



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 66 OF 2002

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

GITITU COFFEE GROWERS COOPERATIVE LTD.....RESPONDENT

RULING

1. By its application brought by Notice of Motion dated 29th September 2021, the Respondent seeks stay of execution of the judgment and decree herein, pending the hearing and determination of its appeal against the judgment.
2. The Respondent also asks the Court to set aside the orders made on 21st September 2021 together with all consequential orders/decrees and the matter be listed for Notice to Show Cause *de novo*.
3. The application which is supported by affidavits sworn by the Respondent's Vice-Chairman, David Njau Kinyanjui and the Respondent's Counsel, Ann Mwaura is based on the following grounds:
 - a) The Respondent is dissatisfied with the Court's ruling of 6th August 2021 with respect to its objection to the Notice to Show Cause and has lodged and served a Notice of Appeal dated 18th August 2021 expressing its intention to appeal against the said decision to the Court of Appeal;
 - b) The intended appeal is primarily premised on three grounds to wit:
 - i) That the Respondent paid a substantial portion of the decretal sum amounting to Kshs. 10,644,749.70 to the respective individual employees (Grievants in the Cause) pursuant to the judgment; requiring the Respondent to again pay the said sum to the Claimant amounts to double compensation;
 - ii) The Claimant has not produced any documents or tendered any evidence controverting the facts and evidence of payment comprised in paragraphs 12, 13 and 14 of the replying affidavit of David Njau Kinyanjui dated 25th February 2020, in answer to the Notice to Show Cause;
 - iii) The Notice to Show Cause and the entire execution proceedings are statute barred by dint of Section 4(4) of the Limitation of Actions Act seeing that the judgment/decree in question was delivered 17 years ago on 18th November 2003.
 - c) The decretal sum is huge (Kshs. 13,894,075.55). If stay of execution is not granted, the Respondent will suffer substantial loss in the following ways:
 - i) The Respondent will be required to again pay the full decretal sum yet it has already paid a substantial portion thereof amounting to Kshs. 10,644,749.70 and the balance is due and payable by a different entity i.e. Nyakiri Farmers Co-operative Society;
 - ii) The Respondent does not know the whereabouts and economic status of the individual Grievants entitled to the judgment sum. The Respondent is thus reasonably apprehensive that it will not be able to recover any paid amount from the said individuals in the event the appeal succeeds. This will render the appeal nugatory;
 - iii) The Respondent is a struggling co-operative society of coffee farmers. Its operations and survival stand to be adversely affected by execution proceedings to the detriment of the farmers.

- d) The Respondent is willing to furnish reasonable security for due settlement of the decretal sum, which security should be determined taking into account that the Respondent has already paid a substantial portion of the decretal sum amounting to Kshs. 10,644,749.70;
- e) The Respondent's Advocates logged into the virtual session on 21st September 2021 but connection dropped due to technical/connectivity challenges;
- f) The proceedings of 21st September 2021 were undertaken without reference to the Replying Affidavit on record, sworn by David Njau Kinyanjui on 25th February 2021, which contained the Respondent's objection to execution;
- g) The Notice to Show Cause was highly contested as per the said Replying Affidavit and the Respondent should be heard thereon;
- h) The Respondent has overwhelming proof that it settled a substantial portion of the decretal sum which, at the very least, should have been discounted from the total decretal sum and execution permitted with respect to the balance only;
- i) It is in the interest of justice that the Respondent is not condemned unheard and that the application is allowed as prayed.

4. The Claimant's response to the application is by way of a Replying Affidavit sworn by one of the Grievants, Joseph Kabera Cimbi on 13th October 2021.

5. Cimbi accuses the Respondent of convoluting issues in this matter; first, by introducing a third party, by the name Nyakiri Co-operative Society, with whom the Grievants had no relationship, second by making an unverified averment that the decretal sum had been settled and third, by pleading limitation of time without any basis.

6. In their pleadings, the parties advanced arguments on the merits of the ruling delivered by **Onyango J** on 6th August 2021. Being of coordinate jurisdiction, I have no legal basis to entertain these arguments, which ought to be made at the Court of Appeal.

7. The only thing for me to do therefore is to consider the prayer for stay of execution pending appeal.

8. The relevant provision is Order 42 Rule 6 of the Civil Procedure Rules, which sets the following conditions for grant of orders of stay of execution pending appeal:

- a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*
- b) such security as the court orders for the performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

9. In **Butt v Rent Restriction Tribunal [1979] eKLR** the Court of Appeal set the following considerations to be taken into account in an application for stay of execution pending appeal:

- a) The discretion of the Court to grant or refuse stay of execution should be exercised in such a way as not to prevent an appeal;*
- b) In the absence of other overwhelming hindrance, stay of execution should be granted so that the appeal is not rendered nugatory;*
- c) In exercising its discretion whether to grant or refuse stay of execution, the Court will consider the circumstances of the case.*

10. This is a very old matter where judgment was delivered in favour of the Claimant's members in 2003. The Respondent claims to have settled a substantial part of the decretal sum. In the supporting affidavit sworn by one of the Grievants, Joseph Kabera Cimbi it is conceded that some money was paid towards settlement of the decretal sum.

11. In determining an application for stay of execution pending appeal, the Court is called upon to balance the Claimant's right to enjoy the fruits of judgment against the Respondent's right of appeal.

12. With this in mind and taking into account the unique circumstances of this case, I will grant a conditional stay of execution on the following terms:

- a) The Respondent will deposit 50% of the decretal sum in an interest earning account in the joint names of the parties' Advocates within the next thirty (30) days from the date of this ruling;
- b) Failure to comply with (a) above will lead to an automatic lapse of the stay hereby granted and execution will proceed without any further orders;
- c) The Respondent will pay the costs of this application.

13. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF DECEMBER 2021

LINNET NDOLO

JUDGE

Appearance:

Mr. Thiong'o for the Claimant

Mr. Mege for the Respondent