



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 496 OF 2018

SAMUEL MUNGAI.....1ST APPELLANT/APPLICANT

PETER NDUNGU.....2ND APPELLANT/APPLICANT

MARGARET NJERI MIGWI.....3RD APPELLANT/APPLICANT

JEREMIAH WAWERU.....4TH APPELLANT/APPLICANT

-VERSUS-

JAMES KAMONI.....1ST RESPONDENT

FRANCIS KARANJA.....2ND RESPONDENT

BRIAN KABOKA.....3RD RESPONDENT

RULING

1. The appellants/applicants in the present instance have filed the Notice of Motion dated 17th October, 2018 supported by the grounds laid out on its face and the facts deponed in the affidavit sworn by their advocate, *Antony Mungai Njogu*. The applicants are seeking the orders hereunder:

(i) THAT there be a stay of Co-operative Tribunal Cause No.s 468 & 470 of 2015 pending the hearing and determination of the appeal against the ruling delivered by the Vice Chairperson of the Tribunal on 4th October, 2018.

(ii) THAT under the supervisory jurisdiction of the High Court over the Co-operative Tribunal among other judicial tribunals, the proceedings, file, records of all rulings and judicial materials in respect to Co-operative Tribunal Cause No.s 468 & 470 of 2015 be moved to this court to aid in the determination of the appeal.

(iii) THAT this Honourable Court be pleased to issue a temporary injunction against the respondents, stopping them from executing the ruling delivered on 4th October, 2018 and interfering with the record or status of the Tribunal Cause No.s 468 & 470 of 2015 pending the hearing and determination of the appeal.

(iv) THAT the costs of the application be provided for.

2. The aforementioned deponent asserted that the Co-operative Tribunal (“*the Tribunal*”) delivered a ruling in Tribunal Cause No.s 468 & 470 of 2015 on 11th December, 2017 and that subsequently, the Tribunal admitted fresh applications for review of its judgment and delivered a ruling on 4th October, 2018, thus irregularly conferring appellate jurisdiction upon itself against the established procedure laid out under Section 81 of the Co-operative Societies Act.

3. The deponent thus urged this court to issue an order for stay of the above ruling until the appeal against the same is heard and determined. Moreover, the deponent challenged the Tribunal’s decision to award costs to the respondent.

4. The Motion stands opposed through the replying affidavit sworn by the 2nd respondent on 12th November, 2018 where he avers *inter alia*, that contrary to the averments featured in the Motion and its supporting affidavit, the Tribunal did not confer appellate jurisdiction; rather, it entertained the application dated 5th July, 2018 filed by the respondents seeking a review of its award, which application was granted.

5. According to the 2nd respondent, when the aforesaid application for review was placed before the Tribunal, the applicants' advocate refused to participate in the proceedings and further made an oral application for stay of proceedings, citing a notice of appeal which had been filed and the High Court's supervisory jurisdiction over the Tribunal, but that in the absence of orders staying the proceedings, the Tribunal proceeded to entertain the application and to make a finding on it.

6. On the subject of costs, the 2nd respondent retorted by stating that the respondents were entitled to their costs, further emphasizing that the review of their application in no way contravenes the provisions of Section 81 of the Co-operative Societies Act since the section is limited to appeals. Further to this, the 2nd respondent maintained that the appellants' sole aim is to deny the decree holders the fruits of their judgment.

7. The Motion was canvassed through written submissions which the parties have since filed and exchanged. In their submissions, the applicants were firm in their position that the Co-operative Societies Act does not empower the Tribunal to re-open a case already determined by itself for whatever reason. In the applicants' view, the Tribunal acted in excess of its jurisdiction by re-opening the case on the basis of an irregular application for review brought by the respondents.

8. The applicants also submitted *inter alia*, that they have satisfied the conditions necessary for the granting of an order for stay of proceedings and/or execution, placing reliance on **Standard Limited & 2 others v Wilson Kalya & another t/a Kalya & Company Advocates [2002] eKLR** where the Court of Appeal determined that for an order for stay of proceedings to be granted, the applicant must show the following:

a) That the appeal which they have filed or which they intend to file is an arguable one, that is, that such appeal is not or will not be a frivolous one; and

b) That unless the order for stay of proceedings sought is granted, their appeal or intended appeal, if it were to succeed would be rendered nugatory.

