REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 363 OF 2018

LAWRENCE MIRITI ....1ST APPELLANT

MATHEW KAUME ....2ND APPELLANT

JULIUS MURIUNGI...................................... 3RD APPELLANT

ROBERT MWENDA .... 4TH APPELLANT

JOSHUA MUTWIRI .... 5TH APPELLANT

CHARITY KARIMI...................................... 6TH APPELLANT

VERSUS

MERU NORTH FARMERS SACCO LTD......RESPONDENT

RULING

1. In the Notice of Motion dated 23rd August 2019, the six appellants (hereinafter the applicants) seek two substantive orders, namely, stay of execution pending appeal and orders of this court recalling cases Nos. 177, 180 and 181 of 2016; 182, 183 and 184 of 2018 (consolidated) filed at the Co-operative Tribunal in Nairobi for purposes of giving further directions.

2. The application is anchored on grounds stated on its face as well as depositions made in the supporting affidavit sworn on 23rd August 2019 by Julius Muriungi, the 3rd applicant on his own behalf and on behalf of the other applicants. Besides replicating their grounds of appeal, the applicants in the grounds premising the motion and in the supporting affidavit contend that they are aggrieved by the Co-operative Tribunal's (the tribunal) decision dismissing their application dated 9th May 2017 and have already filed an appeal and a record of appeal; that if orders of stay of execution are not granted as prayed, they will lose their properties which have already been attached by Beeline Kenya auctioneers; that if execution is levied, they will suffer irreparable loss and damage.

3. The prayer seeking recalling of the aforesaid files from the tribunal is based on the ground that this court has supervisory jurisdiction over the tribunal. No other reason was advanced by the applicants for seeking a recall of the said files at this interlocutory stage.

4. The application is contested. Mr. Titus Munjuri, the respondent's Executive Officer swore a replying affidavit on 20th November 2019 deposing that the application lacked merit and amounted to an abuse of the court process as it had no factual or legal foundation. The deponent asserted that the application was filed in bad faith with the sole aim of preventing the respondent from realizing the fruits of its judgment which was delivered on 7th May 2009 more than ten years ago; that the applicants have not met any of the preconditions for grant of stay as required by the law.

5. The application was argued orally before me on 17th December 2019 by learned counsel Mr. Kurauka for the applicants and learned counsel Mr. Mbaabu who appeared for the respondent. Besides expounding on the averments made by the 3rd applicant in the supporting affidavit, Mr. Kurauka claimed that as the applicants have filed a record of appeal, it would be in the interest of justice to arrest any execution pending disposal of the appeal; that if the application was not allowed, the applicants will suffer great prejudice as their property will be sold but the respondent will not suffer any prejudice; that the appeal has high chances of success and the application ought to be allowed.

6. Mr. Mbaabu in his riposte reiterated the depositions made in the replying affidavit and further argued that the application lacked merit as the applicants have failed to show that they will suffer substantial loss if the stay sought is not granted; that if the court was inclined to grant stay, it should be on condition that the applicants jointly deposit the decretal amount in the sum of KShs.12,000,000 in an interest earning account operated by both counsel on record pending the determination of the appeal.

7. I have given due consideration to the application, the affidavits on record, the rival submissions made on behalf of the parties as well as the court record.

The court record reveals that this is the second application for stay of execution being made by the applicants, the first one being the one filed on 22nd August 2018. Before filing the first application, the respondent had sought to execute the decretal amount by way of arrest of the applicants and their committal to civil jail. The applicants contested the mode of execution then preferred by the respondent arguing that committal to civil jail in execution of a decree was both unlawful and unconstitutional.

8. In its ruling dated 13th February 2019, this court allowed the applicants' prayer for stay of execution but limited it to the suspension of the warrants of arrest issued against the applicants pending disposal of the appeal.

9. It would appear from the court record that thereafter, the applicants went to sleep and only woke up about an year later when the respondent commenced the execution process by way of proclamation and attachment of the 3rd applicant's moveable properties which fact appears to be the basis of the respondent's submission that the instant application was made in bad faith with the aim of denying the respondent the fruits of its judgment.

10. It must always be remembered that execution is a lawful process and the fact that goods have been attached in execution of a decree cannot by itself amount to a good ground for grant of stay.

