



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 73 OF 2012
BANDALI SACCO LTD.....PLAINTIFF
V E R S U S
CHRISTOPHER I OKWI
DAVID KARIUKI
ANNAH W. TIPIS
JOHN O. OMINGO
MARY S. MUGHO
SAMSON DOYO.....RESPONDENTS

RULING

(Being an appeal against the judgment of the Cooperative Tribunal

delivered on the 30th March 2012 in Kilifi Tribunal Case No. 01 of 2010)

1. The appellant BANDARI SACCO LIMITED is a Cooperative Society duly registered under the Co-operative Societies Act Cap 490. All the respondents were the appellant's registered members. The respondents had guaranteed a loan of DAVID KANYI, also a member of the appellant, of kshs 2million. When the said Kanyi failed to repay that loan appellant recovered the same from the respondents. The respondents filed a claim before the Co-operative Tribunal seeking that the Tribunal would order appellant to reverse the recovery of their dividends which were applied to pay Kanyi's Loan. The Tribunal granted respondent's their prayer by its judgment of 30th March 2012. It is that a judgment which is the subject of this appeal.

2. Appellant has by its Notice of Motion dated 14th November 2014 sought stay of execution of that judgment pending the hearing and determination of this appeal.

3. For the appellant to succeed it is required to meet the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules. Those condition require appellant; to satisfy the court that it will suffer substantial loss if stay of execution is not issued, to show that the application for stay was filed without unreasonable delay; and, to meet such security as ordered by the court for due performance of the decree.

SUBSTANTIAL LOSS

4. The appellant both through the affidavit of its chief executive and through oral submissions of its learned counsel stated that the respondents, who are now retired, would not be able to refund the amount of the Tribunal judgment to the appellant if the appellant was successful in this appeal. It was further submitted that if that occurred the loss would be to the individual members of the appellant Cooperative Society.

5. The Respondent Learned counsel was of the view that appellant had failed to show that substantial loss would be suffered if the order of stay of execution was not issued.

DETERMINATION ON SUBSTANTIAL LOSS

6. Although section 107 of the Evidence Act, Cap. 80 places the evidential burden on the party making allegation to prove the allegation, that does in certain circumstances shift to the opposite side. In this case the appellant having alleged that the respondent would be unable to refund the amounts of the Tribunal's decree, if this appeal succeeded, the evidential burden shifted to the respondents which burden then required the respondents to show evidence that they would be able to refund the amount. This is what was stated by the Court of Appeal in the case of ABN AMRO BANK N.V –V- LE MODE FOODS LIMITED CIVIL APP. NO. NAI. 15 OF 2003 viz

“...the burden was upon the bank to show that this appeal would be rendered nugatory if a stay is not granted. But requiring an applicant to discharge that burden, the court must also be alive to certain limitations which an Applicant such as the bank, must of necessity suffer from. The bank in this case is required to pay over to the Respondent over Kshs. 30 million. An officer of the bank has sworn that they are not aware of any assets owned by the Respondent. They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns. They, of course, cannot be expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. So all an applicant in the position of the bank can reasonably be expected to do is, to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has- such as land, cash in the bank and so on.”

7. The respondent's failed to shift that burden of proof. It is for that reason that I find appellant met the first condition for stay of execution, that is appellant showed it would suffer substantial loss.

DELAY

8. Appellant submitted that although the Tribunal judgment was pronounced on 30th March 2012 and this appeal was filed on 27th April 2012 there had not been necessity to stay of execution of that decree because the respondents had not sought to execute it until the respondents by their application dated 3rd November 2014, before the tribunal, sought the committal to jail of the appellant's Chief executive for failing to pay to the respondents the amount of the Tribunal's judgment.

9. The respondents by their replying affidavit stated that the appellant had gone into a deep slumber for three years which amounted to unreasonable

10. In considering this condition of order 42 Rule 6 (2) I am constrained to consider that having determined that appellant had satisfied substantial loss will be suffered if an order for stay of execution is not granted, and having also determined that the substantial loss will be suffered by the individual

members of the Cooperative Society, that is the appellant, it is necessary in considering whether there was unreasonable delay in filing the application for stay of execution to balance rights of the parties. The right of the appellant is to obtain stay of execution pending this appeal. The respondent's rights are to have the Tribunal's judgment satisfied. In this regard I rely on the case **AFRICAN SAFARI CLUB LIMITED – V- SAFE RENTALS LIMITED NAIROBI CIVIL APPEAL (Application) No. 53 of 2010** where the court had this to say:

NOTICE OF MOTION DATED 11TH SEPTEMBER 2014

“...with the above scenario of almost equal hardship by the parties it is incumbent upon the Court, pursuant to the overriding objective to act justly and fairly. The first role we have undertaken in this regard is to consider the hardships of the two parties before us. The second role is to put hardship on scales...we think that the balancing act as described in the analysis of the parties before us, is in keeping with one of the principle aims of the oxygen principle of treating both parties with equality or in other words placing them on equal footing in so far as is practicable.”

11. In balancing the interest of the appellant and the respondent I find that scales tilt in favour of the appellant. The appellant is an established cooperative society with substantial funds, but funds that belong to the various members of that cooperative. Having found that the interests of appellants have a higher weight I will proceed to overlook the delay of filing the present application. After all if the appeal is not successful the respondents will be paid interest which will compensate them for the delayed payment.

SECURITY

12. Having found, as seen above, that the appellant is an established cooperative, there is no need to require it to provide security for the due performance of the decree.

CONCLUSION

13. In conclusion I grant the following orders:

- a. **There shall be a stay of execution of the Cooperative Tribunal case No. 01 of 2010, Nairobi, pending the hearing and determination of this appeal.**
- b. **The costs of the Notice of Motion dated 14th November 2014 shall abide with the outcome of this appeal.**
- c. **Appellant shall within 21 days from todays date amend the Memorandum of appeal to include DAVID KANYI as the 7th respondent and shall thereafter serve him with that Memorandum of appeal.**

DATED and DELIVERED at MOMBASA this 21ST day of AUGUST, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

C/A

For Appellants:

For Respondents:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE