



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 212 OF 2013

AFRICAN COTTON INDUSTRIES LTD.....PLAINTIFF/APPLICANT

VERSUS

**RURAL DEVELOPMENT SERVICES
LIMITEDDEFENDANT/RESPONDENT**

RULING

Introduction

1. On **26th November, 2014** the plaintiff (Applicant) brought the notice of motion dated **25th November, 2014** seeking the following substantive orders:-

- a. Stay of execution of the the order issued on 15th October, 2014 in this matter pending the hearing of the application and the intended appeal;
- b. Stay of proceedings commenced in this matter pending the hearing of the application and the intended appeal; and
- c. The costs of the application to abide the outcome of the appeal.

2. The application is premised on the grounds that the applicant has filed a notice of appeal against the decision of this court (read High Court) made on 15th October, 2014; that unless the orders sought are granted, the respondent may deal with the suit property and the business information confided in it in a manner prejudicial to the applicant; that the applicant is ready, willing and able to deposit such reasonable security as this court may deem fit to require for due performance of such order as may ultimately be made against it and that the application has been made without unreasonable delay. Further, that no prejudice will be occasioned on the respondent because it will continue having quiet possession of the suit property pending the hearing and determination of the appeal.

3. The application is supported by the affidavit of the applicant's manager **Mr. Mureithi Regeru**, in which the grounds thereon are reiterated. The following documents are annexed to the affidavit of Mureithi Regeru:-

- i. Order issued on 23rd October, 2014 in respect of this application, marked **MR-1**;
- ii. The notice of appeal filed in this matter, marked **MR-2**;

4. In reply and opposition to the application, one of the directors of the respondent company, **Lilian Wanjuku Kimani**, filed the replying affidavit sworn on **29th January, 2015**. In that affidavit, she *inter alia*, deposes that the respondent company is a family owned company and that the property which

forms the subject matter of this suit is their matrimonial home; that her family members strongly opposed the sale of the suit property and that there is no need for the court to issue the orders sought because they have no intention of divulging any information or business plans (if any) made available to them by the applicant. Further, that their advocate has advised them that they cannot dispose of the suit property during the pendency of the suit.

5. With regard to the orders of stay sought, she contends that they are incapable of being issued because the court did not order anyone to do or refrain from doing anything; that for any order of stay to issue, the applicant must demonstrate that it will suffer irreparable loss, that in the circumstances of this case, that condition cannot be satisfied because the respondent has no intention of disposing of the suit property. Further, that the deposit paid by the applicant was refunded and that the intended appeal is frivolous. In this regard, it is contended that the applicant has failed to set out the proposed grounds of appeal; that the appeal raises a question of law to wit, whether a sale agreement involving agricultural land can be subject of specific performance and that the respondent does not intend to continue with the transaction.

6. The respondent argues that in the absence of consent from the Land Control Board, the transaction remains void for all purposes and that the applicant cannot be forced to sign an application for consent or to appear before the Land Control Board for that consent.

7. In view of the foregoing, it is contended that the application lacks merit and argued that it will only serve to delay the hearing and determination of the suit.

8. In reply to the issues raised in the affidavit sworn in support of the respondent's case, Mr. Mureithi Regeru filed a supplementary affidavit on **18th February, 2015** where he terms the allegation that the suit property is matrimonial as unfounded because the respondent is a body corporate. He contends that in the sale agreement, the respondent made some promise and representations which are contractually binding on it and that the respondent is estopped from reneging on its contractual obligations. Since the respondent says it has no plan of divulging the applicant's business plan, he contends that no prejudice will be occasioned to it if an order seeking to restrain it from divulging the information is issued. The order seeking to restrain the respondent from divulging information concerning the applicant's business plan is said to be necessary for the purpose of promoting and safeguarding the applicant's economic and intellectual property rights.

9. Contrary to the respondent's argument that the property is safe because the respondent has been advised that it cannot sell it during the pendency of the suit, the applicant argues that without an order prohibiting the respondent from selling and transferring the property, the respondent may nevertheless, sell or transfer it because no law prevents it from doing so. In this regard it is argued that unlike the Indian Transfer of Property Act (ITPA) which recognizes the doctrine of *lis pendens* the doctrine does not apply under the Land Act, 2012 and the Land Registration Act, 2012.

10. Concerning the contention that the deposit paid in respect of the transaction was refunded, it is argued that that does not compromise the applicant's case for specific performance.

11. Owing to the applicant's special interest in the suit property, it is submitted that damages cannot remedy the applicant's grievance.