9. On the premise of the above, it is the applicants' contention that not only do they have an arguable appeal, but that unless the order for stay of the proceedings and/or execution is granted, there exists the apprehension that the respondents will proceed to execute against them for the recovery of the sum of Kshs.118,440/.

10. In their opposing submissions, the respondents emphatically argued that the Tribunal in no way conferred appellate jurisdiction upon itself, neither did it entertain the grounds for review of the award or a re-trial of the subject matter which was previously before it; instead, it merely considered the issue of who ought to be responsible for effecting the decree in Tribunal Cause No.s 468 & 470 of 2015.

11. I have considered the grounds stated in the Motion, the facts presented in the affidavits in support of and in opposition thereto, and the rival submissions together with the relevant authorities cited.

12. In touching on the brief background of the matter, while I have noted that the full proceedings and record before the Tribunal have not been availed to this court, the respondents in their submissions pointed out that the Tribunal entered judgment on 28th November, 2016 upon hearing the parties fully on their evidence, thereby finding the applicants liable to the claimants/decree holders.

13. The respondents also mentioned that the applicants having failed to comply with the award, the claimants filed an application for notice to show cause, to which the applicants filed an application seeking to argue that they were no longer the officials of the judgment debtor (Mololiner Nissan Sacco Limited) hence should not be made responsible for settling the decree. In the end, the Tribunal vide its ruling of 11th December, 2017 held *inter alia*, that the decree holder ought to revisit the issue of who constitutes the proper management of the judgment debtor.

14. That thereafter, the respondents filed an application seeking a review of the award of the Tribunal, to which the applicants filed a notice of preliminary objection largely arguing that the Tribunal is among others, *functus officio* to entertain the application for review since it had already passed the decree. When the Tribunal heard the preliminary objection, it dismissed the same through its ruling of 4th October, 2018 for the reasons that since the order for review being sought touches on execution of the decree, it has jurisdiction to entertain the relevant application, *inter alia*. The said ruling has precipitated the appeal and application now before this court.

15. Having laid out the above, I now return to address the Motion. I choose to begin with order (iii) of the same seeking a temporary injunction. I noted that this order was not discussed any further either in the application or submissions made by the parties. It therefore follows that I have no reason to address my mind to it and dismiss it without further ado.

16. Order (ii) of the Motion calls for the supervisory jurisdiction of the High Court in having the proceedings of the Tribunal moved to the High Court to assist in the hearing and determination of the appeal. The High Court's supervisory power is established under **Article 165(6)** of the **Constitution** which stipulates as follows:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

17. **Article 165(7)** goes ahead to provide that:

“For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to

ensure the fair administration of justice.”

18. Whereas I noted that this limb of the application was not advanced in the applicants’ submissions, I equally noted that the same was not disputed by the respondents. Going by the record and as mentioned earlier on, for this court to aptly exercise its appellate jurisdiction over the matter, it would require the Tribunal records and files in respect to Co-operative Tribunal Cause No.s 468 and 470 of 2015. I therefore find merit in the order being sought.

19. I am now left with the foremost order (i) relating to stay of the Tribunal proceedings and/or execution pending appeal. Being guided by the record availed to me and the facts presented by the parties, I have recognized that the Tribunal entertained the claims before it and delivered judgment. Be that as it may, the respondents filed an application seeking a review of the Tribunal’s ruling of 11th December, 2017 which ruling among others, vacated the orders for execution on the premise that the management of the judgment debtor was brought to question.

20. The guiding principles in determining whether or not the applicants are entitled to an order for stay of the Tribunal proceedings were considered in the Court of Appeal case of ***UAP Provincial Insurance Company Limited v Michael John Becket [2004] eKLR*** in the following manner:

“In order for the applicant to succeed in an application for stay of proceedings pending appeal it is necessary for the applicant to satisfy the court, firstly that the pending appeal is an arguable one, which is not frivolous, and secondly that if the stay of proceedings is not granted the appeal when ultimately heard will be a futile exercise...”

