IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, OUKO & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. NAI. 109 OF 2008 (UR. 66/2008)

BETWEEN

KENYA PLANTERS CO-OPERATIVE UNION LTD. …..…….… APPLICANT

AND

GITHARA CHUCHU & 473 OTHERS MEMBERS OF GITUTU COFFEE GROWERS CO-OP. SOCIETY LTD. ……..…... 1ST RESPONDENT

GITUTU COFFEE GROWERS

CO-OPERATIVE SOCIETY LTD. ……..…….. 2ND RESPONDENT

(Application for stay of execution of the order made against the 2nd defendant on 12th July, 2006 pending the determination of the intended appeal against the orders of the High Court of Kenya at Nairobi (Ojwang, J.) dated 17th February, 2006 and the 12th day of July 2006

in

H.C.C.C. NO. 3616 OF 1993)

****

RULING OF THE COURT

If there is a dispute that reminds us of the fictional long-running litigation in England's Court of Chancery in **Jarndyce V. Jarndyce** narrated in **BLEAK HOUSE, CHARLES DICKEN'S** finest novel written between 1852 and 1853, it is this case. **Jarndyce V. Jarndyce,** a dispute concerning the fate of a large inheritance which dragged on for many generations, so that, by the time it was resolved, legal costs estimated between $60,000 and $ 70,000 (equivalent Kshs. 4,920,000 and Ksh. 5,740,000 today) had devoured the entire estate. ***Dickens*** used this story to illustrate the failure of the British judicial system; an indictment of the English Chancery Court at the time. The story in the novel is similar to the story in this dispute in many respects. Like **Jarndyce** case, it has had a long-winded and unending litigation.

The dispute that gave rise to this appeal erupted in 1978 but the suit was filed on 10th October 1983 (30 years ago). It has passed through the hands of several judges. Efforts to resolve it have been made by Government Ministries, arbitration panel and the law courts.

There have been numerous interlocutory applications, the instant one being one in a series of several others. The application was filed on 23rd May 2008. It has itself taken 5 years to be argued. The bleak state (like the **Bleak House**) of affairs in the dispute was articulated by Nambuye, J (*as she then was,)* in a ruling arising from one of the aforesaid several applications as follows:-

> **"Another consideration peculiar to this case only is the length time of the proceedings have taken in tarmac king** (sic) **in this case and likely to be taken to have the matter finally, determined. In this court's view, indeed, as submitted by the respondent's counsel, that taking 30 years and yet the dispute is not yet finally brought to an end is a shame to the judiciary and a mockery of the justice system, I agree entirely with those sentiments. However, the stage where the proceedings have reached, the only proper authority that can act on those sentiments is the Court of Appeal. This is so because, once an election to appeal has been made by a litigant and a notice of appeal filed in the Court of Appeal, the Court of Appeal becomes seized of the matter and the proceedings become the property of the Court of Appeal."**

Likewise, Ojwang' J. (*as he then was)* headed the ruling, the subject of this motion thus;

> **"APPLICATION AND PRAYERS: THE STORY OF KSHS. 13,251,249/95 WHICH CANNOT BE TRACED."**

That has been the dispute for the last **Thirty (30)** years - the mystery of Ksh. 13,251,249/95 which cannot be traced. It is, in our view a very simple dispute and its background may be summarized as follows:

i. Githara Chuchu, now *Deceased*, and 473 others (the 1st respondents) were members of Gititu Coffee Growers Co-operative Society Limited (the 2nd respondent). It is important to point out at this point that the record before us shows that out of the 475 Respondents, 103 were deceased as at 26th September 2008. For proper conduct of the members' business , an arrangement was made between both parties going back as far as 27th September,1979 where the 1st respondents would deliver their coffee sherries to Kenya Planters Co-operative Union (the applicant) through the 2nd respondent Society. The payment for the coffee delivered to the applicant was to be channeled back to the 1st respondents in reverse order, that is, from the applicant to the 2nd respondent who would then make the final payment to the 1st respondents.

ii. Around the same year, the 1st respondents decided to split from the 2nd respondent Society and form their own separate cooperative society. Consequently they filed High Court Misc Application No. 81 of 1980 seeking orders of registration as a separate society and a refund of monies from the 2nd respondent in respect of the coffee sherries delivered to the 2nd respondent.

