



REPUBLIC OF KENYA

High Court at Embu

Miscellaneous Application 94 of 2012

IN THE MATTER OF COOPERATIVE SOCIETIES TRIBUNAL CASES NO.63/2008, 64/2008,  
68/2008, 71/2008 & 72/2008

AND

SILVANO NDWIGA.....1<sup>ST</sup> APPLICANT  
JOHN MURIITHI NJAGE .....2<sup>ND</sup> APPLICANT  
TIBERIO NYAGA .....3<sup>RD</sup> APPLICANT  
WAWERU GACUVI .....4<sup>TH</sup> APPLICANT  
HARRISON NJIRU ..... 5<sup>TH</sup> APPLICANT  
PATRICK NJERU MUNYI ..... 6<sup>TH</sup> APPLICANT

VERSUS

NEMBURE FARMERS CO-OPERATIVE SOCIETY LTD ..... RESPONDENT

R U L I N G

This is the amended Notice of Motion dated 3/7/2012. It seeks the following prayers;

- 1. That the Applicants do be granted leave to file an appeal against the Co-operative Society Tribunal cases No.63/2008, 64/2008, 65/2008, 68/2008, 71/2008 and 72/2008 out of time.***
- 2. That the Applicants do be granted leave to file a joint, consolidated and/or single appeal against the Co-operative Society Tribunal cases No.63/2008, 64/2008, 65/2008, 68/2008, 71/2008 and 72/2008.***
- 3. That this Court do be pleased to grant a stay of execution of the award in Co-operative Society Tribunal Case No.63/2008, 64/2008, 65/2008, 68/2008, 71/2008 and 72/2008 until this application and the intended appeal is heard and determined.***
- 4. That the costs of this application be provided for.***

The same is grounded on the grounds on the face of application plus the supporting affidavit of Silvano Ndwiga on behalf of the other Applicants.

The affidavit of Silvano has given a history of their matters before the Tribunal and the award. The award herein was delivered on 18/1/2012. And on 20/1/2012 the Applicants applied for a certified copy of Proceedings and Judgment. The said request was received on 23/1/2012. The said request was not complied with until 25/4/2012. However no certificate of delay was issued upon supply of the said certified proceedings and Judgment. The same was requested for on 24/4/2012 in writing and was only issued on 25/5/2012. The application for leave was therefore filed on 31/5/2012. And its against this background that the Applicants are seeking the above orders.

The Respondent filed four (4) grounds of opposition dated 29<sup>th</sup> June 2012 as follows;

- 1. This Honourable Court does not have jurisdiction to grant an order of stay of execution since there is no appeal to this Court from the decision of the Tribunal.**
- 2. That the Application is incompetent, fatally defective and bad in law.**
- 3. That the Applicants are guilty of material non-disclosure as they have not disclosed to this honourable Court that they sought and were granted a Stay of Execution for 30 days after the delivery of the Award by the Tribunal and**
- 4. That the application is misconceived and otherwise an abuse of the process of Court as the right to appeal from the decision of the Co-operative Tribunal is automatic as provided for under section 81 of The Co-operative Societies Act, Cap.490, Laws of Kenya and no leave must be sought before appealing.**

Counsels for both parties herein made oral rival submissions. I have considered the said submissions and all the material before me. The Applicants were the Respondents in various suits filed against them at the tribunal namely cases No.63/08, 64/08, 65/08, 68/08, 71/08 and 72/08. These matters were heard and a Judgment delivered on 18/1/2012 in respect of Tribunal No.63/08. The said Judgment was to abide in the other matters. The Applicants are therefore applying for leave to file their appeals out of time. It is true that one may file a Memorandum of Appeal without the proceedings. However the Appellant to be would require the copy of Judgment to help him/her formulate the grounds of appeal. There is no evidence to show that the Respondent supplied the Applicants with a copy of the Judgment within 30 days period. Infact the documents annexed herein indicate that the Respondent supplied the Applicants with a copy of the Judgment and the Proceedings on 25/4/2012. These were supplied without the certificate of delay which the Applicants had to request for. This again took about 16 days before it was supplied. I find it very unfair for the Respondent to oppose the application for Leave when indeed no certified copy of the Judgment was supplied to the Applicants on time. Secondly the leave sought is Leave to file Appeal out of time **AND NOT** Leave to Appeal. Therefore the 4<sup>th</sup> ground of opposition is misplaced.

I therefore allow the prayer for Leave to file Appeal out of time. The said appeals should be filed and served within 21 days. The 2<sup>nd</sup> prayer is for the Applicants to be allowed to file a consolidated appeal. The reason being that the Judgment of the Tribunal was one and it was to abide to all the other suits. This application for consolidation is premature. The Tribunal gave a Judgment vide Tribunal case No.63/08. The said Judgment was to apply to the other mentioned suits. The suits were never consolidated, and cannot therefore be consolidated before they are filed. This application can only be made once the appeals have been filed.

There is also a prayer for stay of execution of the award. There was a 30 days stay of execution granted by the Tribunal. There is nothing that stopped the Applicants from going back to the Tribunal to have the order of stay extended for the main reason that the Tribunal had not furnished the Applicants with the Judgment and proceedings. Again I find this prayer for stay of execution to be premature. It can only be made against the background of an appeal having been made.

A party appealing can only bring itself into the jurisdiction of the appellate Court by filing a Memorandum of Appeal. The application for Leave to file an appeal out of time is itself not an

appeal. The Leave may be granted or not granted. It cannot therefore be the basis of any other substantiative application.

I therefore grant only prayer number two (2) of the amended Notice of Motion dated 3<sup>rd</sup> July 2012. Costs in the main cause.

**DATED, SIGNED AND DELIVERED IN OPEN AT EMBU THIS 31<sup>ST</sup> DAY OF MAY 2013**

**H.I. ONG'UDI  
J U D G E**

**In the presence of;  
Appellant/Applicants  
Njue – C/c**