



REPUBLIC OF KENYA



**Kenya Qatar Diaspora Sacco Society Limited v Wambura (Civil Appeal
E815 of 2021) [2025] KEHC 4852 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4852 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E815 OF 2021**

TW OUYA, J

APRIL 24, 2025

BETWEEN

KENYA QATAR DIASPORA SACCO SOCIETY LIMITED APPELLANT

AND

JOSEPH GATHONGO WAMBURA RESPONDENT

*(Being an Appeal from the Ruling of the Cooperative Tribunal delivered
on 19th November 2021 by Hon. J Mwatsama, Deputy Chairperson)*

RULING

1. Before the court is an application dated 10th December 2021 seeking for orders that:
 - i. Spent
 - ii. That 30 days stay of execution granted by the cooperatives Tribunal be extended pending determination of this application
 - iii. That a ruling cannot obtain where there is no application.
 - iv. That a judgement cannot obtain where there is no full hearing, save in cases of summary/default judgement or judgement on admission.
 - v. That costs be in cause.
2. The application is premised on the grounds stated on the face of motion and on the depositions made in the supporting affidavit, sworn on the 10th December, 2021, by Grace Njoki Maruga, the applicant's Vice-ChairLady. In brief, Ms Maruga averred that the respondent wrote an email to the Applicant to the effect that "I would like to inform you that I have arrived at a conclusion about my resignation as a member." That the said email did not amount to a notice of withdrawal and that the respondent is still a member of the Applicant Society. That the Tribunal construed the respondent's expression to mean



a resignation which it was not. He invites the court to interrogate both the copy of the Respondent's letter alongside the tribunal ruling both of which are annexed in this application. She also avers that the Tribunal erred by failing to consider the applicant's by-laws which were filed yet the trial court held that the same were not filed. She urges the court to find that the vide ruling dated 19th November 2021 was irregular and should be struck out since there was no application before the Tribunal.

3. Vide a Replying and supplementary affidavit sworn by the respondent on 6th January and 12th March 2021 respectively, the respondent avers that his email dated 1st August 2020 was a clear communication of his intention to leave the applicant Society. That the same received and acknowledged by the applicant on the same date indicating inter alia that: "kindly note that resignation takes 60 days as stipulated by the law. we will then send you the acceptance form indicating your dues thereafter we will credit your dues to the desired account."
4. The respondent averred further that the impugned Ruling was proper as the Applicant in its defence admitted to owe the respondent Kshs. 196,000 instead of Kshs. 216,000 and the court gave directions that parties submit only on the disputed amount. The respondent contends that the application lacks merit and is meant to preclude the respondent from his right of enjoying the fruits of his judgement.
5. This application was canvassed by way of written submissions by counsel for both parties. The applicant raised objection to the respondent's replying affidavit arguing that the same should have been struck out and expunged by the trial court. He gives illustrations such as: that the replying Affidavit was sworn on 6th January, 2021 yet they filed the application on 10th December 2021. The applicant prays that the instant application be allowed unopposed.
6. The Applicants also point out that they have a ruling dated 19th November 2011 disposing the case completely yet there is no application for striking out the Appellant's defence and entering summary judgement. They submit that the tribunal erred in law by rendering a ruling disposing off the claim yet there is no application for striking out the appellant's defence or entering summary judgement.
7. Thirdly, the applicants deny that matter in the lower court went for full trial and that if so, the Tribunal erred in law in proceeding to determine the matter fully and finally without any hearing being conducted. They submit that the tribunal the Tribunal acted ultra vires its own rules found under Rule 16 of the Co-operative Tribunal (Practice and Procedure) Rules, 2009 which state:

"At the hearing, the evidence shall be in narrative form but the Tribunal shall be at liberty to take down questions and answers verbatim."
8. They argued further that the respondent's allegation that he had left the defendant was not supported by evidence and that instead, the tribunal shifted the burden of proving how one leaves on the appellant, despite the fact that it had not shifted to them after being discharged by the respondent contrary to the provisions of Section 107 of the *Evidence Act*.
9. The applicants contend that the tribunal erred in fact in failing to acknowledge and recognize that the appellants had produced evidence of the Respondent's failure to follow the contracted procedure of leaving them. That tribunal failed to take into account their evidence that the respondent did not comply with the correct procedure of 60 days' notice of withdrawal as per their by-laws which they filed in court. That the tribunal instead relied on unspecific provisions of By-Laws which they did not produce.
10. The Respondent opposed the application and submits that he withdrew his membership from the appellant as per their by-laws through an email dated 29th June 2019 sent to the appellant which was acknowledged on the same date. He submits that the applicant's acknowledgement email could only



mean acceptance of the withdrawal and that the respondent was required to wait for 60 days for the savings to be refunded which was not done even after the filing of the claim.

