REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 224 OF 2017

1. PIUS MBITHI

2. VERONICAH WACHIRA.....APPEALLANTS

VERSUS

1. DANIEL MUTIRIA

2. BIASHA HAMISI.....RESPONDENTS

R U L I N G

1. By an application dated 13/11/2017 and premised on the provisions of sections 1A, AB, 3A, 63(E) and 80 of the Civil Procedure Act and Orders 1 Rule 10(2), 22 Rule 52, 40 Rule 7, 45 Rule 51(1) of the Rules, the Appellant seeks from court two substantive Orders:-

> **i. THAT pending the hearing of this appeal, this Honourable Court be pleased to stay execution of the orders issued on the 6th October 2017 by Honourable FRANCIS KYAMBIA in Mombasa Chief Magistrate Civil Suit No. 815 of 2017.**
>
> **ii. THAT the Honourable Court be pleased to review and discharge vacate and or set aside the Orders issued on the 6th October 2017, by Honourable FRANCIS KYAMBIA in Mombasa Civil Suit No. 815 of 2017 pending this Appeal.**

2. The application reveals on its face to be founded on the grounds that the applicants are aggrieved and dissatisfied with the decision of the trial court, HON. FRANCIS KYAMBIA, made on the 6/10/2017, by which the court struck out the entire suit on the basis that the Appellants lacked the relevant and requisite *locuse standi* to bring the action. The dissatisfaction is grounded on the allegation that the appellants were denied the right to be heard contrary to Article 50, that the Appellants/Applicants are the officials of the Kongowea Market Central Committee while the Respondents are just but masquerades.

3. Those facts are reiterated and repeated in the Affidavit of VERONICA WACHIRA sworn and filed in support of the Application. That application reveal that prior to filling the current application, an application had been lodged before the trial court as dictated by the provisions of Order 42 Rule 6 but the same was never urged because at the request of the Applicants counsel to canvass same by way of written submissions, the same was stood over to 17/11/2017 without any interim orders being issued. It is further deponed that while that application was pending the applicants filed in this file and dated 27/10/2017 was on the 7/11/2017 struck out.

4. After that striking out, the applicant then chooses to withdraw the application before the trial court to pave way for filling the current application.

5. Beside that history of the efforts made to procure stay pending appeal, the deponent says that 'for justice to come to an end (may be *'injustice to come to an end'*) it is fair that the Orders of 6/10/2017 be stayed for being a nullity arising from the manner the proceedings went before the trial court. It is then added that the affairs of the Association are at the verge of suffering irreparable damages unless the Orders are granted by the court stopping the Respondents from running the society or carrying out themselves as officials of the association while relying on the ruling by the trial court.

6. The application was resisted by the Respondents who filed a Replying affidavit by BIASHA HAMISI. The deponent takes the position that to grant the Orders of stay would be to effectively reinstate the suit and grant the prayers in the application for injunction, which failed with the striking out of the suit, thereby preempting the appeal before hearing.

7. On prayer 3, the Respondent take the position that review and discharge of the trial court's orders cannot be granted because the same

would amount to allowing the appeal by the interlocutory application when, in the first place, there is no reason advanced to warrant the orders for review being issued. The Applicants are then accused for having disobeyed court orders for which they have been cited for contempt and therefore undeserving of any orders from this court. There is followed an assertion that the applicant ought to have pursued the application to stay before the lower court before coming here and that to the extent that they opted to withdraw it, they should not get the orders of stay in the appellate court prior to the lower court determining such an application. In conclusion the application is resisted for failure to disclose a substantial loss, failure to offer security for due performance of any ultimate decree and for being grounded upon an erroneous ground contrary to a finding by a court of law. For those reasons the Respondent prays that the application be dismissed with costs.

Submissions by the parties

8. When parties attended court to urge the application, Mr Mwaniki for the Applicant submitted that under the Section 26 of the Societies Act, the Registrar has the mandate and jurisdiction to resolve leadership disputes and urged the court to invokes the provisions of Article 165(6) of the Constitution to Order stay by way of supervision of the trial court.

9. He then added that the finding by the lower court is not final as no evidence was led by the parties hence it is in the interests of justice to grant orders of stay. The advocate then wholly relied upon and reiterated the facts deponed to in the affidavit and prayed that the application be allowed as prayed.

10. For the Respondent, Mr. Oluga advocate made submissions that Order 42 Rule 6 made it mandatory that an application for stay be heard and determined by the trial court before one can be presented and considered by the appellate court.

11. On the merits the counsel submitted that the applicants had failed to demonstrate substantial loss to be suffered unless stay is granted. He said that the Respondents have been declared the *bonafide* officials of the society hence no loss can be occasioned to the same society by them carrying out their mandate to the society. The Applicants are then depicted as persons not keen to obey court orders in that they have purported to call for a meeting contrary to the court orders. It is also pointed out that the application was filed after some 37 days hence was never brought promptly as the rules demand.

