



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 34 OF 2012**

**CHRISTINE CHEPCHIRCHIR BAIG .....PLAINTIFF**

**VERSUS**

**MIRZA IQBAL BAIG .....1ST DEFENDANT**

**AGRI SEED COMPANY LIMITED .....2ND DEFENDANT**

**RULING**

1. The second Defendant/Applicant **Agriseedco Ltd** filed a Notice of Motion dated 5/10/2015 in which it sought the following reliefs:-
  1. (Spent)
  2. That there be a stay of further proceedings, Taxation or Execution of any costs as a result of the Judgement /Decree and consequent orders of court given on 16/10/2014 pending the hearing and determination of the 2nd Defendant's intended Appeal pursuant to the Notice of Appeal dated 22/10/2014 and filed in court on 30/10/2014 herein.
  3. That the further orders given by the court on 16/10/2014 together with the request by the 2nd Defendant's Advocate for typed copies of proceedings and certified copies of the Judgement and Decree together with the reminders thereto be complied with expeditiously.
  4. That the costs of this application be provided for in any event.
2. The application is brought under the provisions of **Order 42 Rule 6 and Order 51 Rule 1** of the **Civil procedure Rules** as well as **Sections 1A and 3A** of the **Civil Procedure Act Cap 21 Laws of Kenya**. The applicant contends that it has preferred an appeal against part of this court's Judgement delivered on 16/10/2014. The part of Judgement which the Applicant is appealing against include dismissal of the Applicant's counter-claim with costs. The other aspect of the Judgement being appealed against is the finding of the court that there was an attempt to defraud the plaintiff in this case.
3. The applicant contends that it was denied a refund of money which it had expended on rates , stamp duty and other expenses. It contends that the Plaintiff/Respondent is in the process of taxing her bill of costs and that if stay is not granted, the intended appeal will be rendered nugatory in that the Applicant will find it impossible to get a refund as the Respondent is based in the U.S.A. and her only known asset is the land which the Applicant had unsuccessfully tried to purchase.
4. The Applicant's application is opposed based on grounds of opposition filed by the Plaintiff/Respondent on 2/11/2015 in which the Respondent contends that other than costs, there is nothing else to be stayed and that the Respondent is still the registered owner of **LR No. 3707/4** commonly known as **Tausi Farm**. That the Applicant has already been refunded Kshs

- 27,000,000/= being purchase price.
5. This is an application for stay pending appeal. Under **Order 42 Rule 6**, there are three conditions which should be met before stay can be granted. The first condition is that the application for stay must be brought without unreasonable delay. The second condition is that the Applicant has to demonstrate that he will suffer substantial loss if stay is not granted. The third condition is that there has to be security for the due performance of the decree as may ultimately be binding on him.
  6. The issue for determination in this application is whether the Applicant has met the conditions set out in **Order 42 Rule 6 of the Civil Procedure Rules**. The Judgement being appealed against was delivered on 16/10/2014. This application was filed on 6/10/2015. This is a period of over one year. The Applicant has tried to explain the delay by stating that, this application was not filed in time because typed Proceedings had not been availed as ordered by the court on 16/10/2014 after Judgement was delivered.

Another reason given was that the Applicant spent some time in seeking for a refund of the purchase price which was with the advocate of the first Defendant.

7. I do not think that it was necessary for the Applicant to wait until proceedings are ready before applying for stay of execution pending appeal. Equally the Applicant should not have pegged the application to the refund which it was pursuing. An order for the refund had been made at the request of the Applicant soon after Judgement was delivered. The said refund has since been made. The proceedings have not been typed to date. I therefore find that the reason given for the delay is not convincing. I find the delay of over one year to be unreasonable in the circumstances.
8. The counsel for the Applicant referred me to the decision of **Nambuye J** as she then was (Now J A) in *Nairobi HCCC No 2714 of 1997* between *Crested sea Agencies Ltd – Vs- Muranga County Council*. In this case, an application for review of a consent order had been made by the Muranga County Council after four years from the date of consent. The judge allowed it notwithstanding the delay and set aside the consent. This case is distinguishable from the circumstances of the present case. The judge considered a number of factors in arriving at the decision to allow the application. This included the fact that there was collusion on the part of the officers of the Council who ensured that they covered all tracks of what happened until a new Town Clerk discovered that the consent entered was for money which was not due to the respondent.
9. The next consideration is whether the Applicant has demonstrated that it will suffer substantial loss. The Plaintiff /Respondent's claim was allowed. An intended sale of her property was nullified and the Applicant who was the intended purchaser has been refunded its money and has bought land elsewhere. The way I understand the Applicant's contention, it is not contesting the nullification of the sale. It is only contesting a finding of fraud which touched on it in the Judgement. It is also fighting dismissal of its counter claim. There is nothing to be executed in this case. If there is anything to be executed, it is only on costs. These costs have not been taxed.
10. The question which then arises is as to what loss will the applicant suffer? The simple answer is that the Applicant will suffer no loss. If costs will be taxed later and the Applicant pays, this will not render the intended appeal nugatory as the Respondent will refund the same. Though the Respondent stays in the U.S.A., she has property in Kenya. Her known property which was the subject of this suit is over Shs 56,000,000/=. Is this a person who will not pay the costs? I do not think so. Whereas a losing litigant is entitled to appeal, equally a successful litigant ought not to be denied from enjoying the fruits of Judgement especially where such enjoyment will not render an intended appeal nugatory.
11. Demonstration of substantial loss is the cornerstone for grant of stay of execution pending appeal. As there has been no demonstration of substantial loss, I find that this Application cannot be allowed. The Applicant did not have to pray for an order compelling the typing of proceedings. Typing of proceedings is administratively done at the local level. There is no need for one to file for an order to that effect. Prayer 3 of the Motion is not merited.
12. The condition for security is normally considered if it is found that an Applicant will suffer substantial loss if stay is not granted. All in all, I find that the Applicant's application lacks merit. The same is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 7th day of April 2016.

**E. OBAGA**

**JUDGE**

In the presence of M/s Mufutu for Mr Kiarie for Plaintiff/Respondent and Mr Weche for Mr K'opere for Applicant.

Court Assistant – Isabellah

**E. OBAGA**

**JUDGE**

**7/4/16**