



**REPUBLIC OF KENYA**

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

**Civil Appeal 140 of 2011**

**ELIJAH MWANGI NJOROGE.....APPELLANT**

**VERSUS**

**WIYUMIRIRIE FARMERS CO-OP. SOCIETY LTD.....RESPONDENT**

**RULING**

On 5<sup>th</sup> September 2011, James Macharia Kamau, the Chairman, Wiyumiririe Farmers Co-operative Society Limited, the Respondent herein, filed a statement of claim before the Cooperative Societies Tribunal vide Nairobi Tribunal case No.67 of 2011 in which he sought for the following orders:

1. ***THAT the Respondent be compelled to return all the societies documents to wit; Society Seal, Society Certificate of Registration, Caveat Removal Consent, Register of Members, Registration of Titles – Grant No.L.R.17508, Transfer L.R.10445 East Nakuru Municipality, Application and Letter of Consent L.P. No.Nyandarua 10445, Sale Agreement between Karinga and Farmers Directors (Vendors) and Wiyumiririe Farmer Co-operative Society and Map for Ngorika Farm.***
2. ***Costs of the suit plus interest at Court rates.***

The Respondent contemporaneously filed the motion of the same date in which he asked for the following orders:

1. ***THAT the Respondent Elijah Mwangi Njoroge be compelled to hand over all the society documents to wit:-***
  - a) ***Society seal***
  - b) ***Society Certificate of Registration***
  - c) ***Caveat removal consent***
  - d) ***Register of members***
  - e) ***Registration of the Title – grant No.L.R.17508***
  - f) ***Transfer L.R.10445 East Nakuru Municipality***
  - g) ***Application and letter of consent L.P. No.Nyandarua/10445***

- h) ***Sale agreement between Karinga Farm Directors (Vendors) and Wiyumiririe Co-operative Society***
  - i) ***Map for Ngorika farm***
  - j) ***Any other society documents that he is holding pending the hearing and determination of this case.***
1. ***THAT the application be heard exparte due to urgency of the situation herein.***
  2. ***THAT the costs of this application be provided for.***

The aforesaid motion was heard and the Respondent given the orders as prayed. Elijah Mwangi Njoroge, the Appellant/Applicant herein was aggrieved hence he filed this appeal. On appeal he put forward the following grounds in his petition.

1. ***That the learned chairlady erred in law and fact for giving final orders in an interlocutory application without affording the appellant an opportunity to be heard. A miscarriage of justice was therefore occasioned.***
2. ***That the learned chairlady erred in law and fact for not according the issues before her the seriousness they deserved by insisting on a full hearing of the matter and proceeding to issue orders based on facts in an affidavit.***
3. ***That the learned chairlady erred in law for not realizing that the supporting affidavit for the application dated 5<sup>th</sup> September 2011 was not properly attested to and therefore in capable of forming part of the evidence.***
4. ***That the learned chairlady erred in law for presiding over an issue which the tribunal had no jurisdiction over.***

The applicant has now taken out the motion dated 8<sup>th</sup> December 2011 in which he sought for the following orders:

1. ***That this honourable court be pleased to certify the present application as urgent and that the same be heard exparte in the 1<sup>st</sup> instance.***
2. ***That this honourable court be pleased to order a stay of execution against the order of the Honourable Co-operative Tribunal made at Nyeri in Nyeri C.T.C. No.7 of 2011 – Wiyumiririe Farmers Co-operative Society Ltd – vs- Elijah Mwangi Njoroge pending the hearing and final determination of this application and/or the appeal herein.***
3. ***That the costs of this application be provided for.***

The motion is the subject matter of this ruling. It is supported by the affidavit the applicant. The Respondent opposed the motion by filing the replying affidavit of James Macharia Kamau.

When the motion came up for interpartes hearing Mr. Ng'ang'a learned advocate for the applicant was permitted to persecute the motion exparte when Mr. H.K. Ndirangu learned advocate for the Respondent failed to attend court despite having been served with the motion with a hearing date on the face of it. I am aware that despite the absence of the Respondent and his advocate, I am enjoined by law to consider the replying affidavit filed herein. It is the submission of Mr. Ng'ang'a learned advocate for the Applicant that the appellant has an appeal with high chances of success. He pointed out that at hearing of the appeal, the appellant will argue that the cooperative tribunal erred when it gave the Respondent final orders through an interlocutory application. It is also argued that the cooperative tribunal had no jurisdiction to hear and determine the application. Mr. Ng'ang'a further pointed out that unless the order sought is given

the applicant will suffer substantial loss in that the appeal will be rendered useless. In the replying affidavit of James Macharia Kamau, this court was urged to dismiss the motion on the basis that the same lacks merit. It is argued that the application is meant to delay the handing over of the relevant documents of the Respondent after he was voted out from being chairman of the Respondent cooperative society. The Respondent further argued that the cooperative tribunal had jurisdiction to hear and determine the dispute before it.

In determining an application for stay of execution pending appeal the main consideration to be taken into account is substantial loss the applicant will suffer if he is denied the order for stay of execution. The other consideration is whether there is an arguable appeal. It is not denied by the Respondent that the cooperative tribunal made a final order when it dealt with an interlocutory application. Courts and tribunals are not allowed to give final orders through interlocutory application except in certain applications. It has also been argued that the tribunal had no jurisdiction to entertain the dispute. In my view the appeal raises arguable points which should be argued. It is also not disputed that the appeal will be rendered useless if the tribunal's order is not stayed. That in my view is sufficient to show that the appellant will suffer substantial loss if the order is refused. In the end I find the motion dated 8<sup>th</sup> December 2011 to be well founded. It is allowed with costs abiding the outcome of the appeal. I direct the parties to take the necessary steps to ensure that the appeal is ready for hearing within a period of 45 days from the date hereof to avoid further delay.

**Dated and delivered this 17<sup>th</sup> day of August 2012.**

**J.K. SERGON**

**JUDGE**