REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E040'A' OF 2020

DR. EDWIN KIPNG'ENO RONO..APPLICANT

VERSUS

KENYATTA MATIBABU SACCO SOCIETY LTD...1ST RESPONDENT

ANDREW K. ROTICH..2ND RESPONDENT

RULING

1. Before the Court are two motions by **Dr. Edwin Rono** (the Applicant) dated 21st January 2021 and 3rd May 2021. The motions are expressed to be brought under section 79G and 95 of the Civil Procedure Act and section 81 of the Co-operative Societies Act, the latter which essentially replicates the provisions of section 79G of the Civil Procedure Act. The Respondents are **Kenyatta Matibabu SACCO Society Ltd** (1st Respondent) and **Andrew K. Rotich**. The latter Respondent did not participate in the motions. By the motion dated 21st January 2021 (the first motion) the Applicant seeks that the court be pleased to grant him leave to file appeal out of time from the judgment of the Co-operative Tribunal delivered on 26th February 2020 in **Tribunal Case No. 352 of 2012 Dr. Edwin Kipng'eno Rono v Kenyatta Matibabu Sacco & Another** and that the memorandum of appeal filed herein be deemed as duly filed. There is an apparent error in the Memorandum of Appeal and some parts of the Applicant's filings which refer to 28th July,2019 as the date of the judgment. The copy of the judgment attached to the affidavit in support of the first motion as annexure "**WG-1"** clearly indicates the date of delivery as 26th February 2020.

2. The second motion is the one dated 3rd May 2021 seeking an order to stay execution of the above stated judgment of the Co-operative Tribunal pending the hearing and determination of the intended appeal. The motions are premised on grounds inter alia that being aggrieved by the decision of the Co-operative tribunal, the Applicant desires to appeal and that if stay of execution is not granted, the intended appeal will be rendered nugatory.

3. The first motion is supported by an affidavit sworn by **Wanja Wambugu** and the second one by an affidavit sworn by **William Mugu** respectively, both who describe themselves as counsel for the Applicant, and seized of the matter. The former deponent amplifies the grounds on the face motion by deposing that judgment before the Co-operative tribunal was delivered on 26th February, 2020 and being dissatisfied with the same, the Applicant filed a memorandum of appeal albeit out of time ; that he was unable to file the appeal within the prescribed timelines due to the outbreak Covid-19 pandemic which resulted in the scaling down of court activity and thus the Applicant only obtained a copy of the judgment on 15th June, 2020 and on account of innocent mistake in counsel's office, the appeal was inadvertently not filed on time. Finally, it is deposed the Applicant has a good appeal and it is in the interest of justice the motion be allowed and that no prejudice would be visited on the Respondent.

4. The Respondents did not file any response to the motion dated 21st January, 2021. In the circumstances, the factual basis of the said motion stands uncontroverted. With respect to the second motion the deponent similarly amplifies the grounds on the face of the motion by deposing that the 1st Respondent had already proceeded to file a bill of costs for taxation with pursuant to the tribunal judgment; that unless the court grants orders to stay execution, the 1st Respondent will proceed with taxation and execution for costs thereby rendering the appeal nugatory especially in view of the substantial sum of Sh. 5000,000/- claimed by the Applicant from the Respondents in the tribunal case.

5. In opposing the second motion the 1st Respondent filed a relying affidavit, sworn by **Stanley Mwaura** who describes himself as the Chief Executive Officer of the 1st Respondent. The gist thereof is that the judgment in **Tribunal Case No. 352 of 2012** is a negative order incapable of being stayed; that leave to appeal out of time not having been granted as yet , no stay of execution order could be

countenanced ; that the motion has not met the threshold for issuance of the orders sought; that the Applicant has not demonstrated sufficient cause as costs were awarded by the tribunal; and that the motion is incompetent, bad in law and tantamount to an abuse of the court process and ought to be dismissed.

6. The court directed that the two motions were to be canvassed contemporaneously by way of written submissions. The Applicant's submissions appear to touch on both motions, but the Respondent only complied concerning the first motion. Counsel for the Applicant relied on **Anake 'Ma' Musyi Limited v Paul Kuya [2016] eKLR**, **Equity Bank Limited v Richard Kerochi Ayiera [2020] eKLR** among other authorities and reiterated the contents of the supporting affidavit to submit that delay in filing the motion and appeal has been reasonably explained. He contended, citing **Kenya Railways Corporation v Erdemann Property Limited [2012] eKLR** that the appeal before the court raises arguable grounds. Further citing **Premier Trading Company Limited v Peter Onyango Ogonda & Another [2020] eKLR** counsel submitted that without stay orders, the Applicant stands to suffer substantial loss as the Respondent will proceed to tax its bill of costs rendering the appeal nugatory. He reiterated the Applicant's willingness to comply with any condition that this court may impose in granting the orders sought.

7. Counsel for the 1st Respondent adverting to the Supreme Court decision in **Nicholas Kiptoo Korir Salat v IEBC & 7 Others [2014] eKLR** submitted that the reasons advanced by the Applicant for failure to file appeal in the prescribed time do not demonstrate sufficient cause as envisaged in Section 81 of the Co-operative Societies Act . Further, citing **Chairman Kenya National Union of Teachers & Another v Henry Inyangala & 2 Others [2018] eKLR,** and other decisions, counsel asserted that the delay of eleven (11) months by the Applicant in filing his intended appeal is inordinate and the reasons advanced by way of explanation are unsatisfactory. Counsel took issues with alleged inadvertent mistake by counsel and stated that the 1st Respondent stands to suffer prejudice as granting the motion will derail its legitimate expectation to enjoy the fruits of the judgment.

