



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 581 OF 2013

PAUL KITHINJI IKIUGU.....APPELLANT

VERSUS

NTIMA FARMERS CO-OPERATIVE SOCIETY LIMITED...RESPONDENT

RULING

1. Before me is a notice of motion dated the 3/12/13 filed by the appellant/ applicant. It is brought under sections 3A, 75, 78,79G of the Civil Procedure Act and order 41 rule 4 of the Civil Procedure and all enabling provisions of the law. Prayers 1 & 2 of the said application are spent. The applicant seeks the following orders.
 - i. That a stay of execution in cooperative Tribunal case No. 82 of 2008 be granted pending the hearing and determination of the application.
 - ii. That the court be pleased to grant a stay of execution on Cooperate Tribunal case no. 82 of 2007 pending hearing and determination of the appeal against the award made by the tribunal on the 2nd October 2013.
 - iii. That cost of the application be provided for any other orders that meets the end of justice.

The application is supported by the following grounds;-

- a. That the Honorable Tribunal delivered a judgment awarding the respondent Kshs. 1,061,927.30/- and costs of the suit.
 - b. That the said judgment is signed by only the chairman of the Tribunal contrary to the provisions of Section 80 of the Co-operatives Societies Act Cap 490 Laws of Kenya.
 - c. That if a stay of execution is not granted substantial loss may result to the appellant as once the said money is paid to the respondent, it may not be recoverable.
 - d. That the appeal herein has a reasonable chance of success and if execution is carried out it will render the appeal nugatory.
 - e. That there has been no delay in bringing this application.
 - f. That the plaintiff is likely to execute the decree herein at any time.
 - g. The application was served on the respondent. The respondent did not attend the inter partes hearing. The respondent has filed a replying affidavit sworn by Linnet Gatwiri Nkonge the defendant's Secretary/ Manager CEO of the defendant Society .
2. The application is supported by the affidavit of Paul Kithinji Ikiugu , brief this is what he deposes;

he was a party to Tribunal case no. 82 of 2007. The said case was concluded at the Tribunal on the 25th of October 2013 when the Chairman N. M. T Kariuki read the order and award. On receiving the award and order he noted that it was signed only by the Hon. Chairman of the Tribunal which is contrary to the provisions of section 80 of the Cooperative Societies' Act Cap 490, Laws of Kenya. In the award the claimant was awarded Kshs. 1,061,927/30. That the judgment was littered with irregularities and he has resolved to appeal against the said judgment. That the respondent is likely to execute the decree unless the court orders a stay of execution. That his appeal has a reasonable chance of success and if the plaintiff executes the decree for the amount awarded, his appeal will be rendered nugatory if he succeeds and he is not likely to recover the foresaid amounts.

3. M/s L. G. Nkonge the secretary/manager of the respondent states in her replying affidavit dated 19/12/13 as follows; the application lacks merit and ought to be dismissed and that the application does not meet all the requirements for grant of orders of stay of execution as provided under the Civil Procedure Rules 2010. That the decree appealed from is a money decree and there is no way that its execution thereof would render the appeal nugatory as the money can always be refunded to the applicant in the event the appeal succeeds. That the applicants fears that the respondent is not able to refund the money is misplaced as it is within the appellants knowledge having been the respondent's former secretary/manager that the decretal sum is very little compared to the asset base of the respondent value runs into scores if not in areas of millions and includes 4 coffee factories as states in paragraph 6. That the applicant has failed to give an undertaking to abide by any orders the court will impose for the one area performance of the decree of depositing the decretal sum in court or in a joint interest earning account in a bank. The respondent urged this court to dismiss the application.
4. In her oral submissions in court Miss Omugo for the applicant stated that they are challenging the validity of the award, the jurisdiction of the Tribunal on the issues that were before it which were of employee/employer as opposed to a member of the society contrary to section 76 of the Societies Act. That the applicant was not represented and that it is apparent he was not heard. The applicant relied on 3 cases, **Mordekai Nawanga Nandwa Vs. C. F. C Stanbic Bank Ltd (2013) CA 114 of 2011**, **Rebecca Moraa Ochi & 43 Others Vs. Kiogoro Lands Disputes Tribunal & 10 others CA No. 31 of 2013 eKLR** and the case of **Ferdinand Indangasi Usee and another Vs. R. CA 370 & 372 of 2010**. In the case of **Ferdinand Indangasi Usee and other Vs. (Supra)** the Court of Appeal stated that; **" In the absence of the signature of the other judge, it cannot be said that the judgment was regular and or proper or valid"** .The Court of appeal cited one of its cases of **Lokwachama Vs. Republic (2005) LLR 379** where it stated that **"the judgment of the high court was not signed; hence there was no valid judgment. We are precluded from considering the merits and demerits of the judgment of the high court"**, and the case of **Samson Matende Vs. Republic Court of Appeal No. 526/10 (UR)** where the court held that **" it is our view that in the instant case there is no judgment to be considered. The lack of signature of the second judge is incurable"**.
5. The application is brought under order XLI rule 4 instead of order 42 rules 6 (2). Citing a wrong order is curable by the provisions of article 159 (2) (d) of the constitution which provides that "justice shall be administered without undue regard to procedural technicalities". The applicant has expressed clearly the order he seeks that of a stay of execution pending appeal.
6. The correct order is order 42 rule 6 (2) of the Civil Procedure Rule 2010 which provides as follows;
" No order of stay of execution shall be made under sub rule (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 pending on him has been given by the applicant.

7. The applicant has raised the issue of the validity of the order and award. The respondent did not respond to this. I do note that grant a stay of execution is an act of the exercise of discretionary powers of the court. I have looked at the memorandum of appeal the applicant has several grounds two of them being the jurisdiction of the Tribunal in hearing the case that has led to this application and the validity of the award and order. He claims he will suffer substantial loss if the orders are not granted though the loss is not explained however having considered what has been deposed am satisfied that the applicant deserves a stay order.
8. I therefore grant prayer 2 that there be stay of execution on the Cooperative Tribunal case No. 82 of 2007 pending the hearing and determination of the appeal against the award made by Tribunal on the 25/10/13. The applicant should ensure that the appeal is heard within the year 2014. Costs of the application shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 27th day January of 2014

R. E. OUGO

JUDGE

In the Presence of:-

..... For the Appellant /Applicant

.....For the Respondent

..... Court Clerk