12. It is admitted that the Land Control Board has the discretion to grant or refuse to grant the application for consent but explained that owing to the economic value of the project, the applicant wants to undertake, that the Board may grant its consent for the intended dealing.

13. With regard to the contention that the appeal is frivolous, it is contended that arguability or otherwise of the appeal is not one of the conditions that the court is required to consider in determining whether to grant the orders sought under **Order 42 Rule 6(1)** of the Civil Procedure Rules.

14. It is reiterated that the suit property is unique to the applicant and that the respondent may dispose it

to a third party if the orders sought are not granted, making the applicant suffer irreparable injury.

15. By consent of the advocates for the parties, the application was disposed of by way of written submissions.

Submissions on behalf of the applicant

16. In the submissions filed on behalf of the applicant, it is explained that grant of the orders sought in the applicant's application is governed by **Order 42 Rule 6(1)** and in that regard, submitted that through the pleadings filed by the applicant to wit, plaint, supporting affidavit and supplementary affidavit, the applicant has demonstrated that the suit property is unique to its operational requirements and that unless the orders sought are granted, the suit property may be sold and/or transferred to a third party; an occurrence which, if it happens, will not only render the intended appeal nugatory but also occasion irreparable loss to the applicant. It is submitted that the applicant is also apprehensive that the respondent may divulge its business plan to public thereby injuring its business prospects. On account of the foregoing, the respondent is convinced that he has satisfied the first condition under **Order 42 Rule 6(1)** of the Civil Procedure Rules.

17. With regard to the second condition, under **Order 42 Rule 6(1)**, it is submitted that the application was filed barely one month from the date of issuance of the order sought to be appealed from hence there was no unreasonable delay in lodging it.

18. With regard to the requirement of security for the due performance of such order as may ultimately be binding on the applicant, it is submitted that the applicant is ready and willing to furnish such reasonable security as this court may order.

19. Concerning the issues raised in the respondent's replying affidavit, it is reiterated that the respondent is estopped by the contract executed between itself from raising those issues.

20. On the contention that the appeal has no merit (is frivolous), it is submitted that that is a question which can only be addressed by the appellate court. In bringing the appeal, the applicant is said to have complied with all requirements of law concerning appeals.

21. On whether the suit property is safe from any adverse dealings owing to the doctrine of lis pendens, it is submitted that there being no express provision of the law on that question or even a court of Appeal decision on the issue, the applicant cannot be sure that the suit property is safe.

22. Concerning the authorities cited by the respondent in support of its contentions, it is submitted that the circumstances informing those decisions are distinguishable from the circumstances obtaining in this case.

23. The authorities applicable to the application are said to be those cited by the applicant. That is to say the case of **Juma Ali Mbwana & Another vs. Uni Omar Musa (2014) e KLR; Kithaka Nduvya & 6 Others vs. Stephen Muli (2014) eKLR and Peter Samoei vs. Isaac Ruto (2012) eKLR.**

24. There being no injunction protecting the property, it is submitted that a case has been made for issuance of the orders sought.

Submissions on behalf of the respondent

25. In the submissions filed on behalf of the respondent, it is acknowledged that the respondent entered into the transaction which is the subject matter of the current proceedings and that it later reneged on its obligations. It is pointed out that the sale was subject to consent of the relevant Land Control Board and argued that since the respondent is no longer interested in completing the transaction, it cannot be compelled to make the application for consent or go to the Land Control Board for giving of the consent.

26. In this regard reference is made to the case of **Dulu Igwo v. Lydia Wangui Kamau (2013) e KLR** where it was stated:-

“A court of law cannot compel a party to a contract of sale of property to apply for LCB consent nor compel him to attend the LCB for such application...”

27. With regard to the orders appealed from, it is pointed out that they were negative orders (orders of dismissal), imposing no obligation on the parties hence incapable of being stayed. In that regard reference is made to the case of **Kanwal Sarjit Singh Dhiman v. Keshavji Jivrag Shah (2008) eKLR** where the Court of Appeal stated:-

“an order dismissing an application is a negative order which is incapable of execution save in respect of costs only.”

28. On whether the applicant will suffer irreparable loss if the orders sought are not granted, reference is made to the case of **Socfinac company Ltd v. Nelphant Kimotho Muturi (2013) e KLR** and submitted that in the circumstances of this case, it is difficult to understand what loss the applicant will suffer because it does not have title documents to the property. It is pointed out the deposit paid in respect of the transaction was refunded in full and that the applicant has not demonstrated that the respondent intends to sell the suit property. Further, that the respondent has demonstrated that it is aware that it cannot dispose of the property during the pendency of the suit.

