



**Mikumbune Farmers Co-operative Society v Karanja (Suing as Liquidator
Nkuene Farmers' Co-operative Society Limited) (Civil Appeal E180 of 2021)
[2022] KEHC 17176 (KLR) (Civ) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 17176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E180 OF 2021

DO CHEPKWONY, J

NOVEMBER 24, 2022

BETWEEN

MIKUMBUNE FARMERS CO-OPERATIVE SOCIETY APPLICANT

AND

**BONIFACE M. KARANJA (SUING AS LIQUIDATOR NKUENE FARMERS' CO-
OPERATIVE SOCIETY LIMITED) RESPONDENT**

*(Being an Appeal from the Ruling of the Co-operative Tribunal Nairobi delivered on 4th
March, 2021 by Hon. B. Kimemia (Chairperson) in Nairobi Cop Tribunal No. 57 of 2018)*

RULING

1. Before Court for ruling is a Notice of Motion application dated May 31, 2022 by Mikumbune Farmers' Co-Operative Society (the Applicant herein) expressed in terms of Order 51 Rule 1, Order 42 Rule 6 of the *Civil Procedure Rules*, Sections 1A, 1B and 72B of the *Civil Procedure Act*. The application is seeking for the following Orders;
 - a. Spent;
 - b. Spent;
 - c. That this Honourable Court be pleased to grant an order for stay of further proceedings in Nairobi Co-operative Tribunal Case No 57 of 2018 pending hearing and determination of the Appellant/Appellant's appeal to the High Court against the Tribunal's decision/Ruling delivered on March 4, 2021.



- d. That the Honorable court be pleased to admit the instant appeal to hearing and make any other and/or further Orders for the hearing of the appeal and the preservation of justice in this matter.
 - e. That the costs of this application be in the cause.
2. The application is anchored on several grounds and supported by the annexed affidavit of David K Mugiira. In summary the grounds are couched as follows:-
- a. The Appellant/Applicant lodged this appeal against the Tribunal's decision delivered on March 4, 2021 in which the Applicant's Counter-claim was struck out and the Tribunal directed the Claimants claim proceed for hearing and determination.
 - b. Following an application before the Tribunal under Order 42 Rule 6 of the Civil Procedure Rules for an order of stay of proceedings pending the hearing of this appeal, the Tribunal dismissed the application and fixed the case for hearing.
 - c. The Applicant's appeal, if successful will affect the proceedings before the Tribunal since its Counter-claim will be considered alongside the hearing of the Respondent Liquidator's claim.
 - d. Unless a stay of further proceedings in the Tribunal is granted, the Applicant is apprehensive that the outcome of the appeal will be rendered useless and proceedings before the Tribunal will occasion prejudice to the Applicant Society.
3. In opposition to the application, the Respondent filed a Replying affidavit dated June 16, 2022. The affidavit is sworn by on Eliud Njuguna Uno who deposed that he is the current Liquidator of Nkuene FCS Ltd.
4. He states that by Gazette Notice No 4446 dated April 14, 2022 he was appointed by the Commissioner for Cooperatives to take over the liquidation process of the affairs of Nkuene Farmers' Co-operative Society Ltd from Zachary Njeru the previous Liquidator.
5. The Respondent deposes that from the records, the defunct society Nkuene Farmers' Co-operative Society was placed in liquidation the first time on October 7, 1999 by the Commissioner for Cooperatives and Andrew B Mbwi was appointed as the first Liquidator.
6. He avers that the Appellant Society is a splinter Society which was born after Nkuene Farmers' Co-operative Society Ltd was placed on liquidation. The Appellant Society never existed when Nkuene Farmers' Co-operative Society Ltd was operational.
7. The claim before the Tribunal by the Respondent was for an order compelling the Appellant to contribute to the expenses of liquidation amounting to Kshs 3,081,331/=.
8. The Respondent states that upon filing of the suit, Appellant filed a defence and Counter-claim and on March 4, 2021 the Tribunal struck out the Counter-claim for reasons that it offended the Cooperative Societies Act.
9. He deposed that the applicant never followed the provision of the law regarding the roles of the liquidator in resolving disputes raised during liquidation process.

Submissions

10. The Applicant's submissions are dated July 18, 2022. In his submissions counsel for the Applicant raised four issues for determination by this Honourable Court. On the first issue on whether the appeal raises a triable issue, Counsel submitted that the Memorandum of Appeal raises triable issues and



is not frivolous. In dismissing the Counterclaim, the Tribunal erred in failing to take into account the evidence placed before it showing that the Appellant's claim was anchored on the Respondent's breach of fiduciary duty and fraudulent dealings by the Liquidator, some of which were perpetrated in 2016. Evidence included sale of properties belonging to defunct society whose agreements were never disclosed, including sale proceeds from some of the properties. The documents of title annexed to the Replying affidavit showed that some parcels were transferred between November, 2010 and April, 2016. (Appellant referred to page 122, 133-143 of the Record of Appeal).

11. Counsel submitted that the Applicant and other resultant Societies formed after the dissolution of the Mother Society, were as a matter of right entitled to a disclosure of the sale proceeds. It cannot be gainsaid that the Respondent Liquidator owed a fiduciary duty to the Appellant which is a beneficiary to the management of the affairs, assets and finances of the defunct Nkuene Farmers' Co-operative Society Limited during its liquidation.
12. On the second issue of whether the application has been brought without unreasonable delay, Counsel for the Applicant submitted that upon the delivery of the Ruling on March 4, 2021, the Applicant lodged this appeal and immediately filed an application before the Tribunal for the stay of proceedings pending hearing of the Appeal.
13. The Applicant upon dismissal of their initial application by the Tribunal vide its Ruling on November 4, 2021, the Applicant moved with speed to obtain certified copies of proceedings in order to comply with requirements under Order 42 Rule 6(6) of the Civil Procedure Rules.
14. The said proceedings were only provided on April 14, 2022 and Counsel compiled the Record of Appeal which was lodged on May 27, 2022.
15. In regards to the third issue on whether the Applicant will suffer substantial loss, Counsel urged that the grant of stay of proceedings is intended to safeguard a litigant's right to a fair trial process by dint of Articles 48, 50 and 159 of the *Constitution*.
16. It was contended that the Applicant Counterclaim against the Respondent/ Liquidator was anchored on the breach of fiduciary duty held by the Respondent on alleged fraudulent dealings with the assets of the Mother Society was struck out and the Applicant's claim was for the movable and immovable assets whose value is in excess of Kshs 35,000,000/=.
17. The Applicant submitted that in the event that the orders are not granted, the Applicant will be exposed to trial proceedings before the Tribunal where the Respondent claims for a sum of Kshs 3,081,331/= against the Applicant without an equal opportunity to present its claim.
18. It was contended that if the trial by the Tribunal is not stayed, the Applicant will stand to suffer substantial loss and this appeal will be rendered nugatory. Counsel relied in the case of *Ngaga Enterprises Ltd -vs- Petaer Opande (2016) eKLR* and *Vata Nganda -vs- Practice East Africa Limited (2021) eKLR*.
19. Lastly, on whether the security for the performance of decree has been provided, Counsel cited Order 42 Rule 6(2) (b) of the Civil Procedure Rules that an Applicant for an order for stay of execution/ proceedings is required to provide security for the due performance of the decree, this is always applicable in cases involving monetary decrees.
20. Counsel urged that since the subject of the appeal is a matter before the Tribunal which is yet to be determined, an order for security for costs may not suffice. Counsel cited the case of *Ngaga Enterprises Ltd -vs- Petaer opande (supra)* and urged the court to consider the substantive appeal for admission to hearing under Section 79B of the *Civil Procedure Act*.



21. In opposition to the application dated May 31, 2022, the Respondent filed submissions dated June 16, 2022. In the submissions, Counsel urged that the Respondent is a duly appointed Liquidator of Nkuene Farmers' Cooperative Society Ltd (in liquidation). In terms of Section 65 of the Cooperative Societies Act, all properties of the Cooperative under liquidation are by law placed on the Liquidator.
22. It was submitted for the Respondent that the Applicant has not disclosed the prejudice it will suffer if they file a suit at the Cooperative Tribunal in whether the appeal is successful or not.
23. Counsel argued that if the Applicant has a cause of action against the Respondent, it can still file a separate suit in the Tribunal against the Respondent. The Applicant saw no reason to challenge the distribution until the Liquidator filed a suit demanding from the Applicant the sum of Kshs 3,081,331/= as liquidation expenses. And if the Applicant had any claim against the Liquidator they would have raised it at the earliest opportunity for the Liquidator to investigate and provide solutions.
24. The Respondent cited Section 66 of the Cooperative Societies Act and in view of the aforementioned Section this Honourable Court is not clothed with jurisdiction to investigate matters which are in the domain of the Liquidator as an appeal or stay of proceedings before a competent Court of law would amount to violence to the established provisions of law.
25. Counsel asserted that it is trite law that a party aggrieved by Liquidator in the preference of his duties can only appeal to the Tribunal. If there is no appeal at the Tribunal to challenge the action of a Liquidator, an action in form of counterclaim would be sustainable in law. Counsel cited Section 69(1) of the Co-operative Societies Act and relied on the authority of Alfayo Nyairo vs Nyabomite Farmers' Cooperative Society Ltd (2021) citing with approval the case of East Africa Pentecostal Churches Registered Trustee & 1754 Others -vs- Samuel Muguna Henry & 4 others (2015) eKLR.
26. Finally, the Respondent urged this Court to dismiss the application with costs as there was no good reason of staying the Tribunal Case No 57 of 2018.

