



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL 332 OF 2008**

**GEOFREY MAINGI KINUU & 4 OTHERS.....APPELLANT**

**VERSUS**

**NTHIBIRI FARMERS COOPERATIVE SOCIETY LTD.....RESPONDENT**

**R U L I N G**

The appellant/applicants are defendants in the Cooperative Tribunal Cases Nos 230 – 234 of 2004. In a ruling delivered by the Cooperative Tribunal on 19<sup>th</sup> June, 2008, the Tribunal rejected applications made by the applicants for leave to amend their defences to the respondent’s claim against them in Cooperative Tribunal Cases Nos 230 to 234 of 2004. Being dissatisfied the applicants have appealed against the said ruling. The applicants have now come to this court under Order XLI Rule 4 and Order L Rule 1 – 4 of the Civil Procedure Rules seeking orders for stay of further proceedings in Cooperative Tribunal Cases Nos 230 – 234 pending the hearing and final determination of the appeals. It is the applicants’ contention that refusal of leave to amend their defences has compromised their constitutional rights to a fair hearing. The applicants further contend that the cooperative Tribunal has already prejudged the suit by holding in its ruling that the applicants have no cases to put before it. The applicants therefore maintain that unless further proceedings are stayed, the applicants will suffer irreparable loss as their appeals will be rendered nugatory. The applicants’ apprehension is further strengthened by the fact the respondent has already brought an application for summary judgment.

The application is opposed by the respondent. In a lengthy replying affidavit sworn by Justus K. Nyiruu who is the current chairman of the respondent, the respondent has deponed to facts leading to the filing of the suit against the applicant in the Cooperative Tribunal, and the dismissal of the applicants’ application for amendment of the defences. It is deponed that the respondent’s suit is an enforcement claim, filed pursuant to the provisions of the Cooperatives Act, and that the applicants having failed to challenge the surcharge orders served upon them by the Commissioner of Cooperatives, the order amounts to a civil debt recoverable summarily under Section 75(1) of the Cooperatives Act. It is contended that the application is misconceived and an abuse of the court process, as the applicants are not properly before the court and cannot therefore move this court under the provisions of Order XLI of the Civil Procedure Rules. It is further contended that the application before the court is only intended to delay the finalization of this matter as the proceedings which are sought to be stayed have in fact almost been concluded parties having filed submissions.

I have carefully considered the application before me. Although parties have delved substantially into issues bordering on the merit of the appeal which is pending before this court, at this stage what this court has to deal with is simply whether the proceedings which are now ongoing in the Cooperatives Tribunal, ought to be stayed pending the determination of the appeal. In determining this issue, what is relevant is whether the applicants have satisfied this court that there is sufficient cause to justify the granting of the orders sought. The applicants have alleged that their constitutional right to a fair hearing has been contravened by the refusal of the Tribunal to allow the applicants to amend their defences. However, the applicants have not invoked this court’s supervisory jurisdiction under Section 67 or 84 of the Constitution of Kenya to enable this court deal with such contravention. As far as this court is concerned, the appeal now pending before this court concerns a simple ruling on an application to amend a defence, which application the tribunal had powers to either grant or reject. It will be for the Court after the hearing of the appeal to determine whether the powers were exercised judiciously.

The proceedings currently before the Tribunal are summary proceedings relating to the enforcement of a surcharge order. If the proceedings are not stayed the Tribunal will conclude the matter and orders may be made against the applicant. This does not however mean that the applicants are without remedy as there is a further right of appeal against the Tribunal's judgment. It is not disputed that the proceedings in the Tribunal are almost finalized.

For all the aforesaid reasons, I find no just cause for this court to stay the proceedings before the Tribunal. Accordingly, the application is dismissed.

**Dated and delivered this 10<sup>th</sup> day of November, 2008.**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Gacheru for the applicant

Advocate for the respondent absent