



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

**Civil Appeal 199 of 2009**

**GODFREY KINUU MAINGI.....1<sup>ST</sup> APPELLANT  
JUSTUS MURUNGI.....2<sup>ND</sup> APPELLANT  
JOSEPH NTURIBI MWITHIMBU.....3<sup>RD</sup> APPELLANT  
HARUN MBURUGU.....4<sup>TH</sup> APPELLANT  
ANDREW GIKUNDA.....5<sup>TH</sup> APPELLANT**

**VERSUS**

**NTHIMBIRI FARMERS CO-OPERATIVE SOCIETY..... RESPONDENT**

**RULING**

1. Godfrey Kinuu Maingi, Justus Murungi, Joseph Nturibi Mwithimbu, Harun Mburugu and Andrew Gikunda, hereinafter referred to as the applicants are aggrieved by orders made against them by the Co-operative Tribunal on 2<sup>nd</sup> April, 2009 in Co-operative Tribunal Case No. 230 of 2006 as consolidated with Co-operative Tribunal Case No. 231, 232, 233 and 234 of 2006. They have lodged an appeal against the said orders and now seek *inter alia* an order of stay of execution of the judgment/award pending the hearing and determination of their appeal.
2. The appellants contend that the respondent has already been paid by the applicants Kshs.262,345/= and Kshs.541,568/= thereby making a total of Kshs.803,913/= as costs for resisting the enforcement of the surcharge of over Kshs.5,000,000/= which is the subject of the judgment against them. The applicants maintained that unless the order of stay of execution is granted, they will suffer substantial loss as execution will be levied against them and their respective land parcels upon which they rely on to support their families may be sold in execution of the decree. The application is also supported by an affidavit sworn by Justus Murungi who is one of the applicants.
3. Nthambiri Farmers Co-operative Society, who is the respondent to the appeal and the application, objects to the application through a replying affidavit sworn by Justus K. Nyiruu who is the chairman of the respondent. He depones that following an inquiry which was carried out in accordance with the respondent's by-laws, the applicants who were all former officials of the Society, and one Henry Kithia a former committee member of the respondent, were recommended for surcharge of amounts totaling a sum of Kshs.5,075,224.50. The applicants never appealed to the Co-operative Tribunal against the surcharge orders which were served upon them by the Commissioner for Co-operative Development.
4. The amounts were therefore recoverable as a civil debt against the applicants in a summary manner as provided under section 75(1) of the Co-operative Societies Act No. 12 of 1997 as amended by section 34 of the Co-operative Societies (Amendments) Act No. 2 of 2004. The respondent having applied for summary judgment against the applicants, the Tribunal entered summary judgment on 2<sup>nd</sup> April, 2009. The respondent therefore maintained that the applicants' application is misguided and has no merit and that the sum of Kshs.803,913/= which is alleged to have been paid, was in fact, payment in respect of costs for High Court Misc. No. 633 of 2004 and the Co-operative Case No. 90 of 2006.
5. The respondent maintained that the applicants were vexatious litigants who were using the Court to avoid paying misappropriated funds of the respondent. The respondent further dismissed the applicants' allegations that they will suffer substantial loss maintaining that the respondent Society was able to refund the decretal sum should that become necessary.
6. In support of the application, Mr. Wambugu who appeared for the applicants relied on the following cases:

§ *HCCC (Milimani) 1830 of 2001 Gathenge Engineers vs. Postal Corporation of Kenya*

§ *HCCC No. 786 of 2003 Le Belle International Limited & Another vs. Fedelity Commercial Bank Ltd. and Another*

§ *Oraro & Rachier Advocates vs. Co-operative Bank*

§ *HCCC 922 of 2000 Southern Banking Corporation Limited vs. Atlantic Products Limited*  
§ *Civil Appeal No. 193 of 2003, The Standard Limited vs. G.L Kagia*

7. Mr. Arithi who appeared for the respondent submitted that the application was premature as costs had not been assessed and no execution could therefore take place. Mr. Arithi further submitted that there were prohibitory orders in respect of Tribunal Case No. 90 of 2006 and that an application made before the Tribunal by the applicants for an order of stay of execution was dismissed on 23<sup>rd</sup> July, 2009.
8. It was maintained that the applicants will not suffer any substantial loss if the orders sought are not granted. Counsel submitted that the authorities cited by applicants counsel do not support the applicants' position, as the applicants have not satisfied the principles laid down for granting an application for stay of execution.
9. I have given due considerations to this application. I have also considered the authorities which were relied upon. The principles upon which an application for stay of execution pending appeal can be granted are clear. They are provided under Order XLI Rule 4(2) of the Civil Procedure Rules 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 appellant.**

10. In this case, the application was filed on 27<sup>th</sup> July, 2009. It is however evident from the replying affidavit that the applicants had filed an application in the Tribunal, which application was only dismissed on 22<sup>nd</sup> July, 2009. Therefore the applicants having brought the application just five days after dismissal of their application for stay of execution in the Tribunal, the application was brought without undue delay. Secondly, the applicants provided interim security as was directed by the Court.

11. With regard to the issue of substantial loss, it is evident that the decree is for a total sum of over Kshs.5,000,000/=. This is obviously a large amount for the applicants who are all individuals. Although the respondent may be in a position to refund the amount should that become necessary, it would be oppressive to the applicants to require them to pay this money before the appeal is heard. Such an order may be tantamount to countermanding the applicants' right of appeal. In the circumstances I think it is fair and just that an order of stay of execution pending appeal, do issue, so as to give the applicants a chance to exhaust their rights.

12. Nevertheless this Court has an obligation to protect the interests of both parties. Therefore, in order to protect the interest of the respondent, and so that the applicants can demonstrate that they are not just vexatious litigants, it is necessary to grant the order of stay of execution on terms. Accordingly, I make an order for stay of execution of the judgment of the Tribunal made on 2<sup>nd</sup> April, 2009 in the Co-operative Tribunal Cases Nos. 230 to 234 of 2006, pending appeal on the following conditions:

- (i) That the applicants shall each pay a further sum of Kshs.100,000/=, and that the total sum of Kshs.500,000/= together with the amount of Kshs.500,000/= which was deposited in Court pursuant to the orders made on 27<sup>th</sup> July, 2009, shall be deposited into an interest earning account in the joint names of the parties' advocates with a reputable financial institution within 45 days from the date hereof.
- (ii) That the amount of Kshs.1,000,000/= so deposited, shall remain as security pending the hearing of the appeal.
- (iii) The applicants shall file and serve a record of appeal within 90 days from the date hereof.
- (iv) The applicants shall take all necessary action to facilitate the speedy disposal of this appeal. In the event that the appeal is not disposed off within 12 months from the date hereof, the order for stay of execution pending appeal shall stand discharged unless otherwise extended by the court.
- (v) Costs of this application shall be costs in the appeal.

Those shall be the orders of this Court.

Dated and delivered this 1<sup>st</sup> day of December, 2009

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Ms. Ochanda holding brief for Gacheru for the appellant

Advocate for the respondent, absent

Eric, court clerk