



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

Civil Application 247 of 2011

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPLICANT

AND

AWENDO TOWN COUNCIL.....RESPONDENT

(Application for stay of execution pending the filing and determination of an intended appeal against the ruling and order of the High Court of Kenya at Nairobi (Ringera, J.) dated 30th December 2003

In

MILIMANI H.C.C. NO. 810 OF 2003

RULING OF THE COURT

This is an application for stay of execution of the decree made in Kisii High Court Civil Case No. 40 of 2007. The application also seeks a stay of any further proceedings arising from that decree pending the filing, hearing and final determination of the applicant's appeal to this court. It is based on the grounds that the Applicant has an arguable appeal which would be rendered nugatory if stay is not granted and that the Respondent has already attempted to execute the decree.

1. Basing himself on the averments in the affidavit in support of the application sworn by Gabriel OumaOtiende, the Applicant's Legal Services Manager, Mr. Otieno, learned counsel for the Applicant, submitted that although the decree is incapable of being executed in that no specific amount was decreed, the Respondent is likely to file another suit to have the decretal sum assessed and thereafter proceed with the execution thus escalating the costs of litigation. He further submitted that as deposed in the affidavit in support of the application, the Respondent has constant financial problems as it never pays its workers on time. He therefore argued that if the Respondent executes the decree and recovers any amount from the Applicant, the latter will not be able to recoverback if its appeal is allowed. He said the Respondent having not adopted the adoptive by laws, the issue of whether or not it is entitled to any agricultural producecessis a substantive point that the Applicant will take on appeal. He therefore urged us to allow this application.

2. The application is strongly opposed. Relying on his own replying affidavit, Mr. Kisera, learned counsel for the Respondent, submitted that the Applicant has no arguable appeal and this application has therefore no merit. The Respondent's claim in the High Court was for sugar cane crop cess levied on the sugar cane the Applicant grow on its own farm. On the evidence on record, the Applicant's claim that it did not

buy its own sugar cane was displaced by the exhibits Respondent's witness produced which proved that the Applicant bought its own sugar cane for milling. In the circumstances, he further submitted, the Applicant's intended appeal is not arguable at all. He dismissed the claim that the Respondent is not financially sound as baseless and urged us to dismiss this application with costs.

3. We have read the court record and considered these rival submissions. The principles for the grant of an application for stay of execution are now well settled. To succeed, an applicant must show that he has an arguable case and that if stay is not granted he will suffer irreparable loss and his appeal will be rendered nugatory--**Bob Morgan Systems Ltd vs. Jones [2004] 1 KLR 194.**

4. In this case, without analyzing the evidence on record lest we prejudice the hearing of the intended appeal, we simply wish to observe that the Applicant has an arguable appeal. On the second limb for grant of stay of execution, however, both parties admitted that the decree is incapable of execution. There is therefore no threat of execution to warrant an order for stay. Even if there was an executable decree, we have not been shown any basis for holding that if the decretal sum is paid to the Respondent it will not be able to refund it if the appeal succeeds. In the circumstances there is no question of the Applicant's appeal being rendered nugatory. Consequently we dismiss this application with costs.

Dated and delivered this 10th day of OCTOBER, 2012.

A. VISRAM

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JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR