



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E301 OF 2021

CONCORDE SAVINGS & CREDIT

COOPERATIVE SOCIETY LIMITED.....APPELLANT/APPLICANT

-VERSUS -

JANEETTE RUBADIRI.....1ST RESPONDENT

AGNES SHIKUNGU.....2ND RESPONDENT

AGNES WAIRIMU.....3RD RESPONDENT

DUKE MAYAKA.....4TH RESPONDENT

REMICK MUGA.....5TH RESPONDENT

PATRICIA ONSANDO.....6TH RESPONDENT

ALFRED MUSACHI.....7TH RESPONDENT

FLORENCE OMBWEWA.....8TH RESPONDENT

STEPHEN KISAKA.....9TH RESPONDENT

RULING

The application dated 2nd June 2021 is brought under Sections 1A, 1B, 3A and Order 42 rule 6 of the Civil Procedure Act and Section 81 of the Co-operative Societies Act, Cap. 490 Laws of Kenya. It seeks the following orders:-

1. Spent

2. THAT this Honourable Court be pleased to issue a stay of execution of the Ruling and orders by the Cooperative Tribunal in Tribunal Case No 754 of 2019 pending the hearing and determination of this application.

3. THAT this Honourable Court be pleased to issue a stay of execution of the Ruling and orders by the Cooperative Tribunal in Tribunal Case No 754 of 2019 pending the hearing and determination of this appeal.

4. THAT the costs of this application be provided for.

The affidavit of Rosemary Aseka sworn on 2nd June, 2021 supports the application. The 9th respondent, Stephen Kisaka supports the application through his affidavit deponed on 13th July 2021. The 1st to 8th respondents opposed the application and filed a replying affidavit sworn by the 7th respondent, Alfred Musachi Kadagi. Parties agreed to determine the application by way of written submissions.

The applicant submits that the only issue for determination is whether the execution of the ruling of the Co-operative Tribunal of 27th May 2021 dismissing the applicant's Notice of Motion dated 16th December, 2019 should be stayed pending the hearing and determination of the appeal. It is submitted that this court has powers to grant the orders being sought and reference is made to the case of **BUTT-V- RENT**

RESTRICTIONS TRIBUNAL CIVIL APPLICATION NO. NAI 6 OF 1979 which was cited with approval by the court in **HGE –V-SM (2020) eKLR** where it was held as follows:-

"The power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way is not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings, Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirement"

The applicant contends that the effect of the ruling by the Co-operative Tribunal is to recognize the respondents as the duly elected officials of the applicant despite the fact that the meeting which resulted to their appointment into office was not sanctioned by the regulator. The instruments governing the applicant are being held by other members of the management Committee who are also the signatories to the bank accounts. The applicant will suffer substantial loss if those instruments are relinquished to the respondents without the approval of more than 40% of the members.

If it is further submitted that the Tribunal's ruling is incapable of implementation as it would lead to reinstatement of a former Chief Executive Officer, **James Odera**, to office against an existing court order from the Employment and Labour Relations Court. A new Chief Executive reported on 1st April, 2021. Further, an audit is ongoing involving the financial dealings of the organization which touches on the said James Odera, Counsel for the applicant relies on the case of **NYANDARUA PROGRESSIVE AGENCIES LIMITED –V- FRANCIS WAINAINA MUGO & 9 OTHERS (2021) eKLR** where the court held:-

"The applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.....substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory..."

It is contended that if the ruling of the Co-operative Tribunal is not stayed, the applicant will suffer irreparable loss and the appeal will be rendered nugatory. The respondents may make decisions and enter into agreements that are binding on the members despite the fact that the respondents were not properly elected as officials. Counsel maintain that the application has been made without unreasonable delay. The applicant is willing and ready to furnish any security ordered by the court so as to facilitate the stay of execution pending the hearing of the appeal. Counsel relies on the case of **FOCIN MOTORCYCLE CO. LTD. –V- ANN WAMBUI WANGUI & ANOTHER (2018) eKLR** where it was stated as follows:

"Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."

The 9th respondent supports the application. Counsel for the 9th respondent submit that the application was filed without unreasonable delay. The application must establish a sufficient cause, that substantial loss will be suffered and the readiness to furnish security. The appeal interrogates the soundness of the ruling of the Honourable Tribunal which ruling disregarded the 9th respondent's arguments. The ruling fell short of being just. Counsel urged the court to balance between the applicants' right to pursue their appeal and the respondents' right to enjoy the fruits of the ruling. Counsel referred to the case of **ABSALAM DOVA –V- TARBO TRANSPORTERS (2013) eKLR** where the court stated:-

"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory: and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation..."

The respondents oppose the application. It is submitted that the applicants have not clearly demonstrated what loss they stand to suffer should the orders for stay fail to be granted. The applicants must establish other factors which show that the ruling of the Tribunal will create a state of affairs that will irreparably affect or negate the very essential core of the applicant if the appeal succeeds. It is submitted that the former Chief Executive Officer was on contract and the same has lapsed.

Analysis and determination

The background to the dispute is that the 1st to 8th respondents claim to be the current officials of the applicant Co-operative Society. The eight respondents were elected into office on 30th November, 2019. This aspect of election is disputed by the applicant on the ground that there was change of the venue where the Special General Meeting was to be held and this disenfranchised several members from participating in that meeting. The Co-operative Tribunal recognized the eight respondents as the officials who are legally in office.

The impugned ruling involved two applications. The first one was by the eight respondents dated 5th August 2020 and it sought to restrain the 9th respondent from participating in decision making and attending any meetings of the applicant's Management Committee. That application was granted by the Tribunal.

The second application was by the appellant dated 16th December 2019 and sought the following two main orders:-

i. THAT pending the hearing and determination of the claim herein this honorable Tribunal be pleased to grant an order of injunction restraining the respondents from reinstating JAMES ODERA from entering the offices of the claimant and restraining the said JAMES ODERA from entering the offices and/ or acting as its chief executive officer.

ii. THAT an order of injunction be issue against the Respondents restraining them from interfering with the management and/ or administration of the claimant until the next annual general meeting.

The Tribunal disallowed that application leading to the appeal and the application which is the subject of this ruling.

The conditions to be considered by the court in an application seeking orders for stay of execution pending appeal are now well settled. In the case of **HALAI & ANOTHER –V- THORNTON & TURPIN (1963) LTD (1990) KLR 365**, the Court of Appeal held:-

1. The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.

2. An application for stay of execution is made to Court of Appeal under rule 5(2) (b) of the Court of Appeal Rules and that court's discretion under that rule is unfettered.

In the case of **BUTT –V- RENT RESTRICTIONS TRIBUNAL [1982] KLR 417** the court stated the principles to be considered in such an application and states as follows:-

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

There is no dispute that the current application was filed without unreasonable delay. The ruling of the Tribunal was delivered on 27th May 2021 and the application was swiftly filed on 2nd June, 2021.

The main issue for determination is the irreparable or substantial loss that would be suffered by the applicant should the orders being sought fail to be granted. The applicants contend that the effect of the ruling of the Tribunal is that a former Chief Executive Officer shall return to office yet there is an ongoing audit which is likely to nail down that former officer. The Certificate of Urgency gives among the grounds of the urgency as follows:-

a) The purported meeting by the Respondents was designed to obfuscate an impending audit on financial irregularities perpetrated by the former Chief Executive Officer of the Applicant who was supported by the Respondents.

b) The ruling by the Tribunal is incapable of implementation as it would entail reinstating the former Chief Executive Officer one James Odera to office against an existing court order of the Employment and Labour Relations Court bolstered by the fact that there is a new Chief Executive Officer who reported on 20th April, 2021.”

The applicants annexed a ruling of Justice Nzioki Wa Makau delivered on 14th April, 2021 in Cause Number 87 of 2020. That case was filed by JAMES ODERA against the appellant. The ruling involved an application by the appellant dated 19th February 2021 which sought to restrain James Odera, the Outgoing Chief Executive Officer from trespassing into the appellant's premises or interfering with the appellant's work. That application was granted. Justice Makau observed the following at paragraph 17 of his ruling

“I am of the view that the substratum of the Claimant's claim has been whittled away by the effluxion of time and the contract upon which the order was anchored expired in January 2021. The reinstatement order of 3rd March 2020 therefore could not logically survive beyond January 2021. This in effect means that the orders the Claimant relies on lapsed when the Claimant/Respondent's contract of employment with the Respondent expired.”

The eight respondents have denied the applicant's contention that they intend to reinstate the said former Chief Executive Officer. Paragraph 5 of the replying affidavit states that the term of service of that officer has ended. There is annexed a letter dated 1st February, 2018 which

renewed that officer's contract and partly reads as follows:-

“The Board of Directors of Concord Sacco is pleased to inform you that your contract has been reviewed with effect from 1st February 2018 to 31st January, 2021.”

It is evident that by the time Justice Nzioki Wa Makau delivered his ruling, the term of office of Mr. James Odera had lapsed. There is no evidence that the eight respondents intend to bring that officer back into office. Even if they were to do so, that would be based on a new contract. The on-going audit cannot be the basis for stay of execution of the Tribunal's Ruling. Further, there is no evidence that the eight respondents are ought to dismiss from service the new Chief Executive Officer. If that were to happen, the appellant's operating guidelines and the law will have to be followed. Equally, I do find that the applicant's apprehension that a new Chief Executive Officer will be removed from office cannot be the basis of granting the orders being sought.

The applicants contend that they will suffer substantial damages as the affairs of the society will be run by people who were un-procedurally elected into office. According to the applicant, the eight respondents might enter into agreements that may have adverse binding effects on the society.

The eight respondents maintain that they are the lawful officials or Management Committee of the appellant society having been elected at a Special General Meeting held on 30th November, 2021. Paragraph 15 of the ruling of the Tribunal states as follows:-

“Vide a letter dated 11/12/2019, the Commissioner of the Cooperatives acknowledges the Special General meeting and approved the changes of the bank signatories.”

The Tribunal's ruling further conclude with the following statement:-

“The tribunal notes with concern the turmoil and bad blood between varying parties and the Sacco is the one that is very affected to the detriment of the members. To this end, we order for the Annual General Meeting to be held within the next 3 months on or before September, 2021.”

From the above background and analysis, I do find that no substantial loss will be suffered by the applicant. The eight respondents have been recognized by the regulator as the lawful officials as per the ruling of the Tribunal. A Special General Meeting is to be held before September, 2021. At that meeting members will be at liberty to discuss the affairs of the society including its office bearers. There is no evidence that the eight respondents are mismanaging the society or that they are misusing its funds. I see no good reason as to why the court's discretion to grant orders of stay of execution should be extended in favour of the applicant. No damage will be suffered by the applicant as the eight respondents are also members of the Co-operative Society who are expected to be advancing the interest of all other members.

The 9th respondent contend that his arguments were not considered by the Tribunal. In my view that is an issue to be dealt with during the hearing of the appeal and cannot be a good ground for granting stay of execution orders. I do further note that the 9th respondent was removed from office vide a letter dated 20th September 2019 by the Commissioner of Co-operative Societies. He is not a Member of the Management Committee and the Tribunal held so. The Employment and Labour Relations Court seems to have upheld the decision of the Commissioner for Co-operatives. The 9th respondent as of now is not a member of the Management Committee and has to wait for the outcome of the appeal. The 9th respondent contends in his replying affidavit that his removal is illegal and irregular. That contention cannot be the basis of granting the orders being sought. I do find that the appeal will not be rendered nugatory if execution of the Tribunal's ruling is not stayed. The operation of the Co-operative Society will continue running until the appeal is heard.

The upshot is that the application dated 2nd June, 2021 lacks merit and the same is hereby dismissed with costs.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF AUGUST, 2021.

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S. CHITEMBWE

JUDGE