Analysis and Determination

27. I have considered the application, the affidavits in support and in opposition thereto, the written submissions by both parties and the cited authorities. The issue emerging for determination is whether the Applicant has met the threshold for the grant of stay of proceedings.
28. The conditions for granting an order of stay of execution and stay of proceedings are governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules. However, the conditions for dealing with stay of proceedings pending appeal are not clearly set out under the aforementioned provision.
29. For instance, according to Order 42 Rule 6 of the Civil Procedure Rules, which states that;
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 or order, and 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, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (1) unless—



- a. The court is satisfied that substantial loss may result to the Applicants 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 due performance of such decree or order as may ultimately be binding on him has been given by the Applicants'.

30. In the case of *Kenya Wildlife Service –vs- James Mutembei (2019) eKLR*, the Court held that:

' Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent'.

31. Therefore, in the absence specific conditions on stay of proceedings, this Court turns to principles as set out down in judicial pronouncements on when proceedings may be stayed. It leads to the conclusion that stay of proceedings is a discretionary remedy which ought to be exercised judiciously. The consideration ought to be that an appeal ought not to be rendered nugatory.

32. In *Naizsons (K) Ltd –vs- China Road & Bridge Corporation (Kenya) 2001 eKLR*, the court held that;

' Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay should be granted'.

33. The prayer for stay of proceedings being an equitable remedy is only available at the discretion of the court. It is important for the court to consider whether or not the application for stay of proceedings has been filed timeously and without delay.

34. In the instant application, the court notes that the ruling being challenged was delivered on March 4, 2021 while the application was filed on May 31, 2021. It was therefore filed within 2 months and I am satisfied that the application was filed without undue delay.

35. The next aspect of importance is the Memorandum of Appeal. A cursory perusal of it leads to a conclusion that the intended appeal is at least not frivolous but arguable as the applicant seeks to challenge the dismissal of its Counterclaim which was filed alongside the defence before the Cooperative Tribunal.

36. The Respondent has submitted in his submissions that Section 66(f) of the Cooperative Societies Act gives the liquidator powers to investigate all claims against the society and to decide on questions of priority arising between the claimants. In view of that Section, he has urged that this court is not clothed with jurisdiction to investigate matters in the domain of the appointed liquidator.

37. It has further been urged by the Respondent that it is trite law that a party aggrieved by the liquidator can only appeal to the Tribunal. He has relied on Section 69(1) of the Cooperative Societies Act.

38. I have had the opportunity of reading the provisions of Section 81 of the

Co-operative Societies Act which provides that;

' Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court; Upon the hearing of an appeal under this section, the High Court may;



- a. Confirm, set aside or vary the order in question;
- b. Remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;
- c. Exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
- d. Make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.'

39. Having considered the affidavits and the submissions and the cited authorities, this court comes to the inevitable conclusion that this is a suitable case for the grant of orders of stay of proceedings so that the intended appeal is not rendered nugatory or this court is not engaged in an academic exercise.

40. In the case of *Muchanga Investments Ltd -vs- Safaris Unlimited (Africa) Ltd & 2 Others (2009) eKLR*, the court of appeal stated that;

' Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice'.

41. Based on the foregoing reasons, this court makes a finding that the Applicant's application dated March 4, 2021 is merited and the same is hereby allowed in terms of prayer No (3). The Applicant shall file and serve the Record of Appeal within 45 days. Costs of this application shall be in the cause.

Orders accordingly

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

D. O. CHEPKWONY

JUDGE