iii. Pending the determination of the above case, the Commissioner of Co-operatives in conjunction with Coffee Board of Kenya directed the applicant to suspend payments to the 2nd respondent on behalf of the 1st respondent. Plat, J. (*as he then was)* entered judgment in favour of the 1st respondents allowing them to sue for the sums due in respect of coffee sherries delivered by the 2nd respondent to the applicant on behalf of the 1st respondent.

iv. The applicants thereafter failed to pay the decretal sum due to the 1st respondent prompting the present lawsuit where the 1st respondents sought for the records of coffee sherries delivered to the 2nd respondent; that such sums as would be determined by the records to be paid to the 1st respondents; and an order restraining the applicant from parting or giving away the coffee proceeds in respect of deliveries made between September, 1979 and 1983 by the 2nd respondent to any other party other than the 1st respondents.

v. The applicant's defence was struck out on 31st January 1985 by an order made by Okubasu J *(as he then was)* and Judgment entered for the 1st respondents against the appellant and the 2nd respondent. That judgment became the subject of Civil Appeal No. 46 of 1985 which was allowed on 31st July 1987 and the matter referred back to the High Court for speedy disposal.

vi. The High Court ordered that the dispute be referred to arbitration under **Section 80** of the Co-operative Society Act and subsequently Daniel Mutiso was appointed as a sole arbitrator. He awarded to the 1st respondent Kshs. 8,999,480/=. This decision was challenged by an appeal to the Commissioner of Co-operative Development, who allowed the appeal.

vii. The dispute was thereafter referred to 3 arbitrators as Arbitration Cause No. 6 of 1992.

According to the pleadings on record, the cause is still pending. After attempts to have the dispute brought back to the High Court failed, the 1st respondent applied to the High Court to summon the applicant's Managing Director, Finance Manager or the General Manager to explain what happened to the sum of Kshs. 13,251,549/95. It is the orders subsequent to this that have precipated the intended appeal. The notice of appeal was filed on 28th February 2006, seven years ago and to date the appeal has not been filed for the reason that the High Court has failed to supply the applicant with the proceedings.

The motion before us is for the relief that the execution of orders of 12th July 2006 against the applicant be stayed pending the determination of the intended appeal against the earlier orders of 17th February 2006. The applicant contends that the intended appeal is arguable for the reasons that:-

i. The High Court made the impugned order of payment against the applicant when there was no evidence that the funds were with the applicant.

ii. That without an arbitral award the High Court had no basis to award Kshs. 13,251,549/95.

iii. That the High Court had no jurisdiction to make the orders complained of as the matter only went before the judge for a mention.

iv. That the High Court having found in its ruling of 6th July 1999 that, by dint of section 80 of the Co-operative Societies Act, it lacked jurisdiction and that finding has not been challenged or set aside, it was in error for the learned judge to entertain the dispute.

v. That the learned judge granted orders not sought.

The applicant has, in fulfillment of the requirement of the twin principle, deposed that if the orders in question are not stayed, the intended appeal will be rendered nugatory as there is real risk that the applicants will not be able to recover from the 1st respondents the sum awarded should the intended appeal succeed; that with 474 respondents whose assets and means are unknown, the applicants' fears that it will be impossible to recover the decretal sum are justified.

Responding to these arguments, the 1st respondents, Githara Chuchu Co-operative Society Ltd, on behalf of the farmers through its Chairman, Njoroge Mburu has sworn that the present application is tailored to further delay the conclusion of this matter and to prevent the 474 members of the 1st respondents from enjoying the fruits of the judgment; that the matter is old and that the intended appeal does not raise any arguable grounds as the courts have consistently found that the applicant owes the 1st respondent and the farmers funds in dispute. The 1st respondent contends further that the intended appeal cannot be rendered nugatory as the members of the 1st respondent are coffee farmers who are the backbone of the country's economy; that the applicant, having retained the disputed **Kshs. 1,325,459/95** as since 1983, attracting commercial interest rate of **Kshs. 1,807,881,711/30** and court interest rate of **Kshs. 256,525,420/35** as at 30th May 2009, cannot be heard to even suggest that it will suffer should it pay **Kshs. 13,251,459/95** to

the 1st respondent.

