



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 20 OF 2013**

**HARJIT PANDHAL SINGH.....PLAINTIFF**

**VERSUS**

**AGRICULTURAL DEVELOPMENT CO-OPERATION...1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

***Agricultural Development Co-operation***, hereinafter referred to as the appellant has come to this court praying for an order of stay of execution of the decree in this suit pending the hearing and determination of an appeal preferred in the Court of Appeal. The application is based on grounds that the 1<sup>st</sup> defendant has lodged Notice of Appeal and wishes to proceed on appeal to the Court of Appeal against the court's judgment delivered on 20<sup>th</sup> May, 2016. The 1<sup>st</sup> defendant has requested for typed and certified copies of proceedings for appeal purposes and the same are awaited. This application has been brought expeditiously and without unreasonable delay. The 1<sup>st</sup> defendant will be prejudiced improperly and further if stay is not granted, the said appeal/intended appeal which is against the whole decision of the trial court will be rendered nugatory. The 1<sup>st</sup> defendant is willing to abide by such reasonable stay terms as the court may order in the interests of both parties and justice. The 1<sup>st</sup> defendant will suffer substantial harm since the judgment amount is colossal and in case the orders sought are not granted as recovery efforts against the plaintiff/respondent would be remote thereafter upon payment. The decretal sum entailed comprises an amount that is not a normal debt but arose from circumstances that were beyond the 1<sup>st</sup> defendant's control and which the 1<sup>st</sup> defendant wishes be addressed once more on appeal. The 1<sup>st</sup> defendant's application is made in good faith.

The application is supported by the affidavit of C. K. Kibichiy who states that judgment was determined in this case on 20.5.2016 in favour of the plaintiff against the defendants. A notice of appeal has been filed and have applied for certified copies of proceedings and has a drafted memorandum of appeal.

The application is further supported by a further affidavit of Lilian Kosgei dated and filed on 27.6.2016. The gist of the affidavit is that the judgment is a colossal sum of Kshs.250 Million and where a sum of Kshs.100 Million in against both defendants jointly and severally and they are aggrieved by the same hence they pray for stay of execution pending appeal. That she makes this affidavit in further support of the Affidavit sworn by C. K. Kibichiy Advocate for the 1<sup>st</sup> defendant in respect of their application for stay pending appeal. That if stay of execution is not granted and all the sums under the Decree are paid out, the intended appeal will be rendered nugatory.

This case is not ordinary and the decretal amount does not arise from a normal debt/indebtedness of the

1<sup>st</sup> defendant but from special occurrences which involved the entire country and which were unfortunate circumstances and whereby the 1<sup>st</sup> defendant still wishes to be heard on appeal. The 1<sup>st</sup> defendant, Agricultural Development Corporation (ADC) is a state corporation incorporated under ADC Act Cap. 444 and is wholly owned by the government. That by virtue of the status of ADC, they are regulated by the State Corporations Act and are under the Ministry of Agriculture who is their sponsor with respects to various ongoing projects.

That it is their request and prayer that Agricultural Development Corporation (ADC) be granted stay on such discretionary conditions as the court may consider worthwhile and reasonable taking into account the special circumstances of this case as highlighted above and whereby ADC ought to be considered as capable of meeting its obligations should appeal not be successful in the long run and therefore, that it may be accorded exemption on requirements of deposit of security pending appeal given that it is a State Corporation.

The plaintiff/respondent filed a replying affidavit stating that he is advised by his Advocate on record which advise he verily believes its veracity that an advocate cannot swear an affidavit, in support of an application for stay pending appeal, and particularly depone to the prejudicial issues where he is not a party to a suit, the suffering being prejudiced and/or likelihood of being occasioned substantial and irreparable loss thereof.

According to the respondent, the application for stay is not therefore supported by a competent affidavit and is therefore bad in law, form and cannot stand the test of the application and ought to be dismissed forthwith. The application has not exhibited the decree nor warrants of execution/attachments that would warrant stay pending an appeal and therefore the application is made on presumption, in vicious and baselessly.

The application before court lacks substratum and is merely an academic exercise and there is no demonstration to proof, support nor actual exhibition of imminent threat of loss, prejudices and irreparable damages likely. The state of both parties based on the unfoldings, and the facts of this case as exhibited by the proceedings and the judgment do not warrant the grant of an order for stay pending appeal. The application has been filed as a calculative move to defeat the course of justice, since it has been filed even before taxation and by virtue of the unfolding's after judgement.