11. The respondent submits that the appellant failed to comply with the court orders issued on 4th February 2021 requiring him to file his statement of accounts and by-laws and serve the same to the Respondent despite the matter being mentioned on subsequent dates to confirm compliance. The respondent avers that the trial court ruling was proper since the appellant in their defence and in court admitted to owe the respondent Kshs. 196,000/= instead of Kshs. 216,000/= and the court gave directions that the parties submit on the disputed amount and the appellant did not raise any objection as to that directive.
12. The Respondent urges the court to find that the appellant's application lacks merit and should not be admitted since no sufficient cause been shown by the applicant to warrant the granting of stay of execution of the ruling delivered on 19th November 2021. That the orders sought are prejudicial to the respondent and that they seemingly preclude the rights of the respondent who should enjoy fruits of the judgement herein and that the application is misconceived, an afterthought, bad in law and an abuse of the court process and should be struck out with costs to the respondent.

Analysis

13. This court has taken into consideration the entire application together with the parties' submissions through their counsel. The issue for determination is whether the application for stay has merit and whether or not it should be allowed. The conditions to be fulfilled by an applicant seeking stay of execution orders pending an appeal, have been provided for under Order 42 rule 6 (2) as follows:

“No order for stay of execution shall be made under sub rule (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 applicant.

14. This court will therefore address the issue as to whether the instant application meets the required threshold. The applicant has not demonstrated through its submissions or otherwise that they are likely to suffer substantial loss if the stay orders are not granted or that the respondent is unlikely to make good a refund in the event that the intended appeal succeeds. Secondly, the applicant has not made any deposit or a proposal of deposit for security for costs in line with the statutory requirements. I have no doubt however that this application was filed within reasonable time.
15. This court takes into consideration the preliminary objection raised by the applicant that the respondent's replying affidavit was sworn on 6th January 2021 and should therefore be struck out and the application granted unopposed since the replying affidavit could not have been sworn before the application was filed. However, this court is keen to note that the Applicant filed a supplementary affidavit sworn on 12th March 2021 in response to the subject replying affidavit. This court can only conclude that this was a genuine error by both parties and that the intended dates for the Respondent's replying affidavit and the Applicant's supplementary affidavit are in 2022 considering that the content is relevant to the subject matter both in material and in fact.
16. The applicant's submission that the tribunal the Tribunal acted ultra vires its own rules found under Rule 16 of the Co-operative Tribunal (Practice and Procedure) Rules, 2009 which provides that



- hearing is in narrative is misplaced since it is clear from the ruling that this was case of refund of deposits and that the parties proceeded by way of written submissions after documentary evidence was adduced.
17. There is no evidence of ruling dated 19th November 2011 disposing the case completely as alluded to by the applicant and if it existed, the same should have been annexed applicant by way of affidavit. In the absence thereof this court will not give the issue much weight.
 18. In the case of *Butt v Rent Restriction Tribunal* [1979] eKLR, the court considers that the circumstances of each case should be taken into account before granting an order for stay of execution and emphasizes that the overarching principle guiding the court in deciding whether to grant stay is whether such an order would serve the ends of justice. This court notes that the case in point revolves around the refund of deposits to an existing member, the respondent herein. The contention revolved around the issue of 60-days' notice. Partial judgement was entered in favor of the respondent as against the Applicant on the basis that the applicant admitted Kshs. 196, 000 and that the same was not disputed. The disputed sum of Kshs. 20, 800 was subsequently entered in favor of the respondent as against the Applicant on the basis that the applicant failed to avail proof.
 19. The court also notes that time has lapsed since judgement was entered against the applicant and that an order for stay of execution pending the determination of the appeal will not serve the ends of justice but will only stand in the way of the respondent to delay him from enjoying the fruits of the judgement. Further to the above, the court finds that this application does not meet the threshold prescribed under Order 42 rule 6 of the civil procedure rules.
 20. The court notes that the bulk of the applicant's arguments revolve around the substance of the intended appeal and are not useful to the application for stay of execution or a basis for this court to interfere with the finding of the trial court. For the above reasons, the application must fail.

Determination

21. It is hereby ordered that:
 - i. This application fails with costs to the applicant
 - ii. The ruling of the Cooperative Tribunal delivered on 19th November 2021 by Hon. J Mwatsama, Deputy Chairperson is upheld.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 24TH DAY OF APRIL, 2025.

HON. T. W. Ouya

JUDGE

23/01/2025

Parties were notified vide Notice dated at Murang'a on 9th April 2025

