



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL APPEAL NO.111 OF 2010

ALI WECHULI OMITO APPELLANT

V E R S U S

**MUMIAS OUTGROWERS SAVINGS & CREDIT
CO-OP. SOCIETY (MOSACCO) LTD. RESPONDENT**

R U L I N G

On 24th March 2010, the Co-operative Tribunal sitting at Kakamega entered *ex parte* judgment in favour of the respondent for the sum of KShs.4,088,000/=. The appellant did on 14th April 2010 make an application before the said co-operative tribunal seeking to set aside the interlocutory judgment that was entered against him. The appellant further sought an order of the said tribunal to be granted leave to defend the suit. The tribunal, after considering the said application, dismissed the same. This was on 26th August 2010. At page two (2) of its ruling, the tribunal stated thus:

“When we apply these principles to the present action, we find that the respondent has been less than candid. He knew of the existence of the suit before entry of the interlocutory judgment. There has been no application to date for execution of the decree and accordingly, the respondent has falsely sworn that a firm of auctioneers has been instructed to sell his property. Furthermore, he has not challenged sufficiently or at all the affidavit of service on record or even sought to cross-examine the process server. And although the respondent submitted that the amounts in the claim of KShs.4,088,000/= are high, we have seen the annexures to the replying affidavit loan applications that answers to those sums as highlighted above. The respondent has not annexed a draft statement of defence for our perusal and his affidavit to the present application has only dealt with the question of service of the summons. In the circumstances, we are unable to find that the respondent has a defence or a good defence to the action.”

The dismissal of the application prompted the appellant to file an appeal to this court. The appeal was lodged on 1st September 2010. Contemporaneous with filing the appeal, the appellant filed an application pursuant to the then **Order XLI Rules 1, 19 & 21** (now **Order 42**) of the **Civil Procedure Rules** seeking orders of this court to stay all proceedings before the Co-operative Tribunal, including any intended execution as a consequence of the ruling delivered on 26th August 2010, pending the hearing of the application and thereafter pending the hearing of the intended appeal. The application is supported by the annexed affidavit of the appellant. In the affidavit, the appellant admitted that he had not annexed a copy of the draft defence to the application seeking to set aside the interlocutory judgment before the Co-operative Tribunal. However, he reiterated that he had not been served with the statement of claim. He further stated that he was not aware of the proceedings that were pending before the Co-operative Tribunal. He urged the court to stay the execution of the judgment of the Co-operative Tribunal pending

the hearing and determination of this appeal. It was the appellant's case that if stay of execution of the said claim was not granted, he would have been condemned to pay a huge sum without being given an opportunity to be heard.

The application is opposed. The respondent swore a replying affidavit through its counsel Gabriel Fwaya. In the said affidavit, the respondent deponed that the respondent's claim at the Co-operative Tribunal was on account of a loan which was advanced to the appellant by the respondent and which the appellant failed to repay. It is the respondent's contention that the appellant's application did not have merit in view of the finding that was made by the Co-operative Tribunal. The respondent was of the view that the appellant had not established any grounds to enable this court exercise its discretion in his favour.

At the hearing of the application, this court heard rival oral submissions made by Mr. Sichangi for the appellant and by Mr. Fwaya for the respondent. Prior to oral arguments of the application, the respective counsel for the parties to this application filed written submissions. This court has carefully considered the said submissions. It has also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the appellant established a case to enable this court grant stay of execution of the decision of the Co-operative Tribunal pending the hearing and determination of the appeal. Under **Order 42 Rule 6(2) of the Civil Procedure Rules:**

"No order for stay of execution shall be made under subrule (1) unless –

- (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;*
- (b) 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."*

In **Butt v Rent Restriction Tribunal [1982]KLR 417** at page 419, Madan JA held as follows:

"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (NO.2) 12 Ch D (1879)454 at p 459. In the same case Cutton LJ said at p 458.

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory." "

In the present application the appellant argued that he had a good appeal which ought to be heard and considered on its merits. In effect, he argued that if stay is not granted, his appeal would be rendered nugatory. He further argued that he would suffer substantial loss if the judgment is executed because he would be financially incapacitated. He stated that he would thus suffer substantial loss. The appellant did not offer any security for the due performance of the decree. He however stated that the respondent held the title of his parcel of land as security. He further stated that he held shares amounting to KShs.1.5 million with the respondent. He urged the court to grant the application. The respondent opposed the application and was of the view that the application lacked merit because it was filed after undue delay and further that it was meant to deny it the enjoyments of the fruits of its judgment. The respondent argued that it was a substantial organization which will be able to refund the decretal sum if the appeal is successful.

Having evaluated the facts of this application, it was clear to the court that the appellant had not established a case that would entitle this court to exercise its discretion in his favour. Although the appellant was able to persuade the court that indeed he would suffer substantial loss if stay of execution is not granted, the appellant did not offer any security for the due performance of the decree. It was apparent to the court that the appeal lodged by the appellant will not be rendered nugatory if the respondent is allowed to execute the decree of the Co-operative Tribunal. This is because the respondent will be in a

position to refund such decretal sum if the appeal is successful. The respondent has substantial assets to meet any judgment that may be issued in favour of the appellant.

In the premises therefore, the appellant's application seeking to be granted of stay of execution of the decision of the Co-operative Tribunal lacks merit and is hereby dismissed with costs.

DATED AT KAKAMEGA THIS 21ST DAY OF JUNE 2011

L. KIMARU
J U D G E