REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 398 of 2012

BALOZI HOUSING CO-OPERATIVE SOCIETY LIMITED……..... APPLICANT

VERSUS

CAPTAIN FRANCIS E K HINGA……...RESPONDENT

RULING

By a Notice of Motion dated 10th July 2012 expressed to be brought under the provisions of Section 81 of the Co-operative Societies Act, Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law, the applicant herein seeks the following orders:

1. THAT this application be certified urgent and service be dispensed with in the first instance.

2. THAT this court be pleased to stay proceedings in Co-operative Tribunal Case No. 286 of 2011 and execution of ruling made on the 15th March 2012 pending intended appeal.

3. That costs of this application be provided for.

The application is based on the grounds that if execution pending appeal is not stayed, the appellant's appeal will be rendered nugatory and that the appellant will suffer substantial loss if the execution is not stayed as it will affect the substance of the appeal herein.

The application is supported by an affidavit sworn by **Dr Mary Wambui Kimani**, the Chairperson of the applicant herein on 10th July 2012. According to the deponent, the respondent was granted leave by the Co-operative Tribunal to join certain persons including the deponent as parties in Tribunal Case No. 286 of 2011 between the parties herein. Being aggrieved by the said decision, the applicants have instructed their advocate to appeal against the said decision and copies of the proceedings and ruling were applied for. The ruling was received on 18th April 2012 and it was on receipt thereof that counsel for the applicants realised that the advocate who held his brief did not seek for stay of execution of the judgement upon its delivery. The applicants then fled an application for stay and the respondents raised a preliminary objection but when the matter came up for the delivery of the ruling on the said objection, it is deposed the court ruled on the applications itself before hearing the application itself. According to the deponent, to join the said persons will serve no purpose but will be embarrassing and will unnecessarily lead to increase of costs in litigation. Further the said ruling restricts the applicants' right to legal representation and the decision itself is against the evidence tendered. Unless the application is allowed the matter will proceed against the applicants without the participation of counsel of their choice to the applicants' detriment. According to the applicants they are willing to comply with any fair condition that

may be imposed by the Court. According to the applicants the claimants has nursed what they call a virulent attitude towards the applicants'' lawyers based on considerations such as tribe. Whereas the said advocates acted for the Society in negotiations with Kenya Commercial Bank Limited for the payment of a debt owed to the Bank, they never acted in the manner alleged. Consequently, it is the applicants' view that there was no basis for requiring the disqualification of the applicants' lawyers in these proceedings or joinder of any other person. If the application is allowed, the applicants contend, the respondent will not suffer any prejudice that costs cannot adequately compensate.

In opposition to the application, the respondent filed a replying affidavit on 3rd August 2012. In the said affidavit, it is deposed that paragraphs 15 and 16 of the supporting affidavit are scandalous and irrelevant and ought to be struck out. It is submitted that since the Tribunal has barred the firm of **Nyakundi & Co**. Advocates from representing the Applicant Society in the proceedings, the said firm has no right of audience before this Court as the said order has not been stayed. Since the orders which were sought before the Tribunal sought prohibitory orders, t is contended that the said orders are incapable of being executed thus the application must fail. With respect to the joinder of the other person, it is deposed that the order sought their joinder in their personal capacities and they are not parties to the present application and the applicant has no authority to litigate on their behalf. In any case the order of joinder is incapable of being executed and must fail. Since the applicants seeks to appeal against the decision made on 15th March 2012, the appeal ought to have been filed within 30 days of the decision on or before 14th April 2012 and since no such appeal has been filed the same is out of time. Since there is no requirement that proceedings or order appealed against accompany the Memorandum of Appeal which is the only document required to be filed, the applicant's reasons for not filing the appeal, it is contended, is based on ignorance or misapprehension of the law. In the respondent's view, there is no provision for stay pending intended appeal unless the appeal is to the Court of Appeal or the application is made immediately upon delivery of the decision. It is further contended that the matters deposed by the deponent of the supporting affidavit are matter which cannot be considered in this application. Since the applicant has no other asset other than L R No. 28030n which it is distributing to members, in the event that titles are issued to the said members, the respondent shall be unable to recover its money hence the application ought to be dismissed to enable the respondent prosecute his claim expeditiously before the applicant is wound up. However, if the Court is minded to grant the stay sought, the deponent contends that it ought to be conditional upon the applicant depositing the sum of Kshs. 9,874,366/- in an interest earning joint account in the name of the Registrar of the High Court and the respondent's advocates.

The application was prosecuted by way of written submissions. After outlining the history of the dispute, the applicant submits that there is an arguable case whether the tribunal answered the questions it ought to have answered in the application before it. Restraining counsel, it is submitted has the effect of denying litigants their chosen representations and is not to be trifled with. On reasons for not filing the appeal todate, it is submitted that although copies of proceedings and ruling were applied for todate these documents have not been supplied. According to them the law allows extension of time to file appeal and once the proceedings are availed, this avenue is available to the applicant since proceedings are necessary for the drawing of the memorandum of appeal.

