



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 363 OF 2018**

**LAWRENCE MIRITI ..... 1<sup>ST</sup> APPELLANT**

**MATHEW KAUME ..... 2<sup>ND</sup> APPELLANT**

**JULIUS MURIUNGI ..... 3<sup>RD</sup> APPELLANT**

**ROBERT MWENDA ..... 4<sup>TH</sup> APPELLANT**

**JOSHUA MUTWIRI ..... 5<sup>TH</sup> APPELLANT**

**CHARITY KARIMI ..... 6<sup>TH</sup> APPELLANT**

**VERSUS**

**MERU NORTH FARMERS SACCO LIMITED.....RESPONDENT**

**RULING**

1. The appellants who are the applicants in the Notice of Motion dated 20<sup>th</sup> August 2018 sought two substantive orders. They prayed that they be granted stay of execution of the decree and judgment of the Co-operative Tribunal (hereinafter the tribunal) pending the hearing and determination of their appeal and that the court be pleased to recall Co-operative Tribunal Case Numbers 177 of 2016; 180 of 2016; 181 of 2016; 182 of 2016; 183 of 2016 and 184 of 2016 (consolidated) for the purpose of giving further directions.
2. The application is premised on grounds that this court has supervisory jurisdiction over the Co-operative Tribunal; that if the stay order sought is not granted, the applicants risk being committed to civil jail as warrants for their arrests have already been issued; that they are also likely to lose their properties if warrants for attachment of their properties are issued; that they have a pending appeal which challenges the tribunal’s rulings dated 6<sup>th</sup> July 2017 and 9<sup>th</sup> May 2017 on both facts and the law and that if the application is allowed, the respondent is not likely to suffer any prejudice. These grounds are replicated in the depositions made in the supporting affidavit sworn on 20<sup>th</sup> August 2018 by the 1<sup>st</sup> applicant on his own behalf and on behalf of the other five applicants.
3. The application is opposed through the replying affidavit sworn on 22<sup>nd</sup> October 2018 by the respondent’s chairman *Mr. Raphael K. Imuti*. The respondent avers that the application lacks any factual or legal foundation and ought to be dismissed because in his view, the ruling dismissing the applicants’ application dated 9<sup>th</sup> May 2017 delivered by the tribunal on 6<sup>th</sup> July 2018 was fair and just to both parties; that the warrants of arrest were lawfully issued against the applicants in execution of the summary judgment granted in the respondent’s favour on 7<sup>th</sup> May 2009; that the applicants have had more than ample time to settle the decretal amount and they have not demonstrated that if the orders sought are not granted, they will suffer substantial loss; that the application has been made with unreasonable delay and is a delaying tactic meant to prevent the respondent from realizing the fruits of its judgment; that if the application is allowed, the respondent will be restrained from exercising its statutory powers and will suffer irreparable damage.
4. By consent of the parties, the application was prosecuted by way of written submissions. The respondent was the first to file its submissions on 29<sup>th</sup> October 2018 while those of the applicants were filed on 17<sup>th</sup> December 2018.
5. I have carefully considered the application, the affidavits filed by the parties, the rival written submissions as well as the court record. The law governing stay of execution pending appeal is set out in *Order 42 Rule 6 (2)* of the *Civil Procedure Rules* which states as follows:

**“(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.”*

6. From the foregoing, it is clear that for an applicant to be entitled to orders of stay pending disposal of an appeal, he must prove to the satisfaction of the court that he will suffer substantial loss if stay is not granted; that the application had been made without unreasonable delay and that he was willing to furnish the security that the court may order in its discretion for the due performance of the decree. Needless to state, the court has wide discretion in deciding whether or not to grant stay of execution taking into account all the circumstances and facts of each case.

