REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 596 OF 2002

(From the original Co -operative Tribunal Suit No. 54 of 2002 at Nairobi)

DAVID OTIENO OWIYO……APPLICANT

VERSUS

BANDS SACCO SOCIETY LIMITED……..RESPONDENT

RULING

This application for stay of execution is dated 27th and filed in court on 28th January 2003. It is intended to stay the execution of the Co-operative Tribunal's award made on 20th day of September, 2002 till the hearing and determination of the appeal filed herein on 18th October 2002.

The application is based on the grounds set out on the body thereof and the supporting affidavit deponed to by the applicant and filed herein together with the application.

The grounds on the body of the application include that the applicant will suffer irreparable, considerable and substantial loss if the tribunal award is executed; that the applicant was condemned unheard as the Tribunal proceeded to give an award without hearing the applicant; that he was condemned unheard yet his absence from the hearing was caused by an honest and genuine error, and/or mistake and execution of award before the final determination of this appeal would create a grave injustice and render the appeal nugatory; that the applicant is ready and willing to abide by any conditions as regards security that this court may reasonably grant; and that despite good reason and justifiable excuse presented to the Tribunal by the applicant's advocate the same was declined and overruled by the Tribunal which thereafter proceeded to hear the case. The supporting affidavit deponed that the applicant had mistaken the hearing date of the case, September 13th 2002 as being scheduled on 18th September 2002, and that when counsel applied for adjournment because of the applicants absence, the Tribunal refused to grant the adjournment and proceeded to hear the case exparte.

The affidavit deponed further that without the applicant having been given an opportunity to be heard, the execution of the award of Kshs.734,455/76 made against him will result in manifest injustice since he had lodged an appeal.

That he must seek stay of execution because the respondent had commenced the execution process by taking out notice to show cause why the applicant should not be committed to civil jail.

That the respondent will not in any way be prejudiced by the court granting the order of stay of execution.

Then the affidavit deponed in paragraphs 9,10, and 11 to matters included in the grounds on the body of

the application.

The application was opposed by the replying affidavit deponed to by the treasurer of the respondent and also by grounds of opposition filed by counsel for the respondent both filed in court on 7th February 2003.

The grounds of opposition state that the application is misconceived in law and mischievous; it has not been brought without unreasonable delay; the pending appeal would not be rendered nugatory if the orders sought are not granted, that the applicant will not suffer if stay is not granted; that no security has been offered for the due satisfaction of the award/decree should the appeal fail, that the pending appeal is trivial, frivolous and without any chances of success and was merely intended to delay or obstruct the respondent from recovering members funds rightfully due and owing from the appellant, that it was frivolous, vexatious and devoid of any merit whatsoever, that it was not filed in good faith, that the applicant had not come to court with clean hands, that no sufficient reason had been shown to warrant the giving of the orders sought and that the application was otherwise an abuse of the process of court.

In the replying affidavit the respondent's treasurer sought to show how the applicant had sought an adjournment of the case on 5th July and 23rd August 2002 and was allowed but that when his counsel sought another adjournment on 13th September, 2002 due to the non attendance of the applicant and the court declined to grant it, his said counsel walked out of the court room and did not return.

That this is why the case proceeded to hearing in the absence of the applicant and his counsel and awarded the respondent Kshs.580,536/83 together with costs and interest.

That the applicant was in court when the award was read on 20th September 2002 and that he sought indulgence of 14 days to enable him pay the amount or make reasonable proposals to pay the decretal sum.

That the applicant made no such proposals and this is why the respondent was constrained to move the tribunal for by way of notice to show cause on 5th December 2002 which application was fixed for hearing on 15.1.2003 which date the applicant applied for an adjournment of the application to show cause to enable him apply for stay of execution.

That though the application was adjourned to 30.1.2003, the applicant did not make the application for stay until 28.1.2003.

The replying affidavit deponed further that on 30.1.2003 the applicant again applied for adjournment of the application for notice to show cause which application was granted and the matter was stood over to 17/2/2003.

That the applicant had previously admitted owing the respondent the amount in dispute in the exhibit marked KA 2.

That the amount in dispute is members funds obtained by the applicant fraudulently and in total abuse of office when he was Chairman of the respondent between 1991-1997.

That though the applicant filled 6 loan application forms, he caused 17 cheques to be paid to him.

