



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 262 of 2009

ROSEMARY MUTHONI NJUGUNA.....APPELLANT

VERSUS

KAMUTHI FARMERS CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

RULING

1. There are two applications which are for ruling before me. Both applications are brought by way of Notice of Motion, each dated 26th May, 2009. The first application is brought under Section 81(1) of the Cooperative Societies Act No. 12 of 1997 and Order XLIX Rule 5, order L Rule 1 of the Civil Procedure Rules section 3 & 3A of the Civil Procedure Act. It is seeking an order for extension of time within which to file an appeal against the order/decree of the Co-operative Tribunal delivered on 16th October, 2008 in Tribunal Case No. 43 of 2007. The applicant, Rosemary Muthoni Njuguna also seeks to have the memorandum of appeal already filed deemed as properly filed.
2. In the affidavit sworn by the applicant in support of the first application, the applicant explains that the delay was caused by her advocate who wrongly filed a notice of appeal in the Tribunal instead of filing a memorandum of appeal in this Court. The applicant prays that he should not be punished for the mistake of his counsel.
3. The second application is one for an order of stay of execution of the order and decree of the Tribunal delivered on 16th October, 2008, pending the hearing and determination of the intended appeal. It is also supported by an affidavit sworn by the applicant in which she depones that her household goods were proclaimed on 20th May 2009 by Kingpin General Merchants in execution of the decree issued by the Tribunal. The applicant swears that unless the orders of stay of execution are issued her appeal which has high chances of success will be rendered nugatory. Consequently she will suffer substantial loss.
4. The respondent Kamuthi Farmers Co-operative Society Ltd. has responded to the application through an affidavit sworn by Bernard Kungu Maina the Chairman of the Society. The deponent maintains that the application is incompetent, defective and an abuse of the process of the Court. It is further deponed that the application is nothing other than a delaying tactic to delay the conclusion of the matter.
5. In support of the application, Mr. Ombati who appeared for the applicant submitted that the applicant has explained the delay and that she should not therefore be penalized for the mistake of his counsel. In this regard Mr. Ombati relied on *Kiarie v. Njoroge [1986] KLR 402*. He maintained that the applicant's appeal was not frivolous but raised serious issues of law and facts. Counsel also cited the case of *African Airline International Ltd. vs. Eastern and Southern African Trade and Development Bank*. He maintained that no prejudice will be caused to the respondent if the Court exercise its discretion to extend time in favour of the applicant. With regard to the application for stay of execution Mr. Ombati submitted that the applicant was ready willing to deposit the sum of Kshs.580,000/= in Court as security. He cited the case of *New Stanely Hotel Ltd. v. Arcade Tobacconists Ltd [1986] KLR 757: Tropical Commodities Supplies Ltd & Others v. International Credit Bank Ltd (in liquidation) [2004] 2 EALR 331*.
6. Mr. Gitonga who appeared for the respondent argued that the two applications were both incompetent as there was no competent appeal before the Court. He further maintained that the two applications wren filed in contravention of Order III Rule 9A of the Civil Procedure Rules, as the applicant was represented in the Tribunal by the firm of Munene

and Co. Advocates and no leave of the Court was obtained for Ombati and Company to come on record for the respondent. It was therefore contended that the pleadings before the Court were defective. Mr. Gitonga maintained that the respondent was suffering prejudice as it has been waiting for more than two years to reap the benefits of its successful litigation. He further contended that there was not evidence that the respondent will not be able to reconstitute the decretal sum if required to.

7. I do note that following an order for extension of time for the applicant to deposit the decretal sum in court the decretal sum was deposited on the 26th of June, 2009. I have carefully considered the application, the affidavit in support and in reply, as well as annexures thereto. The applicant has clearly explained the delay in filing the appeal in this Court. That delay was a result of a mistake made by the applicant's counsel. It will not be fair nor just to penalize the applicant for the mistake of counsel. In the circumstances I do allow the application for extension of time and deem the memorandum of appeal filed on 26th May, 2009 to be properly filed.

8. Further, the applicant having deposited the decretal sum in this Court as security I find that it is in the interest of justice that an order for stay of execution do issue pending appeal subject to the deposited sum being deposited into an interest earning account in the joint names of the parties' advocates. With regard to the submissions that the appeal before this Court is incompetent having been filed in contravention of Order III Rule 9A of the Civil Procedure Rules the respondent is at liberty to bring an appropriate application to enable the parties fully argue the issue.

9. The upshot of the above is that both applications are hereby granted on the following terms:

- (i) That the memorandum of appeal filed on 26th May, 2009 is hereby deemed as properly filed.
- (ii) That the sum of Kshs.590,000/= deposited in Court by the applicant on 26th June, 2009 shall be released to the parties' counsel for the amount to be deposited into an interest earning account in the joint names of the parties counsel within 10 days from the date of release and the said sum to remain in the deposit account until further orders of the Court.
- (iii) The costs of both applications are hereby awarded to the respondent.

Orders accordingly.

Dated and delivered at Nairobi this 14th day of July, 2009.

H.M. OKWENGU

JUDGE

In the presence of:

K. Ombati for the appellant/applicant

Advocate for the respondent, absent