



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 252 OF 2018

OROKISE SACCO LIMITED.....APPELLANT

VERSUS

OLIVER NDUN'GU CHEGE.....RESPONDENT

(Being an Appeal from the Ruling and Order of the Chairperson Co-operative Tribunal

(Nairobi) dated and delivered on 18th May 2018, by Honourable Mr. Alex Ithuku)

RULING

This is a ruling on the Appellants/Applicants application dated the 4th day of June 2018, brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act. Article 25 and 159(2) (d) of the Constitution, seeking a stay of execution of the ruling and Order of the Co-operative Tribunal given on the 18th day of May 2018, pending the hearing and the determination of the Appeal. Prayer 2 of the application has been overtaken by events.

The application is premised on the grounds set out on the body of the same and its supported by the affidavit of Joseph Gatheca Kamau sworn on the 5th day of June 2018.

The facts as captured in the said affidavit are that the Respondent herein filed a claim in the Co-operative Tribunal on the 30th day of June 2017. Together with the claim, he also filed an application seeking some interlocutory relief.

That upon hearing the application, the Tribunal on the 24th October, 2017, made an order compelling the Appellant to carry out statutory duty of processing road service licences and crew badges for motor vehicle registration Nos. KBY 610X and KBC 030S from the National Transport Safety Authority on behalf of the claimant pending the hearing of the suit.

It is averred that at the material time, motor vehicle KBY 610X had a valid road service licence in force which was expiring on 6th June 2018. That the claimant's driver and conductors are listed with NTSA and payment of their NSSF contribution was up to date. The deponent contends that upon receipt of the order on 10th November 2017, on 11th November 2017, he logged onto the Sacco system with NTSA and confirmed that motor vehicle KBY 610X was registered as one of the Respondent's vehicles and had been authorized to operate.

That on the same day, he tried to register motor vehicle KBC 030S but was notified that the inspection certificate had expired on the 24th February 2017 and therefore the motor vehicle would not be registered. That he made several other attempts to register the motor vehicle but on 26th February 2018 the Authority wrote to the Appellant indicating that pursuant to legal notice No. 179 of 31st December, 2014 they could not licence any PSV whose sitting capacity was less than 25 passengers to operate commuter services and so they refused to licence motor vehicle KBC 030S.

The Appellant averred that despite all the attempts and the feedback from NTSA, the Respondent filed an application dated 29th November 2018 citing the Applicant for contempt of court and on 18th May 2018, it was found to be in contempt and the management committee members had been ordered to appear before the Tribunal on 8th day of June 2018 to show cause why they should not be punished for contempt.

The Appellant has filed an Appeal against the said ruling and is seeking stay of execution pending the hearing and determination of the Appeal and is ready to abide by any conditions that the court may impose.

The Respondent filed grounds of opposition dated the 7th day of June 2018 on the following grounds:

(1) The applicant is guilty of laches.

(2) That the applicant having been cited for contempt by the Co-operative Tribunal, has not purged the contempt and should therefore not be granted audience.

In a further affidavit filed on 13th June 2018 the deponent stated that he was on 4th June 2018 notified that the court had on 18th May 2018 ordered that the members of the management committee of the Sacco to appear before the Tribunal but the Advocate called him later and informed him he had requested the Tribunal to adjourn the matter to 11th June, 2018 as he was not available to attend on that date. That, on the strength of the advice by their advocate, the members of the management committee were not present before the Tribunal on the 18th June 2018 which absence resulted to issuance of a warrant of arrest against the management committee.

The deponent further deponed that notice to appear before the Tribunal was not served upon all the members of the committee and some were notified by phone by the Appellant's Advocate. It is contended that failure to appear before the Tribunal was not deliberate but was due to the Advocate's advice that he was away and that he had requested the Tribunal to reschedule the matter to 11th June 2018 and when they appeared on the said date the Tribunal was away in Meru. That the management committee later appeared before the Tribunal on 12th June 2018, and were released on personal bonds to appear before the Tribunal on the 4th day of July 2018.

The court has considered the application and the submissions made by counsels for the respective parties.

The application is mainly brought under Order 42 rule 6 of the Civil Procedure Rules. Under that order, an applicant seeking stay of execution has to satisfy the conditions set out therein which are;

“(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.

On the issue of delay, the court notes that the ruling appealed against was given on the 18th day of May 2018 and the application herein was filed on the 5th day of June 2018. This was less than one month thereafter and therefore the same was filed timeously.

On substantial loss, it was averred that the Appellant's management committee is apprehensive that the Tribunal may proceed to make adverse orders against its members which may occasion the Appellant substantial loss or harm. It was submitted that if a stay is not granted, the members of the committee may be committed to civil jail meaning that they will lose their freedom and this will render the Appeal nugatory as the damage shall have been done.

I am persuaded by the Appellant's submissions that unless a stay order is granted the applicant shall suffer substantial loss in the event that they are ordered to serve a sentence.

On security, the Applicants have offered to abide by any condition imposed by the court for granting of a stay of execution order.

The court has looked at the provisions of contempt of court Act No. 46 of 2016, and in particular Section 28 which sets out punishment for contempt of court. A person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months or to both. The Appellant's Committee members were on 18th May 2018 found to be in contempt of court. In view of the said conviction, which the Appellants have appealed against, it is only fair that the Committee members be ordered to deposit a sum of Kshs.200,000/- in court pending the hearing and determination of the Appeal. A stay of execution is hereby granted on condition that the money is deposited in court within seven (7) days from the date of this ruling.

The Respondent has raised the issue of competence of the Appeal. I note that the issue was raised during the submissions and not by way of a preliminary objection. This was an ambush to the Counsel for the Appellant and it's not an issue for determination before this court at this juncture. It ought to have been raised by way of a preliminary objection so that the court can address it substantively and make a conclusive finding on it. It suffices to say that the application before the court is for stay of execution pending Appeal. The other issues shall effectively be addressed at the hearing of the main Appeal as making a finding on them at this time is tantamount to hearing the Appeal and it will embarrass the court that shall hear the Appeal.

Dated, Signed and Delivered at Nairobi this 27th day of September, 2018

.....

L. NJUGUNA

JUDGE

In the presence of:

.....*For the Appellants*

.....*For the Respondents*