



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS APPLICATION NO. E1186 OF 2020**

**FREDRICK NYOLO .....APPLICANT**

**-VERSUS-**

**OSERIAN SACCO SOCIETY LTD.....RESPONDENT**

**RULING**

1. This ruling is in respect to the application dated in which the applicant seeks the following orders: -

**a Spent.**

**b Spent.**

**c THAT pending the hearing and determination of this appeal there be an order of stay of execution of the Judgment/order/decree in Tribunal Case No. 449 of 2019 Between OSERIAN SACCO SOCIETY LTD vs FREDRICK NYOLO.**

**d THAT the Applicant be granted leave to appeal out of time against the whole summary judgment of the Hon. B. Kimemia, Hon. F. Terer and P. Gichuki delivered on 25<sup>th</sup> June 2020 at Nairobi.**

**e THAT the costs of this Application be in the cause.**

2. The application is brought under Order 42(rule 6), Order 50(rule 5) of the civil procedure Rules and Section 74(2) of the Cooperative Societies Act. The application is supported by the applicant's affidavit and is based on the grounds that: -

**a) THAT the Applicant is aggrieved with the judgment and intends to appeal against the same and has a good appeal with high chances of success.**

**b) THAT the applicant also notes with great concern that his advocates were never notified when the judgment was issued and no notice dated 8<sup>th</sup> May 2020 as alleged by the impugned judgment arrived at his advocates chambers or to his address.**

**c) THAT where any notice was sent during the COVID 19 pandemic then the same was never received. Nonetheless Counsel who is based in Naivasha and the applicant had been making attempts at reaching the tribunal for updates with no success until he was informed by the applicant that execution was ongoing.**

**d) THAT the Applicant who in fact has a counterclaim against the Respondent herein will suffer substantial loss and damage if an order of stay is not granted as the Respondent has threatened to proceed with execution.**

**e) THAT the delay occasioned herein is not so inordinate or so great as to be inexcusable.**

**f) THAT this honorable court does not act in vain and it is in the interest of justice fair and expedient in all circumstances of the case that there be a stay of execution.**

3. The respondent opposed the application through the replying affidavit of its Chairman **Mr. Evans Kenege** who avers that the respondent's advocates were informed of the impugned Ruling and issued with a copy thereof together with notice of entry of judgement and intention to execute the same.

4. The respondent's deponent states that the application is anchored on the applicant's own lethargy in following up on the matter as he has offered no proof that he made any efforts to confirm the position of the case prior to the filing of this application. He further states that the application is solely intended to delay the Respondent's enjoyment of the fruits of Judgment.

5. It is the respondent's case that the Tribunal arrived at its decision on merit after the Appellant was accorded adequate opportunity to defend the suit by tendering evidence in opposition to the Respondent's suit and that the appellant's failure to appeal against the decision of the Commissioner for Co-operatives and surcharge orders issued against him as required by the law pursuant to sections 74 of the Co-operative Societies Act, necessitated the Tribunal's decision.

6. It is further the respondent's case that the law, under section 75 of the Co-operative Societies Act, mandated the Tribunal to recover surcharged amount summarily. It adds that the impugned decision is therefore sound, judicious, fair and just in the circumstance and further, that the Appellant cannot fault the Tribunal for its own failure to abide by the law in challenging surcharge orders issued against him.

7. According to the respondent apart from the omnibus ground of failing to consider the Appellant's submissions and attempts by the Appellant to introduce new evidence/issues through this Application, all the grounds of appeal raised by the Appellant were raised before the Tribunal which fully addressed them in the final decision.

8. It was the respondent's case that the intended appeal is not viable as the decision appealed against is the final decision of the Tribunal made under section 75 (1) of the Co-operative Societies Act yet an application made under section 74(2) of the Co-operative Societies Act is only available to one who has pursued section 74(1) unsuccessfully. It was submitted that the Applicant having failed to pursue an appeal against the decision of the Commissioner within the requisite timelines under Section 74 (1), cannot purport to pursue a second appeal under the Application herein when he failed to pursue the first appeal under section 74 (1), within the requisite time.

