



**REPUBLIC OF KENYA**

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

**Civil Appeal 200 of 2011**

**EUNICE AUMA ODERA ..... 1<sup>ST</sup> APPELLANT**

**PETER ODERO WADEYA ..... 1<sup>ST</sup> APPELLANT**

**JAIRUS OGOLA OWITI ..... 1<sup>ST</sup> APPELLANT**

**EVANS OMONDI ODHIAMBO ..... 1<sup>ST</sup> APPELLANT**

**PAUL MISEH ..... 1<sup>ST</sup> APPELLANT**

**AND**

**MIGORI TEACHERS SAVING & CREDITI**

**CO-OPERATIVE SOCIETY LIMITED ..... RESPONDENT**

*(Being an appeal arising from the judgment/Decree of the Honourable Chief Magistrate,*

*Mr. C.G. Mbogo, delivered in Kisii CMCC No.705 of 2006 dated 17<sup>th</sup> November 2008)*

**RULING**

1. The Appellants filed a notice of motion under **Order 41** of the **Civil Procedure Rules** seeking:-

- 1) *A stay of execution of the decree issued on the 15<sup>th</sup> September 2011 until the appeal is heard and determined.*
- 2) *The honourable court alternatively be pleased to issue an order of temporary injunction to restrain the Co-operative tribunal from issuing and causing to be executed any surcharge orders against the appellants herein above until this appeal is heard and finalized.*
- 3) *Pending the hearing and determination of this application, this honourable court be pleased to dispense with the attendance of the respondent in the first instance and issue an interim order of injunction to restrain the execution by the respondent.*
- 4) *The costs of this application be costs in the pending appeal.*

2. The application is supported by the affidavit of Evans Omondi Odhiambo who stated that on the 10<sup>th</sup> august 2010 they jointly appealed against surcharge orders pursuant to **section 74 (1)** of the **Co-operative**

**Societies (Amendment) Act.** On the 29<sup>th</sup> November the appeal was canvassed by way of written submissions and judgment therein was delivered on 15<sup>th</sup> September 2011. On 20<sup>th</sup> September 2011 the appellants delivered a letter from his advocate to the Co-operative tribunal requesting for a certified copy of the judgment and paid a requisite fee of Kshs.400/=. He was then informed that the copy of judgment had only been signed by the chairman and therefore could not be released to him. The appellants' advocate then filed an appeal dated 22<sup>nd</sup> September 2011 and filed it in court on 29<sup>th</sup> September 2011. That on 7<sup>th</sup> October 2011 the tribunal still refused to give the said judgment.

3. On 10<sup>th</sup> October 2011 the tribunal while still maintaining they had not signed the judgment sent a process server to serve the appellants who referred him to their advocate and upon perusal of the document the advocate realized that it had not been properly drawn.

4. The notice to show cause was intended to be heard on 19<sup>th</sup> October 2011 when each of the appellant was required to pay Kshs.972,480/=,

Kshs.2,936,039/=, Kshs.5, 798,580/= and Kshs.4,999, 455/= respectively.

5. In reply to the above affidavit, Mr. John Osewe as the chairman of the respondent averred that:-

- *An award by the tribunal was delivered on 1<sup>st</sup> September 2011.*
- *The appellants did not make any oral application for certified copy of the proceedings and neither did they pray for a stay of execution pending appeal.*
- *Since there was no stay of execution the executive officer was requested to issue the decree.*
- *The decree was issued by the court and an application of notice to show cause filed.*
- *The appellants were served with a notice to show cause but they refused to receive and the same came up for hearing on 19<sup>th</sup> October 2011, when the appellants did not attend court.*
- *The appellants were summoned by the inquiry officers and they signed acknowledgment to be interviewed hence they were accorded the right to be heard and they cannot be heard to say that their constitutional rights have been violated.*

6. Upon file perusal, it appears that the appellants filed a Memorandum of Appeal on 29<sup>th</sup> September 2011. The appellants obtained prayer 3 of the notice of motion to the extent that there would be a stay of execution for 14 days. The application was then fixed for inter parte hearing on 27<sup>th</sup> October 2011. However on 27<sup>th</sup> October 2011 the matter was taken out of the cause list as the court on that day was overwhelmed with other matters. The appellants took another hearing date for the application on 2<sup>nd</sup> February 2012. On 2<sup>nd</sup> February 2012, the file disappeared from the registry only to resurface upon intervention by the Executive Officer.

7. This application now seeks prayer 2 in that there be a stay of execution pending the hearing and determination of the appeal. I have read the submissions and the authorities cited by both parties.

8. For a stay of execution pending appeal, the appellants must prove to the satisfaction of the court that:-

(a) *substantial loss may result to the applicant unless the order sought is granted; and*

(b) *The application has been made without unreasonable delay; and*

(c) *Such security as the court orders for the due performance of such decree or order as may ultimately be*

*binding on him has been given by the applicant.*

9. From the respondent's replying affidavit and submissions, they failed to address the issue as to why a copy of the judgment was never availed to the appellants upon their request and payment of the requisite fee. Furthermore, the fact that the sums shown by the notice to show cause and the surcharge orders differ clearly indicates that there is more than meets the eye for example:-

**Decree amount**

**Notice to show cause amount**

**Eunice Ouma Shs.902,880/=**

**Shs.972, 480/=**

**Evans Omondi Shs.1,906,080/=**

**Shs.1,999,455/=**

10. From the above, it seems clear to me that substantial loss may result to the applicants if the order for stay is not granted. They could be thrown behind bars if they do not pay the amounts decreed.

11. In addition, the appellants also averred that rules of natural justice were not followed when the case proceeded against them before the Tribunal. On whether or not this application was brought without unreasonable delay, I am satisfied that the applicants complied.

12. Accordingly I order as follows:-

- 1) *Prayer 2 of the application is allowed pending the hearing and determination of this appeal subject to each appellant depositing sufficient security by way of a bank guarantee in the sum of Kshs.300,000/= or a title deed within the next 30 days from the date hereof.*
- 2) *The respondent shall avail copies of proceedings and judgment to the appellants within the next 14 days.*
- 3) *Costs of this application shall abide the outcome of the appeal.*

**Dated and delivered and Kisii this 12<sup>th</sup> day of September, 2012**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. G.S. Okoth for Appellants/Applicants

M/s Bw'Oigara Getange for Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**