



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E277 OF 2021

JAMES MWAURA.....1ST APPELLANT

TOM OGELLO.....2ND APPELLANT

DAVID ATUBWA.....3RD APPELLANT

-VERSUS-

ELIUD MUTHIGA MBIYU.....1ST RESPONDENT

JOSEPH OLOO NYAORO.....2ND RESPONDENT

JOSEPH MUNGAI MBURU.....3RD RESPONDENT

RULING

1. The subject matter of this ruling is the Chamber Summons dated 20th May 2021 taken out by the appellant in which he is seeking for the following orders *inter alia*:

a) Spent

b) Spent

c) *There be an order of stay of proceedings in Micro and Small Enterprises Tribunal Cause No.1 of 2021-Eliud Mthiga Mbiyu & Others v James Mwaura & Others pending the hearing and determination of the appellant's Intended Appeal.*

d) Spent

e) *There be an ex parte interim order of stay of execution of the orders made by the Micro and Small Enterprises Tribunal Cause No.1 of 2021-Eliud Mthiga Mbiyu & Others v James Mwaura & Others on 21st April 2021 and 7th May 2021 pending the hearing and determination of the appellant's Intended Appeal.*

f) Spent

g) *The costs of this application be borne by the Respondents on full indemnity basis.*

2. The Motion is supported by the grounds set out on its body and the facts stated in the affidavit of Tom Ogello, the interim secretary of Kamkunji Jua Kali Association.

3. In opposing the said Motion, the respondent filed the replying affidavit of advocate Eliud Muthiga Mbiyu, to which Tom Ogello rejoined with her supplementary affidavit sworn on 21st July, 2021 followed by the further affidavit sworn by Joseph Oloo on 4th August, 2021.

4. When the Motion came up for interparties hearing before this court, the parties filed and exchanged written submissions.

5. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing the Motion; and the rival submissions and authorities cited therein.

6. A brief background of the matter is that on 21st April 2021 the Micro and Small Enterprises Tribunal proceeded ex-parte in the absence of the Appellants and ordered that the Appellants herein are restrained from changing the office bearers of Kamkunji Jua Kali Association and also from interfering with the running of the Association by the bonafide office bearers.

7. The Appellant filed an application to set aside the said orders given on 21st April 2021 but the application was dismissed on 7th May 2021.

8. Being aggrieved by the aforementioned orders the appellant filed an appeal to this court together with this application. The main prayers sought are twofold. First, is an order for stay of execution of the orders made by the Micro and Small Enterprises Tribunal pending the hearing and determination of the intended Appeal. Secondly, an order for stay of further proceedings before the said Tribunal.

9. It is the submission of the appellants that they have an arguable appeal against the said decisions and should therefore be given a chance to argue the same as they stand to suffer substantial loss and prejudice if the parties continue with the proceedings before the tribunal and the appeal subsequently succeeds.

10. The Appellant further stated that his appeal has strong grounds with overwhelming chances of success and that the respondent will not suffer prejudice if the order for stay of further proceedings and execution in this case is granted.

11. The respondent filed the replying affidavit sworn by Tom Ogello to oppose the appellant's application. The respondent stated that their application before the **Small and Micro Enterprises Tribunal** is proper and unchallengeable and that the appellants were served and refused to reply leading to the orders of 21st April 2021.

12. The respondent further stated that the appellants are the ones who caused chaos and not the respondents or the members of the association and that the court should deny them the opportunity they are seeking through their application to continue their acts.

13. The guiding provision in considering an application seeking an order for a stay of execution is **Order 42, Rule 6(2) of the Civil Procedure Rules** which sets out the following conditions in determining an application for stay:

i. The application should have been brought without unreasonable delay;

ii. The applicant must demonstrate the substantial loss to be suffered; and

iii. There must be provision of security for the due performance of the decree or order being appealed against.

14. On the first condition, the applicants aver and submit that the Motion has been timeously filed. From my study of the record and the impugned decisions were made on 7th May, 2021 and 21st April 2021 which is barely two months prior to the filing of the instant Motion. I therefore find that there has been no unreasonable delay in bringing the Motion.

15. The second condition to be considered is whether the appellants/applicants has shown the substantial loss they would suffer if the order for stay of execution is denied. The appellants stated that they have an arguable appeal against the said decisions and that they stand to suffer substantial loss and prejudice if the parties continue with the proceedings and the appeal succeeds.

16. In the Court of Appeal case of **Butt v Rent Restriction Tribunal [1979] eKLR** when it held that in considering an application for a stay of execution, the courts ought to exercise their discretion in a manner that will not

render the appeal in question nugatory, if successful.

17. It is apparent from the proceedings of the Tribunal that ex parte orders were issued when the tribunal was satisfied that the appellants/applicants had been served. It is also apparent that the Tribunal refused to set aside the ex parte orders stating that no good reasons had been tendered justify the setting aside order.

18. An applicant seeking for an order for stay of execution or proceedings must show the substantial loss he would suffer if the order is denied. In this matter, the appellants have failed to show the substantial loss they would suffer if the order for stay is denied.

19. In the end, I find no merit in the application dated 20.5.2021. the same is dismissed with costs abiding the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 30TH DAY OF DECEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st Appellant

..... for the 2nd Appellant

.....for the 3rd Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

..... for the 3rd Respondent