreasonable delay.

12. On the second point, that of substantial loss, it has been held before that substantial loss is the pillar upon which an application for stay pending appeal is anchored. The principle behind this requirement is that the appeal ought not to be rendered nugatory if successful. However, it must also be appreciated that a successful litigant is entitled to the fruits of his judgment. Owing to these competing interests, the court needs to balance the interests of the two combatants as stated by the Court of Appeal in the case of ***Reliance Bank vs Norlake Investments Ltd (2002) 1 EA 227.***

13. The applicant has contended that it stands to suffer substantial loss if stay is not granted. Mr. Mabonga in his submissions stated that the loan to the chargor now stands at kshs. 67,299,333/= and that the applicant will stand to lose this sum if stay is not granted. I will not take these submissions too seriously for there was no affidavit which attempted to give these figures. Mr. Konosi's view was that the applicant does not stand to suffer any substantial loss provided the suit property is preserved and is put in a situation where it can be available to the applicant in the event that it succeeds on appeal. I agree.

14. The applicant was only chargor of the suit land. I do not see what substantial loss it stands to suffer, if the land is transferred to the plaintiff, so long as the plaintiff does not re-transfer or encumber the title. If the appeal succeeds, an appropriate order cancelling the transfer to the plaintiff, and having the land revert to the situation that it was prior to the auction sale, can be made.

15. The upshot of the above is that I am not persuaded that the applicant has demonstrated that it stands to suffer any substantial loss. It is therefore irrelevant for me to go into the issue of security.

16. Upon consideration of the matter herein, I do make the following orders :-

(i) *That the judgment herein be executed.*

(ii) *That upon transfer of the property to his name, the plaintiff not to re-transfer, or encumber the said title in any way, and not register any further dispositions, pending the final determination of the appeal.*

(iii) *The costs of this application shall be costs in the appeal.*

It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 13th day of May 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of : -**

Ms Moraa holding brief for Mr Konosi for plaintiff/Respondent.

No appearance for Mr Rashid Ngaira for defendant/applicant.

Court Assistant: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**