



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL CASE NO. 526 OF 2013**

**LUCY GATHONI WARUTERE.....APPELLANT/APPLICANT**

**VERSUS**

**CAROLINE SERAH MWELU.....1<sup>ST</sup> RESPONDENT**

**CAROLINE WANJIRU NG'ANG'A.....2<sup>ND</sup> RESPONDENT**

**CATHRINE WANJIRU GECAGA.....3<sup>RD</sup> RESPONDENT**

**VICTORIA AMULEGA.....4<sup>TH</sup> RESPONDENT**

**NORAH ARIKO SIRO.....5<sup>TH</sup> RESPONDENT**

**SCHOLASTICA NZEMBI MWAU.....6<sup>TH</sup> RESPONDENT**

**MILCENT KARIMI.....7<sup>TH</sup> RESPONDENT**

**(Appeal from a judgment and decree of the co-operative Tribunal at Nairobi (chairman) dated and delivered on the 20<sup>th</sup> day of September 2013 in Tribunal case no. 209 of 2013)**

**CAROLINE SERAH MWELU.....1<sup>ST</sup> CLAIMANT**

**CAROLINE WANJIRU NG'ANG'A.....2<sup>ND</sup> CLAIMANT**

**CATHRINE WANJIRU GECAGA.....3<sup>RD</sup> CLAIMANT**

**VICTORIA AMULEGA.....4<sup>TH</sup> CLAIMANT**

**NORAH ARIKO SIRO.....5<sup>TH</sup> CLAIMANT**

**SCHOLASTICA NZEMBI MWAU.....6<sup>TH</sup> CLAIMANT**

**MILCENT KARIMI.....7<sup>TH</sup> CLAIMANT**

**VERSUS**

**LUCY GATHONI WARUTERE.....RESPONDENT**

**RULING**

1. Before me is a notice of motion dated the 7/10/13 brought under order 42 Rule 6 of the Civil Procedure Rule. The applicant seeks the following orders.
  - i. A stay of execution of the decree issued by the Cooperative Tribunal on the 2/10/13.
  - ii. That the court sets aside, vary and/or discharge the judgment and decree made by the Cooperative Tribunal on 20<sup>th</sup> September 2013 and 2<sup>nd</sup> October 2013 respectively.
  - iii. That the court does order that the suit at the Tribunal be reinstated for hearing and determination on its merits as per law required.
  - iv. That costs of the application be in the cause.

The application has 4 grounds in support of the application.

2. In brief this is the applicant's case.

Through an affidavit deponed by Lucy Gathoni Warutere dated the 7/10/13 the appellant/applicant depones that on the 20/9/13 the matter between the parties was coming up for directions but instead a judgment was delivered. That the Tribunal ordered that she pays a sum of KShs. 50,000/- to the respondents on or before the 30/9/13 and KShs.25,000/- on or before the last day of the month until payment in full commencing the 31/10/13. That the matter should have proceeded to full hearing as the parties were unable to record a consent. That she is unable to make the payment as ordered without due regard to an opportunity to be heard by a Tribunal sitting as a quasi-Judicial Body and that she should not be condemned unheard. That the Tribunal being a court should have observed the rule of natural justice by conducting a hearing requiring proof of the respondent's allegations.

That it is only fair to have the judgment set aside and the suit reinstated for hearing on its merit. That the respondent's will not suffer any prejudice if the application is allowed since they filed a suit and expected to be heard.

The 1<sup>st</sup> respondent filed a replying affidavit as the 1<sup>st</sup> claimant in Cooperative Tribunal case no. 209 of 2013. She had the authority to swear the affidavit on behalf of the 2<sup>nd</sup> to 7<sup>th</sup> respondents. The claimants oppose the application and state as follows; that the appellant/applicant has not disclosed the true facts of the proceedings in Tribunal case no. 209/13 that can allegedly amount to ultra vires in nature. The respondents give a background on what happened on the 22/7/13 and 15/8/13 when they went before the tribunal. On the 22/7/13 the appellant/applicant was given time to file their documents. Before the 15/8/13 her counsel made an offer to them to pay the decretal sum by monthly installments of KShs. 20,000/- per month. On the 15/8/13 parties informed the court of the appellant's request and another date was taken to record a consent.

They returned to the tribunal on the 23/9/13 when the appellant applicant reiterated her request to pay by installments. On the 20/9/13 the court gave directions that the appellant applicant was to pay KShs.52,000/- by 30/9/12 and KShs.25,000/- per month payment in full. That it is the applicant's counsel who sought the court directions in the matter on the proposals of the both parties and the court made the order after considering the parties arguments. That it is not true that the applicant was not heard. That the orders sought should only be granted if the appellant deposits the decretal sum of KShs.208,299.95/-. The respondent cited the case of **African Safari club Limited Vs. Safe Rental Limited 2010 eKLR** where the Court of Appeal dealt with an application for stay brought under rule

5(2) (b) of the Court of Appeal Rules.

At the hearing of the application counsel for the applicant stated that the Tribunal contravened the rules of natural justice and that the parties should go for hearing. That this court has the jurisdiction to intervene and supervise the acts of the Tribunal which they claim is ultra-vires. That they did not go back to the Tribunal as they were told that they had closed their hands and that they proceeded to the High Court.

I have considered what is deponed by the parties. It is not in dispute that they have a matter before the cooperative tribunal. The applicant claims that the tribunal made a judgment against her without being heard. I note that the applicant has not filed a copy of the proceedings. What happened before the tribunal has been explained by the respondents in detail. This has not been challenged by the appellant/applicant without the proceedings this court cannot establish that the tribunal made the orders against the appellant applicant without hearing her. I am therefore unable to declare the proceedings ultra vires. From what has been deponed by the respondent it is apparent that the parties were given time to negotiate and the appellant's/applicant's counsel sought directions on the proposal made.

Under Order 42 rule (6) (2) no order for stay of execution will be made unless the court is satisfied that substantial loss may result to the appellant applicant. The appellant applicant has not explained the loss she will suffer but claims that she condemned unheard. I note the judgment was delivered on the 20/9/2013 as per the decree attached. The application was made without unreasonable delay. The applicant has not offered any security.

In the absence of the proceedings before the Tribunal I will give the appellant/applicant the benefit of doubt and grant an execution of the decree dated 2/10/13 issued by the Cooperative Tribunal on condition that the appellant/applicant deposits a sum of KShs. 100,000/- within 14 days from the date of the ruling at the Tribunal.

Under rule 17 of the Cooperative Tribunal rules the tribunal can set aside an exparte judgment or order. Let the appellant applicant move the Tribunal appropriately as provided under the rules. Costs shall be in the cause.

Dated, signed and delivered this 11<sup>th</sup> day of December 2013

**R. E. OUGO**

**JUDGE**

**In the presence of:-**

.....For the Applicant

.....For the Respondent

.....Court Clerk