On the part of the respondent it is submitted that under section 81 of the Co-operative Societies Act an appeal against an order of the Tribunal ought to be filed within 30 days of the decision. An application for stay, it is submitted cannot be in vacuum and since the decision sought to be appealed against was made on 15th March 2012 , an appeal therefrom ought to have been filed on or before 14th April 2012. As no such appeal has been instituted as required by way of Memorandum of Appeal, there is no basis upon which an application for stay can stand. Further the orders which were made on 15th March 2012 are prohibiting orders and are incapable of being executed hence an order for stay would still fail.. Since the persons who were ordered to be joined in the proceedings are not parties in this application the applicant herein has no locus standi to litigate on their behalf. Since the order ordering **Nyakundi & Co. Advocates** has not been set aside, the present application is filed in contempt of Court and must be rejected. Further there is no allegation of any loss that may result if the stay order is not granted hence the application ought to be dismissed.

Having considered the application herein as well as the opposition thereto, I cannot help but agree with the Tribunal that:

"the Tribunal observed that the parties were not kind to each other and as a result they adopted bad exchange of insults against each other. We do not believe this was fair. We viewed this conduct on both sides as an embarrassment to the Tribunal".

Advocates as officers of the Court must always strive to avoid being drawn into the murky exchanges between the parties to a suit and must always ensure that decorum is maintained in pursuit of their clients' interests. It must always be remembered that clients only hire the services of the advocates and do not hire the advocates themselves to stand in and take their places in litigation. In this case, it is clear that the advocates have either totally failed to contain their clients or have failed to recognise their duties as officers of the Court. I will say no more on this issue.

I have further noted that the applicants in their submissions have annexed documents which are not legal authorities but which amount to evidence. Submissions ought not to be an avenue for adducing evidence. Evidence ought to be adduced by way of affidavits and to annex evidence to the submissions amount, in my respectful view, to adducing evidence through the back door. I will therefore not consider the evidence annexed to the said submissions.

From the application and the submissions it is clear that the decision which the applicants intend to appeal against was the one made on 15th March 2012. By that decision, the Tribunal restrained the firm of **Nyakundi and Company Advocates** from acting for the applicants and further joined **Mary Wambui Kimani**, **Fatuma Nyaguthi Chege**, **Patrick Kaboi Ngahu** and **David Wachira** in the matter. The law is clear that it is only in cases where the Court has granted a positive order that an order for stay of execution can be granted. See **Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63.**

However, in this case, the order joining the said parties was a positive order although I am not convinced that an application for stay of execution was the most appropriate one as opposed to an application for stay of proceedings.

Whereas I agree that a party is entitled to legal representation of one's choice, I am not satisfied that in the circumstances of this case, the mere fact that the Court or Tribunal makes a decision barring a particular firm of advocates from appearing for a party, amounts to denial of legal representation of one's choice. In my view, there are alternative avenues available to such a party and the most likely loss that the party stands to suffer is that of incurring expenses in instructing another firm and that without more cannot qualify to be termed as substantial loss for the purposes of stay of execution pending appeal.

Again it is trite an application for stay of execution must be brought without inordinate delay. In this case it is clear that no appeal has been filed. In the applicants' submissions it is contended that although proceedings and ruling were applied for none of the two documents have been availed. However, in the supporting affidavit it is admitted that a copy of the ruling was availed on 18th April 2012. However todate no such appeal has been filed. The applicant, however, contend that the intended appeal raises serious issues for determination. It is therefore assumed that the applicants are aware of the issues they intend to raise in the appeal. One then cannot understand why the said appeal has not been filed up to now. The fact that a party files a memorandum of appeal does not deprive him from applying to amend the same at a later stage. However, to grant stay of execution or proceedings when no appeal has been filed and there is no sign of such an appeal being filed in the foreseeable future would in my view occasion a miscarriage of justice. This is not to say that stay can never be granted at all unless an appeal has been filed. Each case must be considered on its merits and the conduct of the applicant since the delivery of the decision is a factor to be taken into account since the decision whether or not to grant stay of execution is an exercise of judicial discretion. In my view the conduct of the applicant herein does not merit the grant of the orders sought. In considering whether or not to grant the stay sought, the Court is enjoined to consider the overriding objective as stipulated in section 1A as read with section 1B of the Civil Procedure Act and give effect to the overriding objective in the exercise of its powers under the Act

or in the interpretation of any of its provisions. According to section 1A(2) “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

To grant the orders sought in this application would have the effect of defeating the overriding objective as it would delay the determination of the pending dispute and would not amount to timely disposal of proceedings. In the exercise of the Court’s discretion, the Court ought to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice. The law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice. I am quite convinced that in this case there would be a much larger risk of injustice if the court found in favour of the applicant, than if it determined this application in favour of the respondent. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

In the foregoing circumstances, I do not think that it is necessary for me to consider the other issues raised.

In the premises the application dated 10th July 2012 fails and the same is dismissed with costs to the respondent.

Dated at Nairobi this 3rd December 2012

G V ODUNGA
JUDGE

Delivered in the presence of Mr Mutua for Mr Nyakundi for the applicant