



REPUBLIC OF KENYA

High Court at Embu

Civil Case 46 of 2006

LAWRENCE M. GATERE.....PLAINTIFF/RESPONDENT

VERSUS

KABARE FARMERS CO-OP SOCIETY.....DEFENDANT/APPLICANT

R U L I N G

This is the Notice of Motion dated 24/1/2013 brought under Order 42 Rule 6 of the Civil Procedure Rules. The main prayer is stay of execution of the judgment and decree made on 20/12/2012 pending the hearing and determination of the intended appeal. The application is supported by grounds which are in the body of the application and the applicant's supporting affidavit.

The main grounds are that the decree involves a colossal sum and that the applicant has filed a notice of an intended appeal. The plaintiff/respondent has filed a replying affidavit opposing the application. He says he is a person of means and will be able to refund the money if the intended appeal succeeds.

The 5th - 3rd party filed grounds of opposition saying his costs had not been taken into account by the applicant. And that the applicant had not shown what damage it would suffer and whether the same could not be compensated. The other 3rd parties did not respond to the application. Under Order 42 Rule 6 of the Civil Procedure Rules there are 3 conditions which the court would normally consider before granting stay of execution pending appeal. These are:-

- (a) ***The application should be brought without delay.***
- (b) ***The applicant should show that he/she would suffer substantial loss if the execution was not stayed.***
- (c) ***Security for due performance of the decree is also considered.***

There is no doubt that the application was filed without undue delay. The judgment was delivered on 20/12/2012. Vacation started on 21/12/2012 and ended on 13/1/2013. This application was filed on 25/1/2013 under certificate of urgency.

There is also proof that a notice of appeal to the Court of Appeal has been filed and served

accordingly. Therefore, this is a competent application before this Court brought under Order 42 Rule 6 of the Civil Procedure Rules. The decree herein is for Shs.1,144,419.00 with interest and costs. There is also an award of costs to the 3rd parties.

The major headache of the defendant/applicant is the amount of Shs.1.1 million. In his affidavit Mr. Solomon Jacob Mureu the defendants chairman states that payment of this amount would cause great economic hardship to the Defendant Society hampering its operations. He further states in paragraph 6 that the plaintiff/respondent if paid the amount will not be able to refund the amount in the event of a successful appeal. He admits that the appeal will take sometime before conclusion. However, he adds that the defendant/applicant is ready to furnish security.

The plaintiff/respondent in his replying affidavit states that he is a man of means and the defendant/applicant should not be worried about his financial status. The decree herein is a purely monetary decree.

Having heard part of this case, I am aware that the defendant/applicant is a Farmers Co-operative Society. The money it has belongs to the farmers. However it should be noted that there is a Judgment in favour of the plaintiff/respondent plus an order for costs to the 3rd parties.

The plaintiff/respondent has indicated that he is a man of means. Well, he who alleges a fact must prove it. The defendant/applicant who alleged that the plaintiff/respondent would not refund the decretal sum if paid did not show that the plaintiff/respondent is a pauper. What substantial loss would the defendant/applicant suffer if the stay were not granted?

Relying on the case of *KENYA SHELL LTD VS BENJAMIN KARUGA KIBIRU & RUTH WAIRIMU KIBIRU (1982-88) 1 KAR 1018*, I do find that it is the duty of the applicant to prove to the court that he/she will suffer substantial loss if stay were not granted. The defendant/applicant herein did not endeavour to do so. It is not enough to make mere allegations.

However, considering that this is a co-operative society it would be prudent to safeguard the interest of the members until the Court of Appeal finally hears and determines the intended appeal.

The defendant/applicant has indicated that they are willing to provide security for due performance of the decree in the event that their appeal is unsuccessful. I am taking into account the fact that the appeal may not be heard very soon. The plaintiff/respondent asked that the defendant/applicant be ordered to deposit the whole decretal sum in Court.

Having heard this matter and considering all the circumstances of the case, I do find that its a suitable case for a stay of execution to be granted, which I hereby do, with the condition that the defendant/applicant deposits Shs.800,000/= in an interest earning account in the names of the counsel for the plaintiff, counsel for defendant and one of the 3rd parties counsels.

This condition must be complied with within 30 days from the date of this Ruling. Non compliance will render the stay of execution vacated.

Costs to the plaintiff and 5th – 3rd party. Right of appeal explained.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF MARCH 2013.

H.I. ONG'UDI

J U D G E

In the presence of:-

Ms. Mumbi Kimani for Defendant/Applicant

Mr. Abubakar for Magee for Plaintiff/Respondent

Njue CC