That he is also informed by his advocate on record which information he verily belief to be true that the said memorandum of appeal is not within the legal nor factual parameters prompting or posing chances of success vide the instant application as exhibited by the supporting affidavit now before court. That he lost his earnings and properties in the said incident pleaded in his suit that was substantially occasioned by the defendant's negligence and therefore entitled to the award granted in his favour vide trial court. That he should get his full fruits of judgment since he is confidence and determined that the appeal has no any chance of success at all and that the judgment pronounced by this Honourable court is just, on point and deserving.

He states that in any event, he is a man of means, a prominent businessman with many blossoming businesses, income earnings and fixed assets and that therefore in the unlikely event that the appellate court holds the standing judgment otherwise, he will be in position to refund or repay it unlike the defendants whose future state cannot be foretold. That the defendant's application is only meant to derail this matter and particularly to deny him his right to enjoy the fruits of the judgment. That he has been long a waiting for the outcome of this trial suit to enable him sufficiently plan and utilize the fruits of judgment in furthering his business which suffered a huge blow of loss as a result thereof and developing further. That the applicant has not shown nor indicated any good faith and conditional collateral willingness in as far as fairness and justice goes since no sound proposal has been made by the defendant nor an after for a fair conditional stay pending appeal.

That he is also advised by his Advocate Esq. Morgan Omusundi, advice he verily trust and believe, to be true that the issue of quantum is discretionary to the trial court and cannot be aptly challenged unless it has been in-ordinately high and substantially above and far beyond the threshold vis-a-vi the loss occasioned,

circumstances of the case and the statutory limit and that it is glaringly clear that the defendant is merely delaying the fruits of the judgment, coming to court with the face of inequity, baselessly challenging the trial courts discretion, and undermining the rule of natural justice. That in the very unlikely event that this Honourable court is inclined to grant the stay, then the same must be granted within the land head parameters of compelling, depositing the amount in a joint interest earning account.

The plaintiff submits that the application is brought expeditiously without undue delay and that the appeal will be rendered nugatory if stay is not granted. Moreover, that there is an equitable appeal and believes that there is a good appeal. Moreover, that the application is likely to suffer substantial loss if stay is not granted. Lastly, that security should not be given as the applicant is a state corporation.

The 2<sup>nd</sup> defendant on his part, argues that the applicant satisfies the conditions set out in Order 42(6) of the Civil Procedure Rules, 2010. The application has been brought within reasonable time and without undue delay and that if stay is not granted, the applicant will suffer substantial loss and that security is not necessary.

The plaintiff submits that if the court finds that the appeal is arguable and that there is a likelihood of substantial loss, then it should order that 50% of the decretal amount to be paid to the plaintiff and 50% to be deposited in court within the next 30 days.

I have considered the application and do find that Order 42(6) gives this court a discretion to grant a stay of execution pending appeal. The conditions for granting a stay of execution pending Appeal are now settled. An order of stay of execution is a discretionary one but that discretion is fettered by the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules which are that: -

- i. The application must be made without undue delay.
- ii. That the Applicants must demonstrate that they will suffer substantial loss unless the order sought is granted.
- iii. 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.

On the first condition on whether the application was filed without undue delay, it is noted that the judgment was delivered on the 20<sup>th</sup> May 2016. The Application herein was filed within 10 days after the lapse of the orders of stay made on 20<sup>th</sup> May 2015 which, in my view, was reasonable time.

Regarding the second condition of substantial loss likely to be suffered by the Appellants if stay of execution is not granted I do not that the respondents have deposed that they are persons of substance with vast businesses a fact that has not been controverted by the applicants.

The Court of Appeal while dealing with a similar situation in the case of Nairobi Civil Application No. 238 of 2005 **National Industrial Credit Bank Limited Vs Aquinas Francis Wasike & Another (UR)** stated: -

***This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.***

In my view, the Respondent was able to discharge his burden.

On the third condition, the court has noted the offer by the appellants to furnish security in any terms as

will be ordered by the court.

I have considered rival submissions and weighed the respondents right to enjoy the fruits of his judgment and the applicant's application for stay of execution and do exercise my discretion by granting a stay of execution of the decree on condition that the 1<sup>st</sup> respondent deposits security of Kshs.10,000,000/= within the next 30 days in a joint fixed interest earning account to opened in a reputable bank in the names of the two advocates representing the plaintiff and the 1<sup>st</sup> defendant. Each party to bear own costs.

**DATED AND DELIVERED AT ELDORET THIS 2<sup>ND</sup> DAY OF JUNE, 2017.**

**A. OMBWAYO**

**JUDGE**