



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.154 OF 2018

ABEID MWAMBURI.....APPELLANT

VERSUS

SOKORO SAVINGS AND CREDIT

COOPERATIVE SOCIETY LIMITED.....RESPONDENT

RULING

1. This is a ruling on application dated 25th July 2019. It seeks the following orders: -

i. Spent

ii. That this Honorable court be pleased to vary and/or review order No.2 of the orders made on the 17th July 2019 which read as follows: -

“That a stay is granted in proceedings in the subordinate court at Molo being CMCC no.319 of 2017 pending the hearing and determination of the appeal”

2. Grounds on the face of the application are that there is an error on the face of the orders made on **17th July 2019** to the extent that there is no decree emanating from **Molo CMCC No.319 of 2017** as the lower court has not heard the matter on ground that jurisdiction is contested.

3. That the appellant has filed record of appeal and should be set down for directions and hearing; that the application has been made to set the record straight.

4. The application is supported by affidavit sworn by **Tom Magutu Geatange Advocate** for the applicant.

5. He averred that application dated 28th March 2019 came for hearing on 17th July 2019 when it was granted as prayed save that this Court proceeded to direct that half the decretal amount be deposited in a joint interest account in the names of both Advocates within 30 days from the date of the order.

6. He averred that the respondent contested jurisdiction the lower court arguing that the dispute is a preserve of the **cooperative tribunal** established pursuant to provisions of **Cooperative Societies Act (No.12 of 1997)**.

7. He further averred that the respondent lodged appeal against the subordinate courts determination to reject the preliminary objection raised in respect of jurisdiction. He urged this Court to review or vary its orders of 17th July 2019.

8. In response, the respondent filed replying affidavit dated 18th October 2019 sworn by **Zacharia Jacob Otieno**. He averred that under **Order 42 Rule 6(2)** a party seeking stay pending appeal must deposit an amount as the Court may order binding him for due performance; that stay was granted on condition that half decretal amount be deposited as security pending hearing and determination of the appeal.

9. He averred that order for deposit in Court is meant to bind him to due performance of court orders whatever the outcome of the case may be; and granting of the orders sought would be prejudicial to him and that the applicant has not given sufficient reasons for unwillingness to deposit the sum ordered.

10. Parties were directed to proceed with the application by way of written submissions.

APPLICANTS SUBMISSIONS

11. In submissions, the applicant restated the prayers and grounds in support of the application and raised two issues; **whether there is a decree in the Molo CMCC No.319 of 2017** and **whether the applicant is able to comply with the order**. Applicant submitted that the applicant was aggrieved of the order dismissing preliminary objection raised on jurisdiction for reason captured above.

12. On the second issue, the applicant restated the averment that there is no decree emanating from the lower court capable of compliance by the applicant; arguing that any decree must be hinged on a judgment and CMCC No. 319 of 2017 has no judgment. The applicant cited the case of **Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR**.

RESPONDENTS SUBMISSIONS

13. The respondent restated averments in the replying affidavit and submitted that the issue raised by the applicant do no constitute a mistake or error apparent on the face of record; further that a party seeking orders of stay pending appeal ought to provide security as well as demonstrate that substantial loss would be occasioned to him if stay is not granted.

14. The respondent submitted that the applicant has not demonstrated why they are unable to deposit the sum ordered; that the applicant has failed to provide sufficient reasons for review; why he should be exempted from depositing security.

ANALYSIS AND DETERMINATION

15. I have considered grounds raised in support of application herein. I have also considered the respondent’s response and submissions by each party herein.

16. I have perused application dated 28th March 2019, the basis of which the orders granted were made on 17th July 2017 in particular prayer 3. The prayer seeks stay pending appeal. The affidavit in support of the application show that the appeal is against a ruling delivered in respect of preliminary objection challenging jurisdiction of the Court.

17. There is no doubt that the matter before the lower court had not been determined to give rise to a decree upon which security would be required to be deposited for performance.

18. It is clear that issuing an order for stay on condition that half decretal amount be deposited is an error apparent on the face of record. No decree had been issued by the lower court at the time I made the order. I see merit in the application herein.

19. FINAL ORDERS

- 1. Order issued on 17th July, 2017 is hereby varied by setting aside condition for grant of stay order.**
- 2. I hereby stay proceedings in the subordinate court at Molo being CMCC no.319 of 2017 pending the hearing and determination of the appeal.**
- 3. Each party to bear own costs of this application.**

Judgment dated, signed and delivered via zoom at Nakuru This 13th day of May, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola- Court Assistant

Ms. Makori holding brief for Gekonga Counsel for Appellant

Ms. Chelagat Counsel for Respondent