



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.12 OF 2013 CONSOLIDATED WITH CAUSES 13 AND 14 BOTH OF 2013

PAULINE WAITHERA MURAGURI.....1ST CLAIMANT

JULIA WANJIKU GATHURA.....2ND CLAIMANT

FAITH NDUTA KIHWAGA.....3RD CLAIMANT

VERSUS

MURANG'A FARMERS CO-OPERATIVE UNION LTD.

(FORMERLY KNOWN AS MUGAMA FARMERS CO-OPERATIVE UNION LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 9th December, 2016)

RULING

The court delivered the judgment in this case on 27.05.2016. Judgment was entered for the claimants against the respondent for:

- 1) The respondent to pay the 1st claimant the sum of Kshs.749,811.50, the 2nd claimant a sum of Kshs.372,577.05, and the 3rd claimant a sum of Kshs.810,517.00 and to each by 1.01.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- 2) The respondent to pay the claimants' costs of the suit.

On 25.10.2016 the respondent filed the notice of motion dated 24.10.2016 brought under order 22 rule 22(1) and (2) and section 3A of the Civil Procedure Act, Cap. 21. The applicant prayed for orders:

- a) That the matter be certified urgent and fit to be heard ex parte in the 1st instance.
- b) That an interim order of stay of execution of the judgment and decree of the court of 5th May 2016 be granted pending the hearing and determination of prayer 3 of the application.
- c) That the applicant be allowed to pay in monthly instalments the decretal amount herein.
- d) That the costs of the application be in the cause.

The application was based on the supporting affidavit of Francis Ngone Gathiga and on the following

grounds:

- a) The auctioneers had proclaimed the respondent's goods valued Kshs.80,000,000.00 in execution of the decree of Kshs.2,310, 141.18.
- b) The applicants do not intend to appeal but are willing and able to pay the decretal sum by equal monthly instalments of Kshs.50, 000.00 until payment in full commencing 31.01.2017 and the last day of every successive month.
- c) The application had been filed without undue delay.
- d) It will be just and fair for the application to be allowed.
- e) The applicant is planning to sell some of its properties, a factory, and thereafter to liquidate the decretal sum.

The claimants opposed the application by filing the opposing affidavit of Faith Nduta Kihwaga on 02.11.2016. The grounds of opposition are as follows:

- a) The applicant has not come to court with clean hands because it has not disclosed its annual financial statement.
- b) Judgment was delivered on 05.05.2016 and the applicant had made no efforts to pay the decretal sum.
- c) The applicant has necessary financial capacity to pay up the judgment sum including funds in a waiver from the government.
- d) Post dated cheques for Kshs.900,000.00; Kshs.900,000.00; and then Kshs.510,000 issued the applicant in favour of the claimants through the claimant's advocates were calculated deceive and to buy time as the applicant acted in bad faith and maliciously to issue the three cheques.
- e) There was no reason for the applicant to prioritise other creditors over the claimant's decretal sum.
- f) The applicant has confirmed that it has assets worth 80,000,000.00 and there is no reason why the applicant cannot liquidate and pay the claimants.
- g) Thus, the application should be dismissed with costs.
- h) In the further replying affidavit by the 3rd claimant filed on 01.12.2016 it was emphasised that the applicant had not disclosed the other creditors. Further the applicant had failed to disclose the whereabouts of the money which was to satisfy the three post dated cheques.

The court has considered the submissions and the parties' respective cases and makes findings as follows:

- a) The applicants have conceded that they erroneously invoked order 22 rule 22 (1) and (2) on stay of execution instead of order 21 rule 12 (1) and (2) that applies to payment by instalment.
- b) The applicant has not explained why the 3 cheques issued in full satisfaction of the decree were not honoured. The court finds that that applicant's conduct demonstrated bad faith which does not attract the court's discretion.
- c) Order 21 rules 12(2) of the Civil Procedure Rules requires that sufficient cause be shown by the applicant for the court to order payment of the amount decreed by instalment. As submitted for the claimants the applicant has failed to establish the sufficient cause especially that the applicant did

not file evidence to show its financial position and why it issued 3 cheques that were not honoured. Further, the applicant prayed to liquidate the sum by Kshs.50,000.00 per month without a justification and the court finds that allowing that would amount to denying the claimants the enjoyment of the decree as the payment would be spread over several years. The court finds that such offer of payment by instalment is not a fair proportion of the debt.

d) Thus the court returns that the applicant has failed to show sufficient cause to justify payment by instalment and has offered an unfair proportion of the debt and the application will fail.

In conclusion the application filed on 25.10.2016 and dated 24.10.2016 is hereby dismissed with orders:

a) The applicant to pay the full decretal sum by 15.02.2017 failing, the execution to proceed, and for that purpose, there be a stay of execution until 15.02.2017.

b) The applicant to pay the claimants' costs of the application.

Signed, dated and delivered in court at Nyeri this Friday, 9th December, 2016.

BYRAM ONGAYA

JUDGE