



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 191 of 2010

**GEORGE ABONGO PLAINTIFF
VERSUS
KISUMU TEACHERS CO-OPERATIVE
SAVINGS AND CREDIT SOCIETY LTD. DEFENDANT
R U L I N G**

The application before the Court seeks two main orders –

- (a) That this honourable Court be pleased to issue a stay of execution of the decree of the Co-operative Tribunal dated 23rd June, 2009, pending the inter partes hearing of this application; and*
- (b) That this honourable Court be pleased to extend the 30 day period within which an appeal is allowed from the decision of the Co-operative Tribunal dated 19th January, 2010.*

The application is brought by a Notice of Motion dated 12th March, 2010, pursuant to **Section 81 of the Co-operative Societies Act**, and **Orders XLI Rule 4 (1)** and **L Rule 1** of the **Civil Procedure Rules**.

The application is supported by the annexed affidavit of George Otieno Abongo whose case, in a nutshell, is that the Respondent filed a suit against him for the recovery of the sum of Kshs.3,299,994.20 advanced to the Applicant by way of loans. On the date of the hearing of the suit, neither the Applicant nor his Advocate attended Court. The Tribunal thereupon entered judgment and issued a decree against the Applicant for the entire sum claimed. The Applicant followed this by filing an application before the Tribunal for stay of execution and the setting aside of the decree. The Tribunal was not satisfied that the Plaintiff had demonstrated that he had a good defence to the action as he had in fact admitted part of the debt and did not avail himself the opportunity to file an amended defence to the amended plaint despite being accorded an opportunity to do so. As a result, his application for stay was also dismissed. It is as a result of this dismissal that the Applicant has come to this Court seeking leave for an extension of time to file an appeal.

At the hearing of the application Mr. Kabugu appeared for the Applicant while Mr. Anyoka appeared for the Respondent. After considering the pleadings and the submissions of Counsel, I find that the main issue for determination is whether the Applicant has satisfied the conditions for stay of execution pending appeal.

Order XLI Rule 4 (1) of the **Civil Procedure Rules** allows this Court to grant stay of execution pending appeal for sufficient cause. I note from the defence filed before the Tribunal that the Applicant acknowledged owing part of the claim made by the Respondent and also expressed his willingness to repay the same if and when his conditions improved financially. But when the plaint was thereafter amended to include some additional loans, thereby revising upwards the amount claimed, the Applicant did not amend his defence to plead to the new figures although he was granted an opportunity to do so.

The exercise of the discretion conferred on the Court by subrule (1) is subject to **Rule 4 (2)** of the aforesaid **Order** which states as follows -

“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; and*
- (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.”*

I note from the pleadings that all the Applicant states regarding his suffering of any substantial loss is that if execution issues, he “will suffer irreparable loss as he is currently unemployed and has no stable

source of income". Beyond that, he does not show how that will come about. The Applicant has, therefore, failed to satisfy the Court that substantial loss will befall him unless execution is stayed. Furthermore, no security as the Court may order for the due performance of such decree or order as may be binding on him has been offered by the Applicant. Arising from the Applicant's failure to comply with these conditions, I find that he has not satisfied the requirements for the grant of stay pending appeal.

I accordingly make the following orders -

(i) The period within which to file an appeal in this matter be and is hereby extended for a period of 30 days from today.

(ii) For the avoidance of any doubt, the Court declines to grant stay of execution.

(iii) Costs of this application to abide the outcome of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 21st day of May, 2010.

L. NJAGI
JUDGE