



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 1'A' OF 2013

(Before Hon. Justice Hellen Wasilwa on 5th June, 2013)

**1.RICHARD NYAEGA ONDIEKI
2.GEOFFREY MOKAYA MARIITA
3.FRANCIS NYAMWARIO NYANCHAGA
4.CHRISTOPHER MOSE ORINA
5.EZEKIEL NYAAYO NYANCHANCHUCLAIMANTS**

VERSUS

WAKENYA PAMOJA SAVINGS AND CREDIT SOCIETY LIMITED.....RESPONDENTS

R U L I N G

The application before court is one dated 29.4.2013. The application has been filed by the respondents herein through a Notice of Motion dated the same day. The application is filed under Order 42 Rule 6(1), (2), 8 & 4, Order 57 Rule 1 of the Civil Procedure Rules and respondents seek orders-

1. That by reason of the urgency hereof service be dispensed with and stay orders do issue *ex parte* at first instance.
2. That this Honourable court do grant stay of execution of the decree passed on 16th April, 2013 pending the hearing and determination of the intended appeal against the said decree.
3. That pending the hearing of this application inter partes, there be a stay of execution of the decree passed on 16.4.2013.

They also seek costs of this application. The application is based on the grounds on the face of the application and on an annexed affidavit sworn by Nelson Gichaba Simba herein on the same date.

The applicants aver that judgment was entered against the applicants on 16.4.2013. That the applicants are dissatisfied with the said judgment and have lodged a notice of appeal. That the said appeal has a very high probability of success. They aver that substantial loss will be occasioned to the applicants if the orders of 16.4.2012 are enforced as they will irreparably effect operations of the applicants. In their affidavit, the applicants aver that they have filed a notice of appeal and that their appeal has very high probability of success. They annexed a draft copy of the Memorandum of Appeal. They aver that if the claimants respondents are not refrained, they will proceed and execute their decree and this will occasion the applicants irreparable damage.

The claimant respondents have opposed this application. They filed their replying affidavit sworn by

Richard Nyaega Ondieki the 1st claimant herein who avers that he is swearing the affidavit on his behalf and on behalf of the other claimants.

They aver that the application is not brought in good faith as the court decree issued in their favour on 16.4.2013 has been fully obeyed and implemented as per the affidavits sworn by the applicants themselves annexed herein as Exh. RNO 1(a) and (b). The claimant respondents also aver that the action of the applicants is tantamount to blowing both cold and hot wherein the applicants want to obey both the benefit of not obeying the order and on the other hand contending that the decree has fully been obeyed and implemented to the letter. They contend that having been reinstated as ordered by court, there is nothing to be stayed.

The respondents also aver that the applicants have not demonstrated the substantial loss they stand to suffer if the order is not granted.

Further, the respondents aver that this application is improperly in court in so far as the provisions of the law invoked are inapplicable and therefore the application is fatally defective.

Having considered, the averments from both parties, the issue for determination is:-

- whether the application has merit and if it can be granted.

The applicants brought this application through a Notice of Motion filed under order 42 Rules 6(1), (2), 8(4) and Order 51 rule 1 of the Civil Procedure Rules 2010. Order 42 deals with appeals from orders. However under Order 42 rule 6(1).

“No appeal or second appeal shall operate as a stay of execution of 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 case order stay of execution of such decree or order ----”

Under Order 42 rule 6(2) orders of stay of execution shall only be made under subrule (1) unless;

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,

b) -----

Under this rule, it is imperative that the applicant demonstrates to the court the substantial loss that will result if the order is not made. I listened to the applicants but they did not address court on this issue and neither did they demonstrate the substantial loss they stand to suffer if the order of stay is not granted.

In any case, the applicants have already reinstated the claimants herein and my ordering of stay will result in the claimants being sacked thus occasioning a grave injustice to them.

The applicants did not also offer anything as a give and take incentive to the claimants if the order was to be given. All they seek is an order for stay pending appeal.

I do not find this application merited. I find it will occasion a grave injustice to the claimants who have already resumed duty. I will therefore not allow it.

HELLEN S. WASILWA

JUDGE

5/06/2013

Appearances:-

Ochoki h/b O. M. Otieno for the respondents present

Ochoki h/b Omariba for applicants present

CC. Sammy Wamache