The 1st respondent argues, in conclusion, that although the applicant's goods have in the past been attached in execution of the decree, they have engaged full gear in disposing them off; that **Kshs. 5,000,000/=,** paid into court by the applicant has been withdrawn from the court and deposited in the joint names of the parties' advocates in a bank.

These grounds formed the basis of the arguments by counsel for the parties before us on 13th June 2013. Although the principles we are invited to apply in considering this application under **Rule 5 (2) (b)** of the Court of Appeal Rules are old hats and while applications like the one before us are everyday fare in this court, we are nonetheless minded to restate them. The applicant must, first demonstrate that the intended appeal is arguable and secondly, that the appeal, if successful, will be rendered nugatory unless the order of stay is granted. See **Githunguri V. Jimba Credit** [1988] KLR pg 838.

As we consider these strictures we bear in mind that:-

i. The applicant must satisfy both conditions.

ii. In considering the arguability of the intended appeal even a single *bona fide* arguable point is sufficient.

> See Damji Pragji Mandaria V. Sara Wee Household & Body Care (k) Ltd, Civil Application No. 345 of 2004.

iii. A arguable appeal is not necessarily one that must succeed.

> **See Joseph Gitahi Gachau & Ano. V. Pioneer Holdings (A) Ltd & 2 Others Civil Application No. 124 of 2008.**

iv. At this stage, we are not expected to make any definitive findings of either fact or law as that is the province of the bench that will ultimately hear the appeal itself.

In answer to the first limb of the twin principle, we think the grounds set out earlier in this ruling clearly raise arguable issues. It is common ground that the 1st respondent brought a notice of motion dated 3rd August 2004 in the High Court for orders that:-

> **"(3) The Managing Director or General Manager or Financial Manager of K.P.C.U. (applicant) be summoned to court and ordered to tell the court whether:-**

a. **KPCU (the applicant) was still holding Kshs. 13,251,549/95 which belongs to the plaintiffs (1st respondent) herein, or**

b. **Whether it has released the said money to anybody else.**

> **4. That if it has released the said money to anyone, then name the person to whom it released the said money, and the date of the said release**
>
> **5. That costs of this application be provided for."**

The application was allowed on 17th February 2006 in a 23 page ruling in which Ojwang, J. made the following factual findings:-

> **"This means, I believe, that there could be no dispute as to the plaintiffs' entitlement to their money being the proceeds of coffee sales for 1,254 bags**

of coffee emanating from the plaintiffs' two factories – Kiagithu and Kimathi. It is equally clear that the moneys in question were recognized and acknowledged to be in the custody of the 2nd defendant, and the legal duty to pay rested squarely on the 2nd defendant. As directions in this regard were emanating from the highest Court in the land, they must, in law, be regarded as final directions, and, if the 2nd defendant then failed to pay the moneys in question to the plaintiffs, then 2nd defendant would bear full liability for the damage ensuing. This must be the guiding principle in the review of the very substantial submissions in the instant application, and in disposing of the matter with finality at this level in the judicial process.

The gravamen in this application is that the plaintiffs' moneys have to-date, not been released to them." (Emphasis ours)

He went on to say that the denial of the moneys due to the 1st respondent by the applicants could very well fall within the ambit of both criminal law and the tort of conversion. Ultimately, the learned judge ordered that:-

"1. The Chairman of the Board, or the Managing Director/General Manager and/or Financial Manager of the 2nd defendant/respondent (Kenya Planters Co-operative Union) shall appear before a Judge in the Civil Division of the High Court, to answer the following three questions.

i. **Is the Kenya Planters Co-operative Union (2nd defendant) still holding the sum of Kshs. 13,251,549/95 which belongs to the plaintiffs herein?**

ii. **Has the Kenya Planters Co-operative Union (2nd defendant) released the said sum of Kshs. 13,251,549/95 to anyone other than the plaintiffs?**

iii. **If the Kenya Planters Co-operative Union (2nd defendant) has released the said sum of Kshs. 13,251,549/95 to someone other than the plaintiffs, then who is that other person, and when was the said sum of money released to that other person?**

2. The Court, upon due compliance with the orders herein by the 2nd defendant, shall issue orders for payment to the plaintiffs of the said sum of Kshs. 13,251,549/95 with appropriate interests, while providing also the plaintiffs' costs; and the Court shall make any such further Orders as it shall deem fit and proper.