8. The court has considered the applications in light of the parties' respective material and submissions and proposes to first deal with the prayer for enlargement of time for filing appeal. Section 79G of the Civil Procedure Act provides that:

> **"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

9. The successful Applicant must demonstrate ***"good and sufficient cause"*** for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

> **"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted."**

10. While the discretion of the court is unfettered, a successful Applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

> **"(T)he is underlying principles a court should consider in exercise of such discretion include;**
>
> **1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
>
> **2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
>
> **3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case-to-case basis;**
>
> **4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
>
> **5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**
>
> **6. Whether the application has been brought without undue delay.**
>
> **7. ......"**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR.**

11. As earlier noted, the first motion was not opposed by way of a replying affidavit, but the submissions of the 1st Respondent address the merits thereof. The delay in this case is between 26th February 2020 and 21st January 2021, a period of 11 months. The Applicant states that

the onset of the COVID-19 pandemic made it difficult for him to obtain proceedings. Indeed, several letters to the concerned registry evidencing attempts made by the counsel are annexed to the Applicant's advocate's affidavit. By his own admission, the Applicant's advocate received the proceedings and judgment of the tribunal in mid-June 2020 but once more, another failure occurred.

12. The explanation for the second failure is that counsels (presumably working in the law firm representing the Applicant) were working in shifts in the material period, and that through inadvertence, the memorandum of appeal was not filed on time, and the failure was only realized later as the record of appeal was being prepared. The period until June 2020 is not inordinate and is sufficiently explained, in my opinion. Concerning the subsequent period of delay of about 5 months (excluding the Christmas period) the explanation proffered is equally not controverted and may well be plausible.

13. It cannot be disputed that the COVID-19 pandemic has disrupted working arrangements in many offices especially because of the need to observe social distance. Five months is a long time though, but to my mind not inordinate in the circumstances described. An eminent Judge has said that blunders will be made by counsel from time to time and that ultimately, the Court should aim to do justice between the parties. The Applicant will lose the opportunity to be heard on his challenge to the dismissal of his claim if his application is rejected. On the face of the memorandum of appeal, the Applicant's proposed appeal is not frivolous. For their part, the 1st Respondent will not be unduly prejudiced as they can be compensated by an award of costs. The justice of the matter lies in allowing the first motion with costs to the 1 st Respondent in any event. It is so ordered.

14. However, regarding the second motion, it is hard to see how the appeal will be rendered nugatory if stay of execution is declined. As rightly pointed out by the 1st Respondent, the judgment of the tribunal dismissed the Applicant's claim for some Shs 5 million against the Respondents. The bill of costs pending taxation a copy of which is exhibited in the second application is for a relatively paltry sum of shs.128,000/- odd. There is no assertion that the Applicant will be subjected to hardship in paying out this sum if confirmed at taxation, or that if the Applicant pays the costs to the 1st Respondent the said party will be unable to refund the sum in the event of the appeal succeeding.

15. The power of the court to grant stay of execution of a decree pending appeal is discretionary. However, the discretion should be exercised judiciously. See **Butt V Rent Restriction Tribunal [1982] KLR 417**.The second motion appears premised on the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provide that:

> **"(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) <u>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;</u> 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".**

16. The cornerstone of the Court's jurisdiction under this rule is substantial loss and the court must determine whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. Put differently, the purpose of the jurisdiction to stay execution of judgment pending appeal is to prevent substantial loss being suffered by the party appealing, while protecting the rights of the decree holder. One of the most enduring legal authorities on the question of substantial loss is the case of **Kenya Shell Kenya Ltd v Kibiru & Another [1986] KLR 410** cited by the Respondent. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell case are especially pertinent. These are that:

> **"1. ………….**
>
> **2. <u>In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.</u>**
>
> **3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.**
>
> **4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."**

17. The decision of **Platt Ag JA,** in the Shell case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

> **"The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim**

damages…It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in the two courts… (emphasis added**)"**

18. The learned Judge continued to observe that: -

"It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money." (Emphasis added).

19. Earlier on, **Hancox JA** in his ruling observed that:

"It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would… render the appeal nugatory. This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said: -

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory…

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

20. By his affidavit in support of the second motion the Applicant did not demonstrate how he stands to suffer substantial loss, beyond bare claims that the appeal will be rendered nugatory if stay is denied. The matter of substantial loss being one of fact should be deposed to in the affidavit of the Applicant. The duty to substantiate such loss lies with the Applicant in the first instance. By failing to depose in his affidavit to the matter of the 1st Respondent's inability to refund any monies paid to it, the Applicant denied the Respondent an opportunity to rebut the assertion.

21. In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] e KLR** the Court of Appeal stated that:

"This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya."

See also **Kenya Hotel Properties Limited vs. Willesden Properties Limited**, **Civil Application No. 322 of 2006 (UR 178/2006**)

22. In the circumstances, the court finds no merit in the second motion and the same is hereby dismissed with costs to the 1st Respondent.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 7TH DAY OF OCTOBER 2021

C.MEOLI

JUDGE

In the presence of:

Mr Mugo for the Applicant

N/A for the Respondent

C/A: Carol