



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1322 OF 2010**

**JAMES GITONGA.....CLAIMANT**

**VERSUS**

**TRUSTEES OF THE AGRICULTURAL SOCIETY OF KENYA..RESPONDENT**

**(Before Hon. Justice Hellen S. Wasilwa on 30<sup>th</sup> July, 2015)**

**RULING**

1. The application before court is the one dated 13/5/2015 filed by the Applicants herein where they seek orders for stay pending hearing and determination of an appeal against the ruling of Hon. Lady Justice Maureen Onyango delivered on 12/3/2014.

2. The Applicants aver that they filed a notice of appeal on 13/3/2014 and are in process of filing a record of appeal after just receiving typed proceedings of this case.

Their main issue in the appeal is on Locus of the Respondent to be sued and they aver that their appeal has high chances of success. They content that the appeal may substantially resolve the issue.

3. The Appellants argue that they had raised the issue of Locus Standi of the Respondent to be sued herein but vide a ruling of 12<sup>th</sup> March 2014 Judge Onyango ordered the matter to star denovo therefore in principle stating that the Respondents have Locus Standi to be sued. It is against this award that the Applicants want a stay as they pursue an appeal in the Court of Appeal.

4. The Claimant Respondents opposed this application. They relied on the replying affidavit of James Gitonga sworn on 28/5/2015 and filed the same date. They aver that the Respondents having admitted the description given to them in their response cannot deny that position at this stage. They also aver that the Applicants have not shown that they have an arguable appeal as they have not annexed any draft appeal.

5. It is the Respondents view that this application denies the Claimant Respondent his right under Article 48 on Access to Justice the longer this claim stays unheard. They also contend that appeal will not render any order nugatory as it has not been argued that the Respondent is a man of no means who cannot refund whatever is granted.

6. I have had recourse to the law under Order 42 Rule 6(1) of the Civil Procedure Rules which states

that:

***“No appeal shall operate as a stay of executive or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree on or order whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty .....to consider such application and make such order thereon as it may seem just.....”.***

7. This court therefore has powers to order stay pending appeal for just cause. This court has in this regard to consider whether there is an arguable appeal and whether the intended appeal would be rendered nugatory if the orders sought are not granted.
8. In **Civil Appeal No. 39 of 2013 at Kisumu Chris Bichage vs IEBC & others** the learned J. A considered the principles upon which such an application can be granted as stated as follows:

***“The principles upon which this court is to entertain applications for stay pending appeal or intended appeal are now well sealed. An Applicant must satisfy the court that his intended appeal or appeal is arguable which is the same as saying that the appeal or intended appeal is not frivolous and also satisfy the court that unless the order for stay is granted, the intended appeal, or appeal if successful, would be rendered nugatory. Both requirements must be proved before an order for stay can be granted – see for instance, the holding of this court in Silverstein v Chesoni (2002) 1 EA 296 and Reliance Bank Limited v Norlake Investments Limited (2002) 1 EA 227”***

9. To show that the intended appeal has chances of success the Applicants have submitted that the Respondents have no Locus Standi to be sued. However, the record of their intended appeal has not been submitted to this court from which this court can examine and make inferences.
10. However given that the issue of Locus Standi like the issue of jurisdiction is key to any suit, it is imperative that it should be resolved at the onset so that no time is wasted and to have records straight. This court cannot at this point go into the merits of the intended appeal not being the court the appeal is preferred to, but upon exercising my discretion, it is my considered view that if the orders sought are not granted at this state, the intended appeal will be rendered nugatory if it succeeds.
11. I therefore exercise my discretion and allow the application for stay pending appeal. The said appeal should however be filed within 30 days from the date of this order. In default this case should not be set down for hearing on a priority basis.

**Read in open Court this 30<sup>th</sup> day of July, 2015**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Barasa holding brief for Mbaluto for Claimant

Makokha for Respondent