That on 15.1.2003 the appellant had offered to pay the decretal amount without interest and that if the respondent insisted on interest being paid then he would prosecute the appeal.

According to the replying affidavit the applicant was accorded at least 3 chances to be heard at the Tribunal but that he did not choose to avail himself; that the applicant has not come to this court with clean hands and/or that this application is not made in good faith.

Further that the applicant did not file this application for stay without unreasonable delay – hence the

application was frivolous, vexatious and mischievous and that it should be refused. But that if the court decided to grant a conditional stay, then the applicant should be ordered to deposit the entire decretal sum together with costs and interest in a joint interest earning account in the names of the parties' advocates.

Advocates for the parties appeared in this court on 12th February 2003 to either present or oppose the application.

Counsel for the appellant repeated that his client was not given a chance to be heard by the Tribunal and to challenge the claim.

That if stay was refused the applicant would suffer substantial loss.

That the applicant was ready to abide by any conditions and reasonable terms.

According to counsel, the issue was how much was owing because the applicant had issued some cheques towards payment of the loan.

That parties need to sit down and work out accounts and that it would be unjust if execution were to proceed in face of such facts.

That since the Tribunal order was made there have been negotiations going on and that is why there has been a delay and that this was a case where the applicant deserves the discretion of this court to make an order of stay of execution in his favour.

He prayed that the application be granted with costs.

Counsel for the respondent opposed the application and said the tribunal case proceeded exparte because the applicant did not turn up and that if he had any good reason for not turning up for the hearing of the case he should have applied to the Tribunal to have the order set aside which he never did.

According to counsel the applicant was given a reasonable opportunity to be heard.

That the applicant does not indicate how much money he owes the respondent and this shows lack of good faith or his part.

Counsel then went on to give numbers of counterfoil cheques, the applicant drew in the names of fictitious people and paid the money to herself.

Counsel submitted that the applicant had not satisfied the conditions of Order XLI Rule 4(2) of the Civil Procedure Rules and had not specifically demonstrated as to what substantial loss he would suffer if the order of stay was refused or that if the appeal succeeds the decretal sum will not be refunded. Counsel prayed for the dismissal of the application with costs.

The question whether or not the applicant was given ample opportunity to be heard in the Tribunal is neither here nor there but it is worth noting that the said Tribunal had adjourned this matter twice previously at the request of the same appellant and that though on 13th September, 2002 his counsel was present, he walked out of the court after the adjournment was refused never to return. That the case then proceeded exparte.

Or whatever reason caused the appellant not to attend the Tribunal on 13th September 2002 is not for this court to determine as this would only arise if he made an application there for setting aside the exparte judgment.

But let me not look as if I am hearing the appeal. The application before me is for an order of stay of execution and the conditions required to be satisfied before such anorder can be granted are well settled; namely:

(1) There is a prima facie appeal with overwhelming chances of success

(2) That the appeal, if successful would be rendered nugatory if an order of stay of execution is not made.

(3) That if the order of stay of execution is not granted and execution proceeds, the respondent would not be able to repay the sum involved, if the appeal succeeds. Here the applicant should demonstrate the inability of the respondent to repay.

(4) That the appellant shall suffer substantial loss if the order of stay is not granted.

In the case in which the appeal subject to this application has arisen, the decree in issue is a money one and as Platt Ag. J.A , as he was then put it in ***Kenya Shell Limited Vs Benjamen [1982 -88]1 KAR 1018.***

"It is not normal in money decrees for the appeal to be rendered nugatory if payment is made".

Here the appellant does not deny owing the respondent the money, but as his counsel put it, it involves the question of taking accounts and arriving at what figure he owes. He does not give a hint as to how much he himself believes he owes the respondent.

But there are cheques which have been exhibited to the supporting affidavit showing that the appellant obtained at least a sum of Kshs123,000/= or so using dubious means and if he wanted to show any good faith, he would, at least have tendered this sum to the respondent through his replying affidavit if this court was to take him seriously.

He says nothing about this at all. Moreover, the respondent being an institution dealing in money belonging to its members, the applicant cannot convince this court that he will suffer substantial loss or that the appeal will be rendered nugatory if successful, if the order of stay is not made when there are all indications that the respondent is an institution capable of refunding any money due to the said applicant.

This application has no merit and it is dismissed with costs.

Delivered this 19th day of February 2003.

D.K.S. AGANYANYA

JUDGE