



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. E048 OF 2021**

**MUMIAS CANE FARMERS CO-OP. UNION LIMITED..... 1<sup>ST</sup> APPELLANT**

**MR. ALLOYS MANDU, CHAIRMAN MUMIAS CANE**

**FARMERS CO-OP. UNION LIMITED..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**WASHINGTON SILVANUS WASHIALI KHWALE.....RESPONDENT**

**RULING**

1. The Application before this Court is brought under a certificate of urgency. The Applicant is also an Appellant pursuant to a Memorandum of Appeal filed on 24<sup>th</sup> September 2021.

2. The Certificate presented by the Advocate on record Mr Joseph Wafula Sichangi on 30<sup>th</sup> September 2021. In Summary the application seeks a stay of execution of the Judgment of the Co-operative Tribunal in **Tribunal Case No 12B of 2018** pending inter partes hearing of the application and thereafter pending and determination of the Appeal on the Judgment.

3. The Application is brought by a Notice of Motion (**Under Sections 3, 3A and 63(1) of Civil Procedure Act, Order 42 Section 6 (1) and (2) of Civil Procedure Rules**) and seeks the following Orders:

*“(a) That service of this application be dispensed with in the first instance.*

*(b) That there be a temporary stay of execution or attachment of the exparte Judgment of the Co-operative Tribunal in the Tribunal case No. 12B of 2018 pending inter partes hearing of this application.*

*(c) That there be a stay of execution of the decree of the Co-operative Tribunal in the Tribunal Case No. 12B of 2018 pending hearing and determination of this appeal.*

*(d) Costs to abide the outcome.”*

4. The Applicant is Alloys Mandu who is the current Chairman of the Mumias Cane Farmers Co-operative Union Limited. The Second Appellant is aggrieved because the Respondent obtained a Judgment. The Judgment was to be executed against his personal property. He believes execution should have taken place against the property of the First Appellant/Defendant instead of him. He says the company has not been wound up. It is said that the Appeal has a high chance of success. In his Supporting Affidavit he relies upon the following grounds:-

*1. The Co-operative Tribunal declined to set aside an exparte Judgment obtained by the Respondent and has commenced execution.*

*2. The Respondent has proclaimed the personal goods of the 2<sup>nd</sup> Applicant who is the Chairman instead of the goods belonging to the Defendant Co-operative Society.*

*3. The execution and attachment of ODAMBO AUCTIONEERS is unlawful as the 2<sup>nd</sup> Appellant was not sued as a party in person but as the Chairman of the 1<sup>st</sup> Appellant which is a duly registered Society.*

*4. There has been no lifting of the veil proceedings or an order of bankruptcy as against the 1<sup>st</sup> Appellant to necessitate attachment of the 2<sup>nd</sup> Appellant personal property at his home.*

5. *The execution commenced if not stayed will result in hardship and loss by the 2<sup>nd</sup> Appellant whose personal properties were proclaimed instead of the 1<sup>st</sup> Appellant's property.*

6. *The appeal herein has high chances of success as the failure to set aside an ex parte judgment was based on trivial issues and denied the Appellants a chance to be heard before being condemned.*

7. *The Appellant is ready to give security and or such condition the Honourable Court deems fit in any event.*

5. The Applicant's principal complaint appears to be that the Respondent obtained judgment with joint and several liability. It is alleged that was done pursuant to an ex parte process and therefore he was condemned unheard. The Applicant says that he is willing to give security. He has not complied with the order of this Court whereby the terms for security were set out. That payment could have come from the First or Second Appellant. Nothing was paid into Court. In addition, the Applicant had made an application for stay before the Tribunal which was not successful.

6. The Respondent filed his response in the form of a Replying Affidavit. In it he contradicts virtually every statement made in the Supporting Affidavit. In particular he states that he still holds shares in Mumias Cane Farmers' Co-operative Union Ltd. He says that he filed written submissions before the Tribunal setting out his case. He says he sued both the Union and the Chairman in a personal capacity.

7. He also states, in relation to the claim that the Appellant was not heard, that the dispute was heard by the Tribunal on various dates and the Applicant was represented by Counsel. In fact, the same Counsel, who represents him in this Application. The Tribunal is said to have sat on 7<sup>th</sup> December 2020 in Kakamega and on 10<sup>th</sup> February 2021 in Kisumu and the dates were known to the Applicant. He denies that he misled Counsel.

8. The Respondent also filed a Notice of Preliminary Objection. It states;

1. **THAT** *there is no proper application before this Honourable Court for determination.*

2. **THAT** *without a Memorandum of Appeal, no records of Appeal no outline of weighty issues, there are no chances of success for this application nor purported appeal.*

3. **THAT** *the application as canvassed before this Honourable Court is incompetent, fatally defective, cannot stand in law and therefore should be struck out and or dismissed with costs*

9. Since the Respondent also filed a Replying Affidavit he is deemed to have abandoned the Preliminary Objection.

10. The evidence before the Court is that the Tribunal was sitting on 10<sup>th</sup> February 2021 and 24<sup>th</sup> April 2021. The Applicant's case is that he was excluded from the proceedings before the Tribunal. The reason put forward is that they got the date wrong because the Respondent misled them, including a very learned and very experienced Advocate into not hearing for a date which was given in open Court in his presence. Thereafter they say they could not access the Judgment but they did file a memorandum of appeal (against the Ruling).

11. The Respondent says that the same application was made before the Tribunal and dismissed. The Respondent also complains that the Applicant has been using the same kind of delaying tactics for 11 years to avoid paying him.

12. In the circumstances, the Court has to consider whether the Grounds of the Application are substantiated. Firstly, it seems completely implausible to this Court that Counsel acting conscientiously in the interests of his client would miss an hearing date on the basis of assertions by a competing party in an acrimonious dispute where submissions had been filed.

13. As to the prospects of success of the Appeal, those are impossible to gauge as the Applicant has neglected to file a Record of Appeal. Lastly, the Applicant says that he is completely in the dark as to the terms of the Judgment. Efforts to access it are fruitless it is said. He says he has never seen the Ruling and he has never seen the file. It should be made clear that what is being appealed against is **not** the substantive judgment for a monetary sum, but the Ruling on the application to set aside/review which was delivered subsequently. If it is the case that the Tribunal file was not made available, there is no application to call for the file.

14. It is noteworthy that the Applicant has exhibited the Decree that was received by his Advocate on 6<sup>th</sup> September 2021. The Judgment was delivered on 22<sup>nd</sup> April 2021 (it says) and the warrant of attachment is dated 14<sup>th</sup> September 2021 returnable on the 1<sup>st</sup> December 2021. The Memorandum of Appeal is dated 16<sup>th</sup> September 2021 and creates the impression that the person drafting it had read the Judgment.

15. In addition, the Respondent informs the Court that the Judgment was published on the Kenya Law website. Counsel did not contradict that. The judgment was for joint and several liability. The Ruling denied an application to set aside the judgment. Execution is taking place on the warrant emanating from the Judgment, not the ruling.

16. As to prejudice to the Applicant. There is no evidence before the Court that the Respondent will not be able to refund any monies paid, should the appeal (which has not been admitted) be successful.

17. For those reasons, the Application is dismissed with costs.

**Order accordingly,**

**FARAH S. AMIN**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS THE 9TH DAY OF DECEMBER 2021 IN KAKAMEGA HIGH COURT**

In the Presence of:

Court Assistant: Clement Okoit

First Appellant: through its Treasurer

Second Appellant: In person

Respondent: In person