11. For an applicant to be entitled to an order of stay pending appeal, he must satisfy the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules. The applicant must satisfy the court that if stay is not granted, he is likely to suffer substantial loss; that the application had been made without unreasonable delay and that he was willing to offer security as the court may order for the due performance of the decree.

12. In this case, though the applicants have not expressly claimed that they will suffer substantial loss if stay is not granted, they have alluded to the same by claiming that if stay is denied, they will suffer irreparable loss or damage. The applicants have however not stated what kind of loss or damage they are likely to suffer if stay was not granted.

13. Though all the preconditions for stay are important and must be complied with before an applicant becomes entitled to orders of stay, the all-encompassing consideration in deciding whether or not to grant stay is whether the applicants have demonstrated that they are likely to suffer substantial loss if the court declined to grant the stay sought. This is so because if there is no likelihood for substantial loss occurring if stay was not granted, there would be no justification for denying a successful litigant the fruits of his or her judgment.

14. I am guided in the above finding by the Court of Appeal's decision in Kenya Shell Limited V Benjamin Karuga Kibiru & Another, [1986] eKLR where the court held that:

> "Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a 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."

15. The likelihood of substantial loss occurring if stay was not granted must be proved by concrete evidence. Needless to say, the burden of proof always lies on he who alleges and therefore, the applicant bears the burden of proving substantial loss. Mere allegations or averments cannot suffice. I am in total agreement with the holding in Lalji Bhimji Sanghani Builders & Contractors V Nairobi Golf Hotels Limited, HCCC No. 1990 of 1995 where the court explained what constitutes substantial loss in monetary decrees and how it should be proved. The court expressed itself as follows:

> "… for an applicant to satisfy this condition, he must persuade the court that the decree holder is a man of straw from whom it will be well nigh impossible, or at least very difficult to obtain back the decretal amount in the event of the intended appeal succeeding. Such persuasion must spring from affidavit or other evidence on record. A bold statement from the bar or indeed in an affidavit by the judgment debtor that he will suffer substantial loss unless stay of execution is ordered unbacked by evidence of the matters I have alluded to carries no weight of persuasion in the mind of a judge."

16. With the foregoing in mind, it is patently clear that the applicants have not demonstrated that if stay is not granted, they are likely to suffer substantial loss.

17. Turning to the requirement that an applicant must satisfy the court that the application was filed timeously, it is important to note that though the application dated 20th August 2018 was disposed of on 13th February 2019, the current application was filed on 23rd August 2019. The delay of about six months has not been explained. In my view, the delay is inordinate and inexcusable.

18. Lastly, the applicants have not offered any security for the due performance of the decree.

19. Given the foregoing findings, I am satisfied that the applicants have not met any of the preconditions for grant of stay as stipulated in Order 42 Rule 6 (2) of the Civil Procedure Rules. The applicants are consequently not deserving of the exercise of the court's discretion in their favour and prayer (c) of the application must for this reason fail.

20. I wish to briefly comment on the applicants' counsel's submission that the application ought to be allowed because the applicants' appeal has high chances of success. In my view, unlike in applications for stay pending appeal made to the Court of Appeal under Rule 5 (b) of the Court of Appeal Rules, whether an appeal has high chances of success is not one of the factors the High Court should consider when determining an application for stay pending disposal of an appeal before it. Apart from considering the wider interests of justice, in determining applications for stay pending appeal, the High Court is guided in the exercise of its discretion by the preconditions for stay stipulated under Order 42 Rule 6 (2) of the Civil Procedure Rules.

21. Finally, I must now consider the applicants' prayer seeking a recall of tribunal case nos. 177 of 2016; 180 of 2016; 181 of 2016; 182 of 2018; 183 of 2018 and 184 of 2018 (consolidated). Though I agree with the applicants that this court has supervisory jurisdiction over the Co-operative Tribunal, it is my finding that this prayer has been overtaken by events since the court record shows that on 22nd August 2018, this court requested the tribunal to furnish it with inter alia its original record in the consolidated cases.

22. For all the foregoing reasons, I have come to the conclusion that the applicants' Notice of Motion dated 23rd August 2019 is devoid of merit and it is accordingly dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of May 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mbaabu for the respondent

No appearance for the applicants

Ms Carol: Court Assistant