3. The 1st and 2nd Defendants shall jointly and severally bear the plaintiffs' costs in this application."

Pursuant to the above order (1) (i) – (iii) the Financial Controller of the applicant was examined on oath on 27th June 2006 after which the High Court directed that the matter be mentioned on 12th July 2006, on which date the learned judge made the second impugned order directing that, within 30 days of the date of the order the applicant must pay to the 1st respondents the sum of **Kshs. 13,251,549/95** and further that the applicant to pay within 60 days interest on the above sum with effect from 19th April 1983. The learned judge also awarded costs of the application dated 3rd August 2004 to the 1st respondent.

According to the applicant, one of the issues to be raised in the intended appeal is whether the learned judge erred in making the orders in question:-

i. without hearing the parties on the motion dated 3rd August 2004;

ii. when there was no basis for awarding Kshs. 13,251,549.95

iii. which contradicted an earlier decision of a judge of coordinate jurisdiction to the effect that by dint of Section 80 of the Co-operative Societies Act, the High Court lacked jurisdiction to entertain the dispute.

These, without going into the details, to our mind are indeed triable issues.

On whether the intended appeal, if successful, will be rendered nugatory, the applicant is apprehensive that should they pay over the decretal sum of **Kshs. 13,251,549/95** with interest and costs as ordered by the High Court to the 474 members of the 1st respondent whose means or assets are unknown it would be impossible to get them to refund. This Court in **Kenya Shell Ltd. V. Kibiru** [1982 – 88] I KAR 1018 and other decisions on the subject of stay of execution have emphasized that whether it is an applicant under **Order 41 Rule 4(1)** of the Civil Procedure Rules or one under **Rule 5 (2) (b)** of the Court of Appeal Rules:

> **"Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented."**

The court's primary concern is to ensure no party suffers substantial loss. It is also well established that once an applicant has raised doubt as to the capability of the respondent to refund the decretal sum after it has been paid over and the appeal were to subsequently succeed, the latter bore the burden to prove that no substantial loss would be incurred.

> **"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 the lack of them. Once an applicant expresses a reasonable fear that 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."**

See **National Industrial Credit Bank Ltd V. Aquinas Francis Wasike & Ano.,** Civil Application Nai. 238 of 2005.

In rebutting the burden cast on them, the 1st respondent has merely averred that they are farmers and that farmers in this country are the backbone of the economy. That is not enough. We are aware that several members of the 1st respondent are deceased – but we do not know the exact number. At some stage, it was estimated that half (1/2) had died. Likewise, we do not know whether their families have taken out grants of representation. In that sense, unless the orders sought are granted and the appeal is successful, it will indeed be impossible to trace and refund the funds once paid over. For purposes of consolation only, there is Kshs. 5,000,000/- deposited in a bank account since August 2008 or thereabout which today, having attracted interest over the years, must be substantial.

Accordingly, while we have considerable sympathy for the 1st respondents, no other course consistent with the material on record and before us is available than to make the following orders:-

i. **The notice of motion dated 23rd May 2008 is allowed with costs in the appeal.**

ii. **There will be a temporary order of stay of execution of the orders issued by the High Court on 12th July 2006 pending the hearing and determination of the intended appeal against orders made by the same court on 17th February 2006.**

iii. **The Registrar, High Court, to ensure that the proceedings for the purpose of the appeal are availed to counsel for the applicant within twenty-one (21) days from the date hereof.**

iv. **The applicant to file the record of appeal within 10 days of receipt of the proceedings aforesaid.**

v. **The Registrar, Court of Appeal, to liaise with the Registrar High Court on (iii) above and thereafter to allocate a priority date in the early part of this term for the hearing of the intended appeal.**

vi. **This order to be served on the Registrars of the two courts.**

Dated and delivered at Nairobi this 20th day of September, 2013.

D. K. MUSINGA

……..

JUDGE OF APPEAL

W. OUKO

……..

JUDGE OF APPEAL

J. MOHAMMED

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR