



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL APPEAL NO. 96 OF 2016**

**JULIUS KONCHELLAH & 6 OTHERS.....APPELLANTS**

**-VERSUS-**

**COMMISSIONER FOR CO-OPERATIVE DEV. & MARKETING.....RESPONDENT**

**-AND-**

**SONYGAR SAVINGS & CREDIT CO-OP. SOCIETY LTD.....INTERESTED PARTY**

**(Being an appeal from the Ruling and Order of the Chairperson, Co-operative Tribunal dated and delivered on the 5<sup>th</sup> day of October 2016 in Kisumu Co-operative Tribunal Appeal No. 5 of 2012)**

**JUDGMENT**

1. This judgment is in respect to the appeal lodged by the Appellants against the ruling of the Co-operative Tribunal at Kisumu in **Tribunal Appeal No. 5 of 2012** (hereinafter referred to as '**the Tribunal Appeal**'). The Tribunal Appeal was against the decision of the Commissioner for Co-operatives Development and Marketing to variously surcharge the Appellants some monies out their dealings at Sonygar Savings and Credit Co-operative Society Ltd, the Interested Party herein.

2. The Tribunal Appeal was filed on 12/06/2012. There being no steps taken in that appeal, the Interested Party filed a Notice of Motion dated 16/02/2015 (hereinafter referred to as '**the application**') on 17/02/2015 seeking to dismiss the Tribunal Appeal for want of prosecution. The application was supported by the Affidavit of **Mr. Mbugua Mureithi**, Counsel for the Interested Party sworn on 16/02/2015. **Mr. Victor Olewe** Counsel from the firm of Messrs. Mbugua Mureithi & Company Advocates for the Interested Parties swore a Further Affidavit in support of the application on 21/04/2015.

3. The Appellants herein opposed the application through the Replying Affidavit of their Counsel **Mr. Joseph Mboya Oguttu** sworn and evenly filed on 20/04/2015.

4. The application was heard *inter partes* on 16/06/2015 where **Mr. Olewe** appeared for the Interested Party/Applicant and **Mr. Oguttu** appeared for the Appellants/Respondents. The ruling was reserved for 14/08/2015 but from the record it was delivered on 05/10/2016 in the absence of both parties. The Tribunal allowed the application and consequently dismissed the Tribunal Appeal for want of prosecution.

5. The Appellants nevertheless learnt of the delivery of the ruling and being dissatisfied they lodged the appeal subject of this judgment contemporaneously with a Notice of Motion dated 05/11/2016 seeking stay of execution orders. This Court dealt with the Motion and rendered its ruling on 15/06/2017 where it granted a stay of execution order pending the hearing and determination of the appeal.

6. Directions on the hearing of the appeal were made on 01/03/2018 where the appeal was to be heard by way of written submissions and timelines within which parties were to file their respective submissions were given. All the parties duly complied and referred to several judicial decisions in support of their rival positions.

7. The Appellants challenged the ruling vide 10 intertwined grounds of appeal. Counsel for the Appellants submitted that the Tribunal erred in not finding that the practice before the Tribunal was that it was the Tribunal itself which fixed matters for hearings and notified the parties and since that did not happen in this case then the dismissal order was not well founded. To that end Counsel submitted that the Tribunal was in contravention of **Section 78(3)** of the **Co-operatives Act, Cap. 490** of the Laws of Kenya which required '*the Tribunal to sit at such times and at such places as it may decide*'.

8. The Appellants contended that by dismissing the Tribunal Appeal summarily, the Appellants were denied an opportunity to be heard and their rights under **Articles 27, 48 and 50** of the **Constitution** were infringed. It was further contended that the dismissal was not in tandem with **Article 159(2) (d)** of the **Constitution** which vouched for substantive justice. The Appellants submitted that the contents of the Replying Affidavit were not considered and as such the grounds on the delay were not weighed against those which sought for the dismissal

of the Tribunal Appeal. The decision in **Mutiso vs. Mutiso (1984) KLR 536** was referred to.

9. The Appellants therefore prayed that the appeal be allowed and the application be dismissed so as to accord them an opportunity to challenge the findings of the Commissioner for Co-operatives Development & Marketing, the Respondent herein.

10. The appeal was vigorously opposed by the Respondent and the Interested Party. They contended that the duty to prosecute the Tribunal Appeal was on the Appellants and not the Tribunal. They supported the Tribunal finding that the procedure suggested by the Appellants was foreign to the Tribunal. They contended that the delay was not explained and hence not excusable. They prayed that the appeal be dismissed so that the longstanding matter could be brought to an end. They also cited several judicial decisions in support of their cases.

11. I have carefully considered the matter before me. I have as well perused the proceedings before the Tribunal and the impugned ruling. There is no doubt that the application was for dismissal of the Tribunal Appeal for want of prosecution. By the time the application was filed, the appeal had been filed close to three years back. In that case the Appellants were under a duty to give a reasonable explanation on the delay. The Appellants relied on the Replying Affidavit. The Tribunal in its ruling considered the reasons put forth by the Appellants. The Tribunal was guided by **Rule 14** of the **Tribunal's Practice and Procedure Rules, 2009**. The Rule required any Claimant (including an Appellant) to set down a case immediately after the close of the pleadings.

12. The Tribunal further dealt with the issue of its sittings. It was clearly explained that the Tribunal was by law required to gazette its sittings and that it did so and that it had been actively sitting all over the country from 2012 to 2015. The Tribunal at one point expressed itself thus: -

**.....As appellants it was their duty to find out from the Kenya Gazette when it [Tribunal] was sitting. They did not bother. The only explanation plausible is that they [the Appellants] lost interest [in the appeal] ....**

13. The Tribunal therefore dealt comprehensively with the grounds put forth by the Appellants at the hearing of the application. A party to a suit must always be vigilant. It must take every step to ensure that the suit is disposed of one way or the other at the earliest. That may be by way of setting down the matter for hearing or applying for its dismissal. That is the calling under **Article 159(2)(b)** of the **Constitution**. That position is reinforced by **Article 10(2)(b)** of the **Constitution** which elevates 'equity' to a constitutional principle of governance. One of the maxims of equity state that equity aids the vigilant and not the indolent.

14. Having considered this appeal, I am satisfied that the Tribunal dealt with the application fairly and that the Tribunal correctly rendered itself. It balanced the interests of both the Appellants and the Respondent and Interested Party and rightly dismissed the Tribunal Appeal which had been dormant for close to three years.

15. The appeal is therefore unmerited. The same is hereby dismissed with costs and the finding of the Tribunal rendered on 05/10/2016 is hereby affirmed.

16. Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of March 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

**Mr. Oguttu** Counsel instructed by the firm of Messrs. Oguttu-Mboya & Co. Advocates for the Appellant.

**Miss Opiyo** Learned Senior Litigation Counsel instructed by the Hon. Attorney General for the Respondent.

**Mr. Olewe** Counsel instructed by the firm of Messrs. Mbugua Mureithi & Co. Advocates for the Respondent.

**Evelyne Nyauke** – Court Assistant