



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

**CIVIL DIVISION**

**CIVIL APPEAL NO. 85 OF 2012**

**NEW KENYA CO-OPERATIVE CREAMERIES LTD .....APPELLANT**

**V E R S U S**

**JOHN THEURI MWANGI.....RESPONDENT**

**R U L I N G**

1. This is an application (notice of motion dated 14<sup>th</sup> June 2013) for stay of execution pending appeal. It is opposed by the Respondent. The decree is for the modest sum of KShs 211,000/00 plus costs and interest.

2. I have read the two affidavits sworn in support of the application and also the replying affidavits. I have also considered the submissions of the learned counsels appearing, including the cases cited.

3. Under **Order 42 rule 6 (2) of the Civil Procedure Rules 2010 (the Rules)** the Appellant demonstrate that it has applied without unreasonable delay, and that it stands to suffer substantial loss unless the order sought is granted. It must also be prepared to give such security for the due performance by it of the decree should its appeal fail.

4. As for delay, there is none. The lower court dismissed a similar application for stay on 10<sup>th</sup> June 2013. The Appellant then filed the present application on 14<sup>th</sup> June 2013, only four days later.

5. As for substantial loss, it is not usual for an Appellant to suffer such loss merely by paying the decretal sum. But the Appellant may suffer such loss in the event that, should he succeed in his appeal, he will be able to recover the decretal sum from the Respondent, or that he cannot make such recovery without undue difficult or expense.

6. In the supporting affidavit annexed to the application it is deponed at paragraph 6 that the Appellant stands to suffer irreparably if execution takes place as such execution would bring its operations to a halt or disrupt the same. Well, the Appellant can avoid such disruption by paying the decretal sum. As already pointed out the judgment sum was very modest; together with costs and interest it is still below KShs 500,000/00. Payment of that modest sum surely cannot unduly affect the operations of the substantial public operations like the Appellant. In any event, an obligation to pay a decretal sum can never amount to substantial loss. It is has not been alleged in the supporting affidavit that he Appellant will be unable to recover the decretal sum from the Respondent, or that it will have undue difficulty in such recovery, in the event its appeals succeeds. Instead what is alleged is that payment of this modest decretal sum will lead to institution of other claims. It is not explained how that is so.

7. I find no merit at all in this application as the Appellant has not demonstrated what substantial loss it stands to suffer unless the stay sought is granted. In the result I refuse the notice of motion dated 14<sup>th</sup> June 2013. It is dismissed with costs. Any interim stay of execution in place is hereby vacated. Those will be the orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF JULY 2014**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 4<sup>TH</sup> DAY OF JULY 2014**