



REPU
KENY

IN TH
COUR

AT
MOM

Civil
of 200

1.

CYPRIAN MUGO

2.

MARIAM MAHERO

3. PHILIP OSEBE.....APPELLANTS/APPLICANTS

4. ANNE

NGURE

-AND-

MOMBASA TEACHERS SAVINGS & CREDIT SOCIETY LTD.....
.....RESPONDENT

RULING

The respondent to the appeal lodged by Memorandum of Appeal of 27th June, 2007 moved this Court by Notice of Motion dated 4th December, 2009, and brought under s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya) and Order XVI [Rule 2] of the earlier edition of the Civil Procedure Rules.

The application carried one substantive prayer, that:

“This Honourable Court be pleased to dismiss the application dated 4th March, 2008 for want of prosecution.”

The said application of 4th March, 2008 had been filed by the appellants and was, in substance, seeking stay of proceedings before the Co-operative Tribunal, pending the hearing and determination of their appeal in the High Court.

The respondent’s application rested on the following grounds:

(a) the stay application of **4th March, 2008** was last fixed for hearing more than a year in the past, even though it had been brought under certificate of urgency;

(b) the appellants have no interest in prosecuting the said application of **4th March, 2008**;

(c) the delay in prosecuting the said application of **4th March, 2008** is inordinate and inexcusable;

(d) the said application of **4th March, 2008** should be dismissed, as “justice delayed is justice denied.”

For the respondent, their Advocate, **Jason Orina Maranga**, swore a supporting affidavit on **4th December, 2009**; and he deposed that the application of **4th March, 2008** was filed under certificate of urgency on that very date; that “it is more than one and a half years since this application was fixed for hearing”, but no step has been taken thereafter. The deponent averred that the continued pendency of the said application of **4th March, 2008** “has prejudiced the [respondent’s] case at the Co-operative Tribunal.” He deposed that “the [appellants] have lost interest in the application [of **4th March, 2008**], and [it] should be dismissed so as to pave the way for the [respondent] to enjoy the fruits of his right to be heard in Court.” The deponent stated that the delay in prosecuting the said application “is inordinate and not excusable and offends the provision of [the] law”; and he averred that “the continual existence of this application is an abuse of Court process.”

The appellants responded by filing grounds of opposition bearing the following contentions:

(i) the application is “frivolous, vexatious or otherwise [an] abuse of Court process.”

(ii) the application is brought under a wrong provision of the Civil Procedure Rules;

(iii) the appellants are now in the course of taking hearing dates;

(iv) the impugned application has the legitimate purpose of preserving **status quo**;

(v) “it is fair, just and equitable” to seek such stay of **status quo**.

The record in this matter contains entries that are to be taken into account:

(i) on **10th March, 2010** learned counsel **Mr. Wachira** (holding brief for **Mr. Maranga**) and **Mr. Gichana**, representing the respondent and the appellants respectively, appeared before the Court; **Mr. Wachira**, on that occasion, just as **Mr. Gichana**, expressed readiness to proceed with the respondent’s application;

(ii) owing to the heavy cause-listing for **10th March, 2010** the Court adjourned hearing to **29th April, 2010**;

(iii) on **29th April, 2010** learned counsel, **Mr. Kinyanjui** for the respondent and learned counsel, **Mr. Gichana** for the appellants came up with a consent, in the following terms:

“(1) By consent, the application dated **4th December, 2009** is hereby withdrawn.

“(2) The appellants/respondents shall pay costs thrown-away in the sum of **Kshs.5000/=**.”

On that basis, the Court made an Order, on **29th April, 2010**, fixing the appellants’ application of **4th March, 2008** for hearing on the basis of priority. Thereafter, on **1st July, 2010** **Mr. Gichana** and **Mr. Kisa** (holding brief for **Mr. Wachira**) appeared before the Court, and recorded a consent that the application of **4th March, 2008** would be disposed of by way of written submissions. The appellants were to file and

serve their submissions within 14 days of **1st July, 2010**; and the respondent was to file and serve within 14 days of receiving service. When the matter was mentioned on **20th September, 2010** it was recorded that only the appellants had filed and served their written submissions; the respondent had taken no action, and that remains the case to-date.

The appellants, by their Notice of Motion of **4th March, 2008** were seeking stay of the proceedings running before the Co-operative Tribunal, to enable them to prosecute an appeal regarding earlier decisions of that Tribunal.

The application rested on the following grounds:

- (i) *there is a proper appeal filed herein, challenging the Ruling and Orders of the Co-operative Tribunal made on 31st May, 2007;*
- (ii) *the said appeal raises a multiplicity of triable issues;*
- (iii) *the appeal has overwhelming chances of success;*
- (iv) *unless stay is granted in respect of proceedings Nos. 716, 717, 718, 720 and 721, the appeal may be rendered nugatory.*

To the application were annexed the several supporting affidavits of the appellants, each dated **3rd March, 2007**. The burden of their averments is that the Co-operative Tribunal, in the several sets of proceedings (Nos. 716, 717, 718, 720 and 721) had surcharged them in their capacities as serving officials, and they felt aggrieved.

Mr. Gichana submitted that the appellants were aggrieved by the Ruling and Orders made by the Chairman of the Co-operative Tribunal on **31st May, 2007**; and they were asking for a stay of the proceedings pending the hearing and determination of their appeal.

Counsel urged that the relevant issues for consideration are: whether there is an appeal on record which has chances of success; whether the applicants stand to suffer irreparable loss and damage if stay is not granted; whether the appeal may be rendered nugatory, if the application is not allowed.

Counsel submitted that the appeal had been filed timeously, and that a perusal of the Memorandum of Appeal shows that there are weighty issues to be canvassed.

Counsel submitted that the appellants, who are Primary School teachers running a Savings and Credit Co-operative Society, have had their shares withheld and have been surcharged substantial sums of money – and hence they stood to suffer major loss if orders of stay are not granted.

Mr. Gichana submitted that the appeal would be rendered nugatory, if stay orders were not granted at this stage.

Counsel relied on the Court of Appeal decision in **UAP Provincial Insurance Co. Ltd. v. Michael John Beckett**, Civil Application No. Nai 204 of 2004 [2004] eKLR, in which the governing principle in such a matter was thus stated:

“In order for the applicant to succeed in an application of this nature before us it is necessary for the applicant to satisfy us, firstly, that the pending suit is an arguable one, which is not frivolous, and, secondly, that if the stay proceedings is not granted the appeal when ultimately heard will be a futile exercise.”

From the facts before this Court and from the submissions of learned counsel, it is plain that the appellants have been touched upon by the Tribunal's Orders in elements that spell fundamental *rights* and

duties; and on that account alone, any relevant controversy merits full-scale judicial consideration within the High Court. There is, thus, a meritorious appeal already lodged; and at this interlocutory stage, this Court will make all appropriate Orders to lay the ground for a hearing on the merits. It is also evident that if stay of the proceedings before the Tribunal is not granted, then the outcome of the appeal when heard, may be rendered purely academic. Such a possibility is to be averted, as the established task of this Court is to render real and tangible rights to parties, in a proper case.

Consequently, the appellants' application of 4th March, 2008 is allowed. I hereby grant stay of the Tribunal proceedings in Tribunal Cases No. 716, 717, 718, 720 and 721, pending the hearing and determination of the appeal filed herein or further Orders of this Court.

The costs of this application shall be in the appeal.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 20th day of February, 2012.

**.....
M.A. ODERO
JUDGE**