7. Starting with a consideration of whether or not the application was filed timeously, I am unable to agree with the respondent's submission that there was inexcusable delay in filing the application considering that the respondent obtained summary judgment against the applicants on 7<sup>th</sup> May 2009. From the court record, it is evident that the appellant's appeal does not challenge the validity of the aforesaid summary judgment but attacks the legality of the ruling and order of the tribunal dated 6<sup>th</sup> July 2018. Consequently, what the court should consider in determining whether or not the application was filed without unreasonable delay is the lapse of time between when the impugned ruling was delivered and the date the instant application was filed. I have already stated that the ruling subject of the appeal was delivered on 6<sup>th</sup> July 2018. The instant application was filed on 20<sup>th</sup> August 2018 about one and a half months later. Though the delay has not been explained, it cannot be validly said that it is prolonged or inordinate. I find that the application was filed without unreasonable delay.

8. On the issue of substantial loss, though the applicants did not annex to their application a copy of the ruling subject matter of the appeal, it is apparent from the material placed before me that the ruling dismissed the notice of motion dated 9<sup>th</sup> May 2017 filed before the tribunal by the applicants in which they sought *inter alia* the setting aside of warrants of arrest obtained against them by the respondent in execution of the summary judgment obtained in favour of the respondent on 7<sup>th</sup> May 2009.

The material placed before me shows that two warrants of arrest have already been issued against two of the applicants namely the 2<sup>nd</sup> and 6<sup>th</sup> applicants. The warrants are annexed to the application and are collectively marked as exhibits 'LM1'. Given the mode of execution chosen by the respondent, there is no doubt that if the orders sought are not granted, the respondent will be at liberty to push for the execution of the warrants of arrests which will expose the applicants to the risk of being committed to civil jail before their appeal is heard and determined. I agree with the applicants that if this risk attaches, they are bound to suffer substantial and irreparable loss and damage since they will lose their liberty and suffer the consequences of incarceration in all their various forms before the legality of the tribunal's findings is established by the High Court.

9. It is however not lost on this court that the decree whose execution is sought to be stayed is dated 7<sup>th</sup> May 2009. It is about nine years old. The claims by the respondent that the applicants have not made any effort to settle the decree has not been disputed by the applicants. What is not disputed is in law deemed to be admitted. Given those circumstances, the respondent's contention that the current application is one of the ways the applicants have invented to frustrate the respondent from enjoying the fruits of its judgment cannot be said to be farfetched.

10. The sword of justice is double edged. It cuts both ways. In as much as the applicants are entitled to their right of appeal, the respondent is also entitled to enjoy the fruits of its judgment without unnecessary delay.

11. Having weighted the competing interests of the parties, I am inclined to exercise my discretion in favour of the applicants but on conditions which will ensure that none of the parties suffers prejudice pending determination of the appeal. As noted earlier, the appeal herein does not challenge the validity of the judgment obtained by the respondent against the applicants.

The applicants' complaints on appeal are centered on the tribunal's ruling dated 6<sup>th</sup> July 2018 which dismissed their notice of motion dated 9<sup>th</sup> May 2017 which principally sought orders to suspend or to set aside the warrants of arrest issued against them in execution of the decree dated 7<sup>th</sup> May 2009. Bearing this in mind, I find that the order that would best serve the interests of justice in this case would be one which preserves the substratum of the appeal so that the same is not rendered nugatory and which does not prevent the respondent from realizing the fruits of its judgment through other modes of execution other than the one previously preferred by the respondent.

12. In view of the foregoing, I find merit in the applicants' prayer for stay of execution which stay will be limited to the suspension of the warrants of arrest issued against the applicants pending the hearing and determination of the appeal. For purposes of clarity, this order means that the respondent will be at liberty to execute the decree using any other mode of execution allowed by the law other than by way of execution of the warrants of arrest issued against the applicants notwithstanding the pendency of the appeal.

13. With regard to the prayer seeking recalling of the tribunal cases listed in prayer (d) of the motion, I find that the applicants have not given any reason why the said matters should be recalled by this court. No basis has therefore been established for the grant of such an order. It is thus my finding that the prayer (d) of the motion is not merited and it is hereby dismissed.

14. The costs of the application shall abide the outcome of the appeal.

It is so ordered.

**DATED, DELIVERED and SIGNED at NAIROBI** this 13<sup>th</sup> day of February, 2019.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Kurauka for the appellants

Mr. Mbabu for the respondent

Mr. Fidel: Court Assistant