



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 568 OF 2017**

**TOTONA MOSES.....APPELLANT**

**VERSUS**

**NATION STAFF SACCO SOCIETY LIMITED.....RESPONDENT**

**(Being an appeal from the Judgment of Hon Co-operative Tribunal Hon Kithinji Chairman,**

**Odhiambo Member, Mwambere- Member at Nairobi delivered on the 25<sup>th</sup> day of September,**

**2017 in Co-operative Tribunal Case No 255 of 2012)**

**RULING**

**INTRODUCTION**

1. The Appellant's Notice of Motion application dated and filed on 22<sup>nd</sup> October 2018 was brought pursuant to provisions of Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act) and all other enabling provisions in law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. Spent.**

**3. THAT this Honourable court be pleased to order a stay of execution of the judgment and decree of the Hon Co-operative Tribunal, Hon Kithinji- Chairman Odhiambo-Member, Mwambere-member at Nairobi delivered on the 20<sup>th</sup> day of September 2017 in Co-operative Tribunal Case No 255 of 2012 pending the hearing and determination of the appeal and/or until further orders of the Honourable court.**

**4. THAT the costs of this application be in the cause.**

2. The Appellant's Written Submissions were dated 21<sup>st</sup> January 2019 and filed on 23<sup>rd</sup> January 2019 while those of the Respondent's were dated and filed on 25<sup>th</sup> January 2019.

3. The parties requested the court to render its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPELLANT'S CASE**

4. The Appellant's affidavit in support of the present application was sworn on 22<sup>nd</sup> October 2018. He swore his Supplementary Affidavit on 17<sup>th</sup> January 2019. The same was filed on 18<sup>th</sup> January 2019.

5. He pointed out that on 20<sup>th</sup> September 2017, the Co-operative Tribunal delivered a judgment against him in favour of the Respondent in the sum of Kshs 332,986/= in **Co-operative Tribunal Case No 255 of 2012.**

6. Being aggrieved by the said judgment, he filed his Memorandum of Appeal dated 19<sup>th</sup> October 2017 on the same date. He stated that he had also filed his Record of Appeal and that the same was ready for directions and hearing. His Record of Appeal was filed on 28<sup>th</sup> September 2019.

7. He averred that on 18<sup>th</sup> September 2018, he was served with a Notice to Show Cause why he should not be arrested and committed to civil jail.

8. He was categorical that he would suffer substantial loss if he was jailed if the orders he had sought were not granted and he was therefore seeking the protection of the court to enable him exercise his right of appeal. He contended that the decretal sum had by the time of filing his present application risen to Kshs 596,916/=. He pointed out that he filed his application immediately upon being served with the Notice to Show Cause and that he was ready to furnish sufficient security for the due performance of its orders.

9. It was his contention that the Respondent would not be prejudiced if his application was allowed for the reason that it was just expeditious and proportionate for the same to be allowed. He thus prayed that his application be allowed as prayed.

#### **THE RESPONDENT'S CASE**

10. In response to the said application, Jacob Kimathi, the Respondent's Chief Executive Officer (CEO), swore the Replying Affidavit on its behalf on 4<sup>th</sup> December 2018. It was filed on 5<sup>th</sup> December 2018.

11. Its case was that the Appellant, who was its member, had taken various loans whose terms were contained in the Loan Application Form but that he defaulted in repaying the same.

12. It stated that the present Appeal was to deny it its fruits of judgment which was prejudicial to it. It contended that the Appellant ought not to be granted an order for stay of execution because he had not met the conditions of stay.

13. It was its averment that it would be prejudiced if the matter proceeded on appeal without the decretal sum in the sum of Kshs 598,691/= being deposited in court or in a joint interest earning account in the name of its advocates and his advocates.

14. It therefore urged this court to order that the Appellant deposit the decretal sum as aforesaid if it was inclined to grant it an order for stay of execution pending appeal.

#### **LEGAL ANALYSIS**

15. Both parties were agreed on the circumstances under which an order for stay of execution pending appeal can be granted.

16. The Applicant relied on the cases of **Selestica Limited vs Gold Rock Development Ltd [2015] eKLR**, **James Wangalwa & Another vs Agnes Naliaka Chesetomise [2012] eKLR**, **Joseph Ouma Onditi vs Jane Kisaka Mung'au [2018] eKLR** amongst other cases to buttress his argument that he had satisfied all the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules and that this court should therefore exercise its discretion in his favour and grant him an order for stay of execution pending appeal.

17. On its part, the Respondent relied on the cases of **Civil Appeal No 291 of 2017 Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others** and **Civil Application Nairobi No 322 of 2006 (UR 176 of 2006) Kenya Hotel Properties Ltd vs Willesden Properties Ltd** that were cited in the case of **Housing Finance Company of Kenya Ltd vs Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR** where it was held that an applicant must satisfy all the conditions in Order 42 Rule 6 (2) of the Civil Procedure Rules and that the success of an appeal would not be rendered nugatory if the decree was a money decree so long as the court ascertained that the respondent was not a man of straw respectively.

18. Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:-

**“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 applicant 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 applicant.”**

19. An applicant seeking a stay of execution must demonstrate:-

**a. That he will suffer substantive loss if the order for stay is not granted;**

**b. That he had filing his application for a stay of execution timeously; and**

**c. That he was willing to provide security.**

20. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.

21. It was this courts view that courts must exercise restraint in not granting an order for stay of execution pending appeal even where a decree was a money decree for the reason that the rigmaroles of recovering money from unsuccessful respondent could be deemed to because substantial loss to a party. It was for that reason that this court found it prudent not to reject the Appellant’s application right at the outset merely because what was being executed against him was a money decree.

22. Notably, the Respondent did not attach any Affidavit of Means to demonstrate that if it was paid the entire decretal sum and the Appellant succeeded in his Appeal, it would be able to refund him the same. This court was thus satisfied that the limb dealing with substantial loss under Order 42 Rule 6 (2) of the Civil Procedure Rules had been met.

23. The Notice to Show Cause was dated 4<sup>th</sup> July 2018. The Appellant filed his present application on 22<sup>nd</sup> October 2018. Appreciably, **“equity aids the vigilant and not the indolent.”** However, it was the view of this court that a delay of about three (3) months in the Appellant filing the present application was not inordinate. This court therefore found that the Appellant had satisfied the second condition for being granted an order for stay of execution pending appeal.

24. In respect of the third condition, the Appellant submitted that he was ready and willing to abide by any conditions given by the court. He indicated that he was willing to furnish security for the due performance of the judgment herein.

25. Accordingly, having considered the parties affidavit evidence, their respective Written Submissions and the case law they each relied upon, this court did not see what prejudice the Respondent would suffer if the orders the Appellant had sought were granted. If it suffered any prejudice, then it did not demonstrate the same. On the other hand, this court came to the firm conclusion that there would be more injustice in the Appellant being denied an opportunity to ventilate his case.

### **DISPOSITION**

26. For the foregoing reasons, the upshot of this court’s Ruling was that the Appellant’s Notice of Motion application dated and filed on 22<sup>nd</sup> October 2018 be and is hereby granted in terms of Prayer No (3) therein in the following terms:-

- 1. THAT the Appellant shall deposit into an interest earning account in the joint names of his advocates and those of the Respondents, the sum of Kshs 322,986/= within the sixty (60) days from the date hereof i.e. by 28<sup>th</sup> July 2019.**
- 2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 26 (1) hereinabove, the conditional stay of execution shall automatically lapse.**
- 3. Costs of the application herein shall be in the cause.**
- 4. Either party is at liberty to apply.**

27. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of May 2019**

**J. KAMAU**

**JUDGE**