12. On review and setting aside the counsel submitted that a person seeking review must propose the manner of review sought and that in this case that has not been done. On setting aside the orders, it was submitted that, that is a final order and cannot be made before the appeal is heard and determined on the merits.

13. On the complaint that the applicants were denied a hearing, the counsel pointed out that to be an untruth in that parties were heard on two applications and the court made a determination after hearing counsel for the two sides. To the counsel there is no requirement in law that parties must be heard in person and by oral evidence before the court discharges its duty to accord parties a chance to be heard. Reliance was sought on the two documents marked B1 & B2 to show that the Appellants have been acting contrary to the findings and orders of the trial court. The counsel prayed that the application be dismissed

14. In his closing submissions Mr. Mwaniki conceded to be bound by Order 42 Rule 6 but pleaded with the court to invoke the provisions of Article 159(2) d and do substantial justice rather than rely on technicalities.

Issues for determination

15. Whatever the provisions of the law cited or omitted to be cited, what is before me is an application for stay pending appeal. For clarity and avoidance of doubt the Appellants are not seeking an injunction pending appeal also available under Order 42 Rule 6(6). Being so, the court is guided by the requirements or thresholds set by Order 42 Rule 6(1). In the understanding of the court, the first consideration regards the competence of the application in line with Order 42 Rule 6(1). The court needs to satisfy itself that the applicants have exhausted their rights before the trial court before approaching this court. The law reads:-

> **"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient course orders stay of execution of such degree or order and whether the application for such stay shall be granted or refused by the court appeal from, the court which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such orders thereon as may to it seem just, and any person aggrieved by an order of stay made by court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside ". (Emphasis provided)**

16. I read and understand the rule to dictate that the first port of call by an application for stay pending appeal is the trial court and that once it considers and determines the application then an aggrieved party has the liberty to approach this court and have the orders so issued set aside.

17. Put in the context of the matter before me it is clear that the trial court has not been afforded the opportunity to hear and determine any application for stay. That being the position, and being a court of law applying the law as enacted, this court must tell the applicant that the law is for all to be observed and not be side-stepped. I am in no doubt that the application seeking stay before this court as the appellate court is prematurely made and does not lie. On that score alone, I would decline to order stay of execution of the decision by the trial court and dismiss the application for stay.

18. However even if I was to consider the matter on the merits, and having read the documents filed and listened to the parties on submissions I am unable to find that the Applicants have discharged their obligations imposed by Order 42 (6) 2 in that there is no substantial loss demonstrated or proved just as much as no security for the duly performance has been offered.

19. Substantial loss has been defined to be the kind of a loss that is assessed by the totality of the consequences awaiting the Applicant if stay is not granted. In ***Dawie Chebutal Rotich & 2 Others vs Emirates Airlines, Civil Case No. 368 of 2001***, Mutunga J deformed substantial:-

> **"…….is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum"**

20. Granted that in the current appeal there is no decretal sum due for payment, I am prepared to substitute the phrase 'forced to pay' decretal sum with 'forced to comply with' the orders of the trial court.

21. The decision by the trial court compels the Appellants to handover the property of the society and to refrain from purporting to conduct the affairs of the society or discharging any duties as officials of the society. That being the case it was incumbent upon the applicant to bring out what injury or loss the compliance with that Order will bring upon them. They made no attempt at the discharge of that duty.

22. At this juncture the merits and demerits of the appeal must be left for the hearing of the appeal and this court must refrain from commenting on any issue that may prejudice that hearing. It is however enough to say that substantial loss which is the cornerstone and vary foundation of granting stay pending[1] appeal has not been demonstrated hence even on the merits the application cannot succeed but must fail.

23. How about the order to review and setting aside? That is equally wholly misconceived. An order for review under Order 45 and section 80 of the Act is only available before the Court granting the Order sought to be reviewed and not before the appellate court.[2]

24. Even setting aside is not available to the applicants at this juncture because if any such order is made upon this interlocutory application, there shall be nothing outstanding on the appeal and this court shall then expose itself to justified charges of being rush and determining the appeal before the same in canvassed by the parties.

25. All in all the entire application lacks merit, it is wholly misconceived and is hereby dismissed with costs.

26. I may only wish to add that parties who come before court ought to wholly submit to the court and be prepared to comply and have enforced orders of the court whether palatable to them or not. If indeed all the parties here are members of the society then the statutory inbuilt mechanisms for dispute resolution ought to have been employed in full prior to filing the suit for the communal good of the entire membership and not personnel interest of the leadership or just persons angling to seek leadership. Let the trial court's orders be complied with for the sake of preserving the dignity of the court even as the appeal is progressed towards hearing.

Dated and delivered at Mombasa this 15th day of December 2017.

P.J.O. OTIENO

JUDGE

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[1] **Ada Nyaibo K vs Uganda Holdings Properties Ltd [2012]eKLR**

[2] Order 45 Rule 1(1)