21. A similar approach on the subject was taken in ***Standard Limited & 2 others v Wilson Kalya & another t/a Kalya & Company Advocates [2002] eKLR*** quoted by the applicants.

22. As concerns whether the appeal is arguable or not, the courts have rendered that an arguable appeal constitutes an appeal with arguable grounds, irrespective of whether or not it will eventually succeed. Such was the case in ***M/S Master Power Systems Limited v Public Procurement Administrative Review Board & 2 others [2015] eKLR*** cited by the applicant where the court rendered itself thus:

“I am mindful that an arguable appeal is not one that must necessarily succeed, but one in which the court should consider...”

23. It has been established in the present instance that the appeal is against the Tribunal’s order to the effect that it has jurisdiction to review its judgment close to one (1) year after its delivery. The issue here is whether the Tribunal has the power to review its decision or whether by doing so, it will be sitting on appeal against the same. Without diving into the merits of the appeal as the respondents did in their submissions, I am satisfied that the appeal gives rise to arguable grounds.

24. Concerning whether the appeal will be regarded a futile exercise if the proceedings are not stayed, I borrow from the court’s reasoning in ***M/S Master Power Systems Limited (supra)*** that:

“...whether or not an appeal will be rendered nugatory is a question of fact which will depend on the peculiar circumstances of each case; whether or not what is sought to be stayed, if allowed to happen, is reversible or not and whether an award of damages will be sufficient compensation for the purpose of the application.”

25. In the present scenario, the applicants are apprehensive that the respondents will proceed to execute the costs resulting from the impugned ruling. I have looked at the letter dated 8th October, 2018 annexed to the application as “ANM 3” and addressed by the respondents’ advocates to the applicants’ advocates, requesting for the sum of Kshs.118,440/; this confirms that the respondents are intent on executing the order. The respondents made no attempts to challenge this aspect of the order being sought.

26. On my part, I have taken into consideration that one of the key issues raised before the Tribunal is that of the management/officials of the judgment debtor, which issue is tied to the review order sought and consequently, the appeal. In the premises, I am of the opinion that to have the appeal determined first would assist in determining the course of the execution proceedings before the Tribunal in terms of who ought to settle the costs and any other amounts, hence it would only be prudent to grant the order for stay of further proceedings.

27. In regards to stay of execution of the costs on the preliminary objection, the relevant provision relating to stay of execution is Order 42, Rule 6(2) of the Civil Procedure Rules which expresses that the following conditions must be met for such order to be granted:

(a) the application must have been made without unreasonable delay;

(b) the court must be satisfied that substantial loss may result to the applicant unless the order is made and that;

(c) the provision of security for the due performance of such decree or order.

28. In respect to the first condition, I am satisfied that the application, having been made less than one (1) month following the delivery of the impugned ruling, has been timeously brought.

29. I addressed the second condition on substantial loss under the ambit of whether or not the appeal will be rendered nugatory, though I wish to point out that whereas the applicants did not demonstrate the manner in which they will suffer substantial loss, I equally noted that the respondents did not dispute the granting of an order for stay of execution. I am therefore inclined to balance the interest of the parties in

this regard.

30. The third condition on the provision of security was not touched on by either of the parties. Nonetheless, it would appear that in this case, the security would relate to the costs amounting to Kshs.118,440/ arising from the impugned ruling. I am empowered to exercise my discretion in applying this condition in a manner that is just.

31. Accordingly, I will allow orders (i) and (ii) of the Motion and make the following consequent orders:

a) That there shall be a stay of further proceedings in Co-operative Tribunal Cause No.s 468 and 470 of 2015 pending the hearing and determination of the appeal.

b) That the Tribunal proceedings, file and record be hereby forwarded to this court to aid in the determination of the appeal.

c) That there shall be a stay of execution of the costs awarded in the order made on 4th October, 2018 pending the hearing and determination of the appeal on the condition that the applicants do deposit the sum of Kshs.118,440/ in court within 30 days from today, failing which the order for stay shall lapse.

d) Costs of the Motion shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 7th day of November, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellants/Applicants

.....for the Respondents