

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Miscellaneous Application 36 of 2010

GEORGE NDIRITU.....1ST APPLICANT
GICHECHA RIBUTHI.....2ND APPLICANT
AMOS KARIMI.....3RD APPLICANT
JOHN GITHINJI.....4TH APPLICANT
FRANCIS JAMES NDEGWA.....5TH APPLICANT
SHADRACK G. KARINGA.....6TH APPLICANT
JOSEPH MWATHI.....7TH APPLICANT
JOHN NDEGWA GITONGA.....8TH APPLICANT
DEDAN KIAI.....9TH APPLICANT

VERSUS

TETU DAIRY FARMERS CO-OP. SOCIETY LTD.....RESPONDENT

RULING

Pursuant to the provisions of *Order XLI rule 4* of the Civil Procedure Rules, the applicants herein, took out a Notice of Motion in which they sought for an order of stay of execution of the orders of 23rd February 2010 in the Co-operative Tribunal Case Nos. 205 of 2006, 206 of 2006, 207 of 2006, 208 of 2006, 209 of 2006, 210 of 2006, 211 of 2006, 213 of 2006 and 214 of 2006 (Tetu Dairy Co-operative Ltd.) =vs= George Ndiritu, Gichehu Ributhi, Amos Karimi, John Githinji, Francis James Ndegwa, Shadrack G. Karinga, Joseph Mwathi, John Ndegwa Gitonga and Dedan Kiai. The motion is supported by the affidavit of Francis James Ndegwa sworn on 9th March 2010. Tetu Dairy Farmers Co-operative society Ltd, the Respondent herein, opposed the Motion by filing the Replying Affidavit of its Chairman, Francis Kamweru Wamugunda sworn on 6th April 2010.

When the motion came up for interpartes hearing, the Respondent and its counsel failed to turn up hence the same proceeded for hearing exparte. I am aware this court is enjoined to consider the contents of the Replying Affidavit notwithstanding the absence of the Respondent. It is the submission of J. Macharia, learned advocate for the Applicants, that unless the order of stay is given, the Applicants are likely to be crippled financially because the monthly installments they had been ordered to pay is beyond their individual capacities to meet. The Applicants are also of the view that the intended appeal has high chances of success in that they will be able to show that the decisions were decided on the wrong premises and that summary judgment was entered whereas there were triable issues.

The Respondent opposed the Motion on the following grounds: First, it is argued that the Motion is fatally defective in that there was no authority permitting the proceedings filed on behalf of other persons. Secondly, that the Motion lacks merit. Thirdly, that the Motion is *resjudicata* since the applicant had filed a similar application before the Co-operative Tribunal.

I have considered the grounds set out on the face of the Motion and the facts deponed in the affidavit filed for and against the Motion. The Motion is premised on the provisions of *Order XLI rule 4* of the Civil Procedure Rules. In such applications an applicant must show the substantial loss it would suffer if the order is denied. The application for stay must be filed without an unreasonable delay. The provisions for security for the due performance of the decree must be considered. In this case the Applicants aver that the monthly installments imposed would cripple them. It is on record that the Applicants were ordered to make payments by installments as follows:

“CASE NO.

	JUDGMENT DEBTOR	A M O U N T S			PROPOSED	IMPOSED
				APPROXIMATE		
205/ 2006	George Ndiritu	330,000	5,000	18,000		
206/20 06	Gicheha Ributhi	1,300,000	5,000	75,000		
207/20 06	Amos Karimi	300,000	5,000	18,000		
208/20 06	John Githinji	330,000	7,000	18,000		
209/20 06	Francis James Ndegwa	1,300,000	5,000	75,000		
210/20 06	Shadrack G. Karanja	1,300,000	10,000	75,000		
211/20 06	<i>No proposals made</i>					
213/20 06	John Ndegwa Gitonga	1,300,000	5,000	75,000		
214/20 06	Dedan Kiai	330,000	8,000	18,000”		

The Co-operative Tribunal made the aforesaid orders upon being beseeched by the Applicants. In fact they moved the Tribunal to exercise

its discretion to be allowed to liquidate the decretal sum by monthly installments. It would appear if the order of stay is not given, the Applicants may be inconvenienced in meeting monthly installments. In my view that itself cannot amount to a substantial loss. I am not convinced that the Applicants have shown the substantial loss they would suffer. It is also alleged that the Motion is *resjudicata*. This averment is contained in paragraph 8 of the Replying Affidavit of Francis Kamweru Wamugunda. This averment has not been controverted despite the fact that the affidavit was served upon the Applicants' counsel. I have perused the ruling of the Hon. Mr. Justice Makhandia delivered on 29th January 2009 and annexed to the affidavit of Francis Kamweru Wamugunda and it is obvious that the Applicants made a similar application which was heard and dismissed by the Hon. Mr. Justice Makhandia. I am convinced this Motion is *resjudicata*. The applicants have simply abused the Court process.

In the end I see no merit in this Motion. The same is ordered dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 7th May day of 2010.

J. K. SERGON

JUDGE