



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NOS. 13 OF 2020 CONSOLIDATED WITH NO. 14, 15 AND 16 OF 2020

1. DAVID NYARIBO.....1ST APPELLANT/APPLICANT
2. JOSIAH OYARO.....2ND APPELLANT/APPLICANT
3. ALFAYO NYAIRO.....3RD APPELLANT/APPLICANT
4. DAVID NYARIBO.....4TH APPELLANT/APPLICANT

=VRS=

NYABOMITE FARMERS CO-OPERATIVE SOCIETY LTD.....RESPONDENT

(Being an appeal against the Ruling of Hon. B. Kimemia, Hon. F. Terer and Hon. P. Gichuki

dated and delivered on the 23rd day of July 2020 at the Co-operative Tribunal Nairobi

in Tribunal Cases No. 228 of 2019, 229 of 2019, 230 of 2019 and 231 of 2019)

RULING

The appellants in this consolidated appeal have by the Notice of Motion dated 8th February 2021 sought a stay of execution of the order of the Co-operative Tribunal, delivered on 23rd July 2020, pending hearing and determination of their appeals. The application is premised on grounds that the applicants have already filed the appeals and directions have already been taken; that the appeals would be rendered nugatory were execution to proceed; that the respondent has served them with a Notice to Show Cause which is fixed for hearing on 2nd March 2021 and that they would suffer irreparable loss and it is only fair and just that the same be stayed.

The application was argued orally on 25th February 2020. Mr. Masese appearing for the appellants/applicants urged this court to allow the application so as not to render the appeals nugatory.

Mr. Getenga for the respondents vehemently opposed the application and submitted that the same is merely intended to frustrate the execution proceedings at the tribunal noting that the appellants/applicants having been surcharged by the Commissioner for Co-operatives the surcharge sum is recoverable summarily. Counsel also submitted that no substantial loss has been demonstrated to warrant this court to grant the application and urged this court to dismiss it with costs.

In reply, Mr. Masese submitted that it is within the appellants'/applicants' rights to bring the appeals and reiterated that it is only fair to stay execution so that the appeals are not rendered nugatory. He contended that the application is not made in bad faith and urged this court to grant the order sought.

I have considered the rival submissions carefully and found as follows: -

Firstly, whereas it is within the appellants/applicants' right to appeal to this court, **Order 42 rule 6 (1) of the Civil Procedure Rules** makes it clear that an appeal does not operate as a stay of execution and that such a stay can only be ordered upon the fulfilment of certain conditions by the applicant. Those conditions as set out in **Order 42 rule 6 (2) of the Civil Procedure Rules** are: -

“(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.”

There is a long line of cases that enunciate the above principles but for the purposes of this ruling I shall cite only two. In the case of **Machira t/a Machira & Co Advocates v East African Standard (No 2) [2002] 2 KLR 63** Kuloba J stated:-

“1. In such applications for stay of proceedings, the court cannot proceed on initial presumption that the appeal or intended appeal shall succeed and so *prima facie* the applicant is the preferred party. The matter must remain in the discretion of the court to be exercised upon considering all material circumstances and not the interests of one party.

2. In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him a success at any stage.

3. A successful party at whatever stage should have access to the consequences of that judicial finding and decision. Any subsequent decision which tends to impede the normal flow of justice by suspending the enjoyment of the consequential orders can only be rendered in exceptional circumstances.

4. In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or other evidential material that substantial loss may result.

5. In this kind of applications for stay, it is not enough for the applicant merely to state that substantial loss will result. He must provide specific details and particulars.

6. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.

7. The applicant will obtain a stay of further proceedings if he can show that an impecunious party may squander what may be needed restitution or that the subject matter may be destroyed if the appeal succeeds.

8. In granting a stay of proceedings the court may consider the delay in making the application and the requirement of security for due performance.....”

A similar holding was made by Odunga J in the case of **Joseph Gachie T/A Joska Metal Works v Simon Ndeti Muema [2012] eKLR** where he stated: -

“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid. In an application of this nature, the applicant should show the damages it will suffer if the order for stay is not granted since by granting stay would mean that status quo should remain as it were before judgement and that would be denying a successful litigant of the fruits of judgement which should not be done if the applicant has not given to the court sufficient cause to enable it exercise its discretion in granting the order of stay.”

The issue for determination therefore is whether the appellants/applicants have met the requirements set out in Order 42 Rule 6 (2) of the Civil Procedure Rules sufficiently to warrant this court to grant the orders sought.

Having carefully considered the application and rival submissions it is my finding that they have not. To begin with they have not demonstrated that they stand to suffer substantial loss if their application is refused and the appeal succeeds. The decree appealed from is for a surcharged sum of money. The applicants have not demonstrated that the respondent in the appeal would not be in a position to refund their monies were the appeal to succeed and an order for a refund is made. The condition requiring them to demonstrate substantial loss has therefore not been satisfied. I also find that the appeals cannot be rendered nugatory since were they to succeed the surcharge would be reversed and an order for refund would be made.

I further find that the applicants have also not satisfied the second condition in that they have not either by themselves or through their advocate expressed any willingness to give security as this court may order for the due performance of the decree or order. Even though the issue of security was raised by Counsel for the respondent, Mr. Masese made sure not to comment on it. In the premises I find that the applicants are not willing to deposit security. The application is therefore not merited and the same is dismissed with costs to the respondent. It is so ordered.

Ruling signed, dated and delivered electronically in Nyamira this 1st day of March 2021.

E. N. MAINA

JUDGE