



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 681 OF 2019

SIMON OTIENO ADEDE.....APPELLANT/APPLICANT

VERSUS

MEK SACCO SOCIETY LTD.....1ST RESPONDENT

SAMSON OMONDI CHILO.....2ND RESPONDENT

CHRISPIN OTIENO PUDO.....3RD RESPONDENT

FRANCIS OCHIENG OSURE.....4TH RESPONDENT

MARY ANNE AKOTH.....5TH RESPONDENT

ERIC ONYANGO OTIENO.....6TH RESPONDENT

JENIFER MUYOYO.....7TH RESPONDENT

RULING

1) The appellant/applicant took out the motion dated 22nd November, 2019 in which he sought for the following orders:

a) This application be certified as urgent and service thereof be dispensed with at the first instance for purposes of this prayer and prayer (b) herein.

b) Pending inter partes hearing and determination of this application, this honourable court be pleased to stay execution of the judgment and decree of the Cooperative Tribunal at Nairobi (B. M Kimemia (Chairman), P. Swanya (member) and R. Mwambura (member) given on 8th day of January 2019 in Cooperative Tribunal case no. 612 of 2017.

c) Pending the hearing and determination of the appeal from the ruling of the Cooperative Tribunal at Nairobi (B.M. Kimemia (Chairman), P. Swanya (Member) and R. Mwambura (Member) given on 7th day of November 2019 in Cooperative Tribunal case no. 612 of 2017, this honourable court be pleased to stay execution of the judgment and decree of the Cooperative Tribunal at Nairobi (B. M. Kimemia (Chairman), P. Swanya (Member) and R. Mwambura (Member) given on 8th day of January, 2019 in Cooperative Tribunal Case No. 612 of 2017.

d) Costs of this application be provided.

2) The appellant filed the affidavit he swore in support of the motion. The 1st respondent filed the replying affidavit sworn by Duncan Otieno Ogango to oppose the application. The appellant further filed a supplementary affidavit he swore in response to the replying affidavit filed by the 1st respondent. Francis Ochieng Osure, the 4th respondent filed the replying affidavit he swore in support of the appellant's motion. On 10th December 2019, Lady Justice Kamau gave directions to have the motion disposed of by written submissions. At the time of writing this ruling, the appellant was the only party who had filed written submissions.

3) When this motion came up for interpartes hearing, the 1st respondent did not attend the virtual court session to oppose the motion. This court is enjoined by law to take into account the replying affidavit by the 1st respondent notwithstanding its absence during the virtual hearing.

- 4) Mr. Nyakiangana, learned advocate for the 2nd, 3rd, 5th, 6th and 7th respondents indicated to this court that the aforementioned respondents did not wish to oppose the appellant's application.
- 5) Mr. Chimei, learned advocate for the 4th respondent informed this court too that the 4th respondent did not wish to oppose the appellant's application. The 4th respondent relied on the replying affidavit he filed in support of the application.
- 6) I have considered the grounds set out on the face of the motion together with the facts deponed in the affidavits filed in support and against the appellant's application. I have further considered the appellant's written submissions.
- 7) It is the averment of the appellant/applicant that on 8th January 2019, the Cooperative Tribunal at Nairobi entered an ex parte judgment in favour of the 1st respondent and against the appellant without giving him a right of hearing.
- 8) It is further stated by the appellant that he only came to learn of the Cooperative Tribunal's decision on 22nd May 2019 when he received a demand notice demanding from him to satisfy the decree, the subject matter of this appeal.
- 9) He further averred that he unsuccessfully approached the Cooperative Tribunal seeking to have the decision of the Tribunal set aside to enable him participate in the proceedings before it on merit.
- 10) It is the submission of the appellant that the 1st respondent has commenced execution proceedings hence his property may be attached and sold if the order for stay is not granted. He stated that he has been served with a proclamation notice by Eshikhoni Auctioneers.
- 11) It is argued that the application for stay was timeously filed. Francis Ochieng Osure, the 4th respondent, filed a replying affidavit in support of the appellant's application. He averred that the appellant was condemned unheard at the Cooperative Tribunal therefore he did not defend the claim.
- 12) The 4th respondent averred that he was let down by his erstwhile advocate who failed to inform him of the status of the claim that was before the Tribunal. He also accused his erstwhile of failing to file an appeal as instructed against the Tribunal's decision.
- 13) The 4th respondent also stated in his replying affidavit the reasons why he was not heard. The 4th respondent did not depone on any facts in relation to the appellant's motion save for the allegation that the appellant was not heard before the Cooperative Tribunal.
- 14) The other respondents save for the 1st respondent merely informed this court through their advocate, Mr. Nyakiangana that they were unopposed to the appellant's motion without filing any response to the appellant's application. In response to the replying affidavit the appellant swore a supplementary affidavit to rebut the averments.
- 15) He averred that the commissioner of Cooperatives never served him with the notice to surcharge. It was pointed out that in the affidavit of service it is clear that the deponent did not aver that he served the notice to surcharge or to enter appearance.
- 16) The 1st respondent filed the replying affidavit of Duncan Otieno Oganyo to resist the appellant's motion. It is averred that on 5th October 2015, the commission of Cooperatives published in a gazette a notice to conduct an inquiry into the claims of the 1st respondent Sacco and conducted an inquiry between September 2015.
- 17) It is the submission of the 1st respondent that the appellant and the 2nd to 7th respondents were duly summoned, notified and even took part in the inquiry hearings and that the inquiry found the appellant and 2nd to 7th respondents liable for embezzling funds of the 1st respondent amounting to ksh.16,772,074/=. The commissioner recommended for a surcharge of ksh.16,772,074 to be recovered from the 2nd to 7th respondents which recommendation was adopted by the members of the 1st respondent.
- 18) The 1st respondent further stated that the surcharge notices were served upon the appellant, the 2nd – 7th respondents as evidenced by the affidavit of service of David Elvis Ochieng. The 1st respondent further pointed out that it filed a notice of motion before the Cooperative Tribunal in which it sought for recovery of the surcharged amounts when it became apparent that the appellant and the 2nd – 7th respondents did not appeal against the findings of the inquiry.
- 19) It is said that summons to enter appearance were served upon the appellant and the 2nd – 7th respondents. It is pointed out that the appellant did not enter appearance nor did he file a defence and neither did he respond to the 1st respondent's motion while the 2nd- 7th respondents entered appearance and a defence but did not respond to the motion filed with the claim. An affidavit of service sworn by David Elvis Ochieng was filed to show that the above documents were served.
- 20) The 1st respondent stated that the Cooperative Tribunal entered judgment against the appellant and 2nd to 7th respondents on 8th January 2019, pursuant to the provisions of Section 73 of the Cooperative Societies Act and thereafter the 1st respondent engaged the services of auctioneers to recover the decretal sum.
- 21) The matter that is before this court for determination is the motion dated 22nd November, 2019 in which the main prayer sought is an order for stay of execution pending appeal under the provisions of Order 42 rule 2 of the Civil Procedure Rules. The principles to be considered are set under order 42 rule 6 of the Civil Procedure Rules.

22) The **first** principle is that an applicant must show that the application for stay was filed without unreasonable delay. The record shows that the decision sought to be impugned was delivered on 7th November 2019. This appeal was filed on 22nd November 2019 contemporaneously with the motion, the subject matter of this ruling. In my view, the motion was filed without unreasonable delay.

23) The **second** principle is that an applicant seeking for an order for stay pending appeal must show that he would suffer substantial loss if the order is denied. The 1st respondent has stated that the appellant/applicant has not shown the substantial loss he would suffer if the order for stay of execution is denied. I have perused the applicant's motion and the affidavit filed in support and it is clear that the applicant has merely stated that unless the order for stay is granted, his assets may be attached. In my view, the fact that execution process may take place cannot by itself be regarded as substantial loss. It is a lawful process which cannot be interfered with without any justification.

24) With respect, I am persuaded by the submissions of the 1st respondent that the appellant/applicant has failed to show the substantial loss he would suffer if the order for stay is denied.

25) The **third** principle is the provision for security for the due performance of the decree. This principle is dependent on the existence of the second principle which is the cornerstone of an application for stay. Since the applicant has failed to establish the substantial loss, then there is no need to belabour considering the third principle.

26) In the end, I find no merit in the motion. The same is dismissed with costs being awarded to the 1st respondent.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 13th day of November, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... **for the Appellant/Applicant**

..... **for the Respondent**