



REPUBLIC OF KENYA



H&M Savings & Credit Co-operative Society Limited & 3 others v Mugambi (Civil Appeal E052 of 2023) [2023] KEHC 3114 (KLR) (Commercial and Tax) (6 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E052 OF 2023**

DAS MAJANJA, J

APRIL 6, 2023

BETWEEN

**H&M SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED 1ST APPELLANT
GRAY MWAMUYE 2ND APPELLANT
NANCY MWAMKUU 3RD APPELLANT
LUCY MUCHIRI 4TH APPELLANT**

AND

JAMES GICHUKI MUGAMBI RESPONDENT

(Being an appeal from the Judgment and Decree of the Co-operative Tribunal sitting at Nairobi dated 16th February 2023 in CTC No. E089 of 2021 (Formerly Tribunal Case No. 287 of 2021))

RULING

1. What is before the court for consideration is the appellants' notice of motion dated March 15, 2023 seeking to stay execution of the judgment of the Co-operative Tribunal ("the Tribunal") dated February 16, 2023 ("the Judgment") pending hearing and determination of the appeal. The application is supported by the affidavit of Gray Jilani Mwamuye, the 2nd Appellant and chairman of the 1st Appellant, sworn on March 15, 2023. It is opposed by the Respondent through the Respondent's replying affidavit sworn on March 27, 2023. Counsel made brief oral submissions in support of their respective arguments.
2. The substance of the dispute between the parties was whether the Respondent was a trustee of the Appellants for the purpose of purchasing shares on behalf of members of the 1st Appellant



through funds contributed by individual members and for that purpose it entered into certain trust deeds/agreements with the 1st Appellant. The Appellants denied the Respondent's claim and raised a counterclaim in which they sought nullification of the arrangements and refund of all monies paid to the Respondent under the trust deeds/agreements.

3. The Tribunal heard the Respondent's claim and the Appellants' Counterclaim and in the Judgment made the following dispositive orders:

1. Prayer (a) of the Statement of Claim is marked as spent.
2. We hereby declare that the 1st Respondent holds Co-op Holdings Cooperative Shares in trust, for the Claimant owing to the Trust created between the claimant and the Respondent as per the Trust Agreements/Deed executed by both parties.
3. The 1st Respondent officials do hereby execute the Deed of Rectification and the new Trust Deeds as agreed/proposed in the Tripartite meeting of 12.5.2021 and attached to the letter dated May 28, 2021 sent by the Claimant to the 1st Respondent.
4. The 1st, 2nd, 3rd and 4th Respondents herein do remit, pay and/or facilitate payments of all monies paid as dividends and/or investments in the Coop Holdings shares belonging to the claimant.
5. A permanent injunction be and is hereby issued restraining the Respondent by themselves, agents or assigns from withholding and/or refusing to remit the dividends of the Coop Holding Cooperative Society shares. To this effect, were order as follows.
 - a. That the dividends for the year 2022 held in the fixed deposit joint account of the Claimants Advocates and the 1st, 2nd and 3rd and 5th Respondents Advocates to be released forthwith [being Kshs 110,120,701/70, to the claimant together with interest therein accrued from the date of issuance of the dividends issued in the year 2021 (if any was not remitted to the claimant)].
6. Prayer (e) of the Statement of claim is spent.
7. The 4th Respondent is hereby found to hold no liability in the matter having resigned from the Management Committee of the 1st Respondent and is accordingly discharged from the proceedings.
8. The 1st, 2nd and 3rd and 5th Respondents to bear the costs of the claim jointly and severally.

4. I am now called upon to consider whether the court should issue a stay of execution pending appeal. The principles upon which the court grants an order for stay pending appeal are set out in order 42 rule 1 and 2 of the *Civil Procedure Rules*. Under those provisions, the appellant bears the burden of demonstrating that it stands to suffer substantial loss unless the stay order is made, that the application has been made without unreasonable delay and that it has provided security or is ready to provide such security as the court may order.



5. Bearing in mind that the respondent is entitled to enjoy the fruits of its judgment, an appellant must, as a threshold issue, demonstrate that they will suffer substantial loss. It is only then that the court will consider whether security should be provided. In order to do so, the appellant must prove the likelihood of substantial loss by putting forth facts which so demonstrate or from which the court may draw an appropriate inference. Once it establishes a prima facie case, then the evidential burden shifts to the respondent to show that it is capable of assuaging any loss that may be suffered if the decree is reversed/stayed.
6. I have looked at the deposition of Gray Jilani Mwamuye against the aforesaid principles and I find that apart from narrating the litigation history of the matter and the fact that it has filed an appeal which is arguable, he depones as follows at the material part:

(59) That I have also been informed by our Advocates on record which information I verily believe to be true:

- (a) That the 1st, 3rd and 4th Appellant and I have a right to be heard as enshrined under article 50 of the *Constitution* and should be accorded the opportunity to challenge the orders of the Tribunal.
- (b) That if stay is not granted we will suffer irreparable damage and the eventual success of the Appeal herein will be rendered nugatory and/or a pyrrhic victory.
- (c) That the 1st, 3rd and 4th Appellant and I stand to suffer irreparable harm and prejudice if the orders sought are not granted as there is a danger of the Respondent executing the orders made on 16th February 2023.

[60] That the 1st Appellant is ready and will to have the dividends of the year 2022 and any subsequent dividends received from Co-op Holdings to be deposited in the Joint Interest earning account in the names of the Advocates of the Parties herein which account is held in Cooperative Bank in accordance with Order 42 rule 6 of the *Civil Procedure Rules*.

7. In this case the affidavit is devoid of facts showing how the Appellants will suffer substantial loss. The 2nd Appellant merely repeats and recites known principles of law without setting out any facts that would assist the court exercise its discretion in the Appellants' favour. Moreover, the material part of the affidavit in support of the application comprises submissions rather than facts thus violating the fundamental rule in Order 19 Rule 3(1) of the *Civil Procedure Rules* which provides that,

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

8. In conclusion, I am not convinced that the Appellants have made out a case for the grant or an order for stay and in that regard, I adopt what Gikonyo J, stated in *John Gachanja Mundia v Francis Muriira alias Francis Muthika and another* HC MRU Civil Application No 42 of 2015 [2016] eKLR that:

Therefore, stay of execution is a matter of the discretion of the Court. But for the court to postpone the right of the judgment holder to immediate enjoyment of the fruits of his judgment, the Applicant must show that the Respondent cannot make a refund of the decretal sum; as that would certainly reduce a successful appellant to merely a holder of



a barren success, thus, a pious explorer in the judicial process. I must, however, restate the law, that is; the onus of proving substantial loss would occur falls on the shoulders of the Applicant. He must not throw or shift it to the Respondent to state his financial ability before the Applicant has shown a prima facie case on reasonable facts that there is some financial limitation on the part of the Respondent. It is only after the legal burden is discharged by the Applicant that the Respondent will be called upon to discharge his evidential burden or provide affidavit of means.

9. It must now be clear that the appellants' application is for dismissal. The application dated March 15, 2023 is now dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF APRIL 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M Onyango.

Mr Kinyua instructed by Eric Kinyua and Company Advocates for the Appellants.

Mr Muriuki instructed by Gitonga Muriuki and Company Advocates for the Respondent.