29. In view of the foregoing, it is reiterated that the application and the appeal lack merits and are only meant to delay the hearing and determination of the suit.

Analysis and determination

30. The sole issue for the courts determination is whether the applicant has made up a case for issuance of the orders sought.

31. Starting with the prayer for stay of proceedings, the law applicable to such application was captured by **Gikonyo J.**, in the case of **Lucy Waithera Kimanga & 2 others v. John Waiganjo Gichuri (2015) e KLR** thus:-

“The legal considerations in an application for stay of proceedings have been enunciated in a host of judicial decisions which I need not multiply. Except I can cite some few, say, Daniel Walter Rasugu Nbi Hccc No 15 of 2006 ; Global Tours & Travel Limited; Nairobi HC Winding Up Cause No.43 of 2000; and Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi [2014] eKLR. The guiding legal principles gathered from these cases may be summarized as follows:-

- a. **The decision whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.**
- b. **The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.**
- c. **In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.**
- d. **In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.The *locus classicus* authority is the finding of Madan JA (as he then was) in the case of **Butt v The Rent Restriction Tribunal** (supra) stay of execution. The Applicant for stay of proceedings pending appeal must provide specific details and particulars of the loss he is likely to suffer if the stay is not granted. It is not enough to**

merely state that substantial loss will result, or that justice would be put into disrepute, like the Applicant in the instant case. The Respondent/Applicant has not shown how he is likely to suffer if his application is dismissed. His appeal is unmerited. It is the shareholders who will suffer out of the mismanagement of the companies. See decision by Havelock. J. in Bai Lin (K) Ltd & 2 others v Zingo Investments Limited & another [2014] eKLR where he relied on the holding in Machira v. East African Standard (No. 2) (2002) 2 KLR 63, where Kuloba J. found;

“In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him a success at any stage.....In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavits or other evidential material that substantial loss may result...In this kind of application for stay, it is not enough for the applicant merely to state that substantial loss will result. He must provide specific details and particulars...Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

[11] See also decision by Odunga J on substantial loss in Republic v. The Commissioner For Investigations & Enforcement 'Ex-Parte' Wananchi Group Kenya Limited [2014] eKLR, where he relied on the case of Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63, where Kuloba J. also held that;

“...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the

other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is

acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court...”

32. In applying the foregoing principles to the application at hand, I note that other than arguing that because there is no injunction in place, proceeding with the suit leaves the suit property exposed to the risk of disposal, there is no other reason given why there should be a stay of the proceedings. The intended appeal will definitely not determine the parties rights to the suit property. That bit will be determined before this court. If this court is able to take care of the applicant’s fears, in my view, nothing prevents it from proceeding with hearing of the case filed before it. This so because no decision touching on the merits of the suit pending before it has been appealed from. The decision of the Court of Appeal will only have an effect on the application appealed from and not the suit. Being of the view that this court has power to protect the suit property pending the hearing and determination of the suit, I am unable to agree with the applicant that proceeding with the main suit will in any way affect its rights or occasion it any prejudice.

33. On whether in view of the nature of the orders appealed from, an order of stay of execution can issue, I agree with the submissions by counsel for the respondent that the orders appealed from did not impose obligations or confer rights on the parties, save for costs, that are capable of execution. That being the case, on the authority of Kanwal Sarjit Singh Dhiman v. Keshavji Jivrag Shah (supra), I find and hold that the orders appealed from are incapable of forming the subject matter of the prayer for

stay of execution, save on the aspect of costs only.

34. The upshot of the foregoing is that the prayer for stay of execution has no merit and is denied.

35. With regard to the prayer of stay of proceedings pending appeal, since the issues appealed from will not have any effect on the decision of this court concerning the main suit, I am not persuaded that the applicant has made up a case for stay of proceedings. As pointed out above, the applicant's concern can be taken care of by requiring the respondent to file an undertaking that it will not deal with the suit property in a manner prejudicial to the applicant's interest therein, until the suit herein is heard and determined

36. In view of the foregoing, I decline to order stay of the proceedings and instead direct the respondent to file an undertaking within thirty days from the date hereof, that it will not deal with the suit property in a manner prejudicial to the interest of the applicant pending the hearing and determination of the suit.

Dated, signed and delivered at Nyeri this 25th day of May, 2015

L N WAITHAKA

JUDGE

In the presence of:

Mr. Wairoto for the Plaintiff/Applicant

Mr. Wanga for the Defendant/Respondent

Lydia – Court Assistant