REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 85 of 2011

ELIZABETH WANGUI NJENGA

JANE WANGUI CHEGE

BENSON GICHUKI CHEGE

FRANCIS NJUGUNA CHEGE.....APPLICANTS

VERSUS

MOTO FARMERS CO-OPERATIVE SOCIETY ..... RESPONDENT

RULING

By a notice of motion dated 25th July 2011, the applicants seek for orders of stay of execution of the judgment, decree and or further court proceedings in **Nakuru CMCC No.1804 of 1995 MOTO FARMERS CO-OPERATIVE SOCIETY VS PETER CHELULE and 5 OTHERS** pending hearing of the appeal.

It is premised on grounds that the status quo and the substratum of the suit should be preserved pending the hearing and determination of the said appeal. The applicants are ready and willing to abide by any conditions the court might give.

The applicants are aggrieved by the lower court's decision of 9th May 2011 which declined to set aside an exparte judgment, so they lodged an appeal to challenge the same. The applicant's prayer for stay pending hearing and determination of the appeal was also rejected by the lower court.

It is the applicants' contention that the appeal has very high chances of success at it raises serious issues for determination revolving around service and the merits of the defence filed, and the trial court's jurisdiction.

It is argued that if the prayers sought are not granted, then the appeal shall be rendered nugatory, as the appellants will be dispossessed of the suit land and they will suffer irreparably as the property has tenants. The applicants are not in a position to pay damages awarded of Kshs.600,000/= as the estate is already distributed and has no money.

The application is opposed and in a replying affidavit sworn by Ibrahim N. Kariuki, he details the history of this case which has been in court for 16 years and he points out that whereas one applicant/defendant entered appearance and filed defence, the other two did not enter appearance. He also points out that this

file has frequently disappeared from the court registry for unclear reasons and has had to be reconstructed many times.

Many of the respondents have grown old, and some have even died while awaiting finalization of this matter. The appeal is described as having no merit, as the question regarding service is a non-starter as there exists evidence of service, and the statement of defence filed was a sham. While the matter was pending, the applicants reaped handsomely by collecting rent and the application for stay is an afterthought and the appeal is a mere academic exercise.

The deponent gives details as to why the appeal is not likely to succeed and the lower court properly exercised its jurisdiction.

In a further reply, the applicant states that although the matter was filed a long time ago, they only became aware of its existence when judgment was entered in November 2010, so they cannot be blamed for any delay. Further that the suit against the applicant is not dependent on the 1st defendant in the lower court as they had all been sued separately.

The application was disposed off by way of written submissions. The applicant's counsel submits the appeal is arguable and has high chances of success because the trial magistrate failed to appreciate the applicable legal principles. In the written response the argument raised is that the applicants have no arguable cause whatsoever and fourteen points are listed to demonstrate this. In essence what both parties have done (and which is why I avoid going into details of their arguments) is to literally argue the appeal. The main concern of the court is to do justice to the parties and to consider the nature of the action filed – these views were appropriately captured in **PATEL V E.A. CARGO HANDLING SERVICES** (1974) EA 75 by Duffu, P, and also in the case of **SEBEI DISTRICT ADMINISTRATION V GASYALI** (1968) EA 300 by AINLEY J.

The applicants have raised issues of service, whether the defence proposed raises triable issues, whether the defence filed by 1st defendant would suffice for all the other applicants. What I am able to make out from the material before me is that definitely the appeal is arguable and this meets the first limb contemplated by Order 42.

The second argument is that the applicants are likely to suffer substantial loss because execution of the judgment will result in the Respondents being given possession of the suit land and the decretal sum paid out and this would mean that were the appeal to succeed, the applicants would have to file another suit to recover the sum paid out. There is fear that the Respondents may mismanage or interfere with the tenants as the suit property is a commercial building.

The consideration on this limb is for the applicants to demonstrate to this court that the Respondents are financially incapable of refunding the decretal sum, were the same to be paid out. It is not enough to simply say that it would be cumbersome to recover the money because they would be required to file suit. It is upto the applicant to show that Respondents have liquidity problems and there is a risk of not recovering the decretal sum if the orders sought are not granted.

So far there is nothing to suggest that the Respondents intend to change the user of the premises or that they will most likely evict the tenants – so that those claims remain allegations without any tangible support.

Certainly the applicants moved in a timely fashion to challenge the lower court's decision and I concur with counsel that the application has been made without unreasonable delay; having been filed within 4 days after the order issued by the magistrate's court. With regard to security for costs, it is pointed out that, the applicants have already deposited a sum of Kshs.100,000/= following orders made by the court on 29/07/2011 and are willing to deposit any further security in terms of Title or further monies, thus meeting what is contemplated by Order 42 Rule 6.

The upshot is that:-

1. Applicants have adequately demonstrated that they have an arguable appeal.

2. The application has been made without unreasonable delay.

3. The applicants are willing to deposit security.

I recognise that this matter has been in court for over 16 years and it should come to a final determination but that must be considered in the light of what is fair and just. In my view this means giving the applicants a chance to exhaust the avenues of redress available to them, but within a limited time frame. To this extent then, I grant orders of stay on condition that:-

(1) The applicants deposit a further Kshs.100,000/= as security for costs within 7 days from today – the same be deposited in an interest earning account in the joint names of the applicant's and respondent's counsel.

(2) The applicants deposit the Title document in respect of the suit property in court, within 7 days from today.

(3) The appeal must be set down for hearing within 60 days from today's date.

(4) The costs shall be borne by the applicants.

Delivered and dated this 9th day of October, 2012 at Nakuru.

H.A. OMONDI
JUDGE