9. The respondent's deponent was of the view that if the Court is inclined to grant the Respondent stay then the respondent be accorded protection from the same be on the following conditions: -

***a) That the Applicant to expedite this matter by timely filing of its record of appeal and submissions in view of the fact that it is more than six months since the date of the decision appealed against.***

***b) That the applicant deposits the decretal sum of Kshs. 5,412,274.90/= in a joint interest earning account held between the Respondent's Advocates and the Appellant's Advocates pending hearing of this Appeal.***

***c) That the applicant deposits security for costs for the current Appeal in court pending hearing of this Appeal.***

10. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.

#### **Stay of Execution**

11. Order 42 Rule 6 of the Civil Procedure Rules provided for the conditions to be fulfilled by an applicant for orders for stay of execution pending appeal as follows:

***“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(2) No order for stay of execution shall be made under subrule (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.***

***(3) ...***

***(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.***

***(5) ...***

***(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”***

12. In summary, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in the aforementioned provision, namely; (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

13. In **Butt vs. Rent Restriction Tribunal** [1979], the Court of Appeal held that the power of the court to grant or refuse an application for a stay of execution is a discretionary one that should be exercised, firstly; in such a way as not to prevent an appeal, secondly; the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion, thirdly; a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings and lastly; that the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

14. In **James Wangalwa & Another vs Agnes Naliaka Cheseto** [2012] eKLR, it was held that: -

***“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”***

15. In the present case, it was not disputed that that summary judgment was entered on 25<sup>th</sup> June 2020 in the absence of the parties. It was alleged that the appellant was informed of the entry of judgment via email but the applicant denies service with the notice of judgment.

16. The applicant submitted that his case meets the requirements for the grant of orders of stay of execution. He urged the court to consider the unique circumstances surrounding the case particularly the advent of the Covid -19 Pandemic that brought about the cessation of movement thus preventing him from physically accessing the Tribunal so as to be able to know the position of his case. It was the applicants case that the delay in filing the application cannot be said to have been unreasonable. Reference was made to the decision in **Jaber Mohsen Ali & Another vs. Priscillah Boit & Another E&L No. 200 of 2012** [2014] eKLR where the court held that what amounts to unreasonable delay depends on the circumstances of each case.

17. My finding is that taking into account the period and circumstances under which the impugned decision was rendered, that is, via email at the height of the Covid-19 Pandemic when there was restriction of movement, I find that the application cannot be said to have been unreasonably delayed.

18. I also find that the issue of provision of security for the due performance of the decree was addressed by the applicant when he submitted that his entire life savings in shares valued at of Kshs 3,227,960 are held and controlled by the Respondent. This is a matter that was extensively canvassed in the applicant's counterclaim and further affidavit.

19. On substantial loss, I find that the amount of **Kshs. 4,706,326.00/=** that the applicant was surcharged is a tidy sum of money which the applicant did not demonstrate it would be able to refund should the appeal be successful.

20. On whether the intended appeal is viable, I find that this is an issue that can only be determined upon considering the merits of the appeal in question.

21. In sum, considering the fact that in an application such as this, the court is called upon to balance the interests of a prospective appellant, to the right to appeal, and the respondent, to the fruits of the judgment, I will allow the instant application, but on conditions that will ensure that the respondent's rights are also secured. Consequently, I allow the application dated 29<sup>th</sup> October 2020 but on the following conditions: -

(i) ***That the applicant shall within 30 days from the date of this ruling deposit Kshs. 2 Million as security, in an interest earning account to be held in a banking institution of repute in the joint names of the advocates for the parties herein.***

(ii) ***That in the event of failure to comply with condition (a) hereinabove, the stay orders issued herein shall be vacated/lapse in which case the respondent shall be at liberty to proceed with the execution.***

(iii) ***The costs of the application are awarded to the respondent.***

Dated, signed and delivered via Microsoft Teams at Nairobi this 22<sup>nd</sup> day of July 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Ojwang for Respondent.

Court Assistant: Sylvia.