



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 630 OF 2017

KOMOTHAI COFFEE GROWERS

CO-OPERATIVE SOCIETY LIMITED APPELLANT

VERSUS

STEPHEN NDUNGU KANJI RESPONDENT

RULING

1. This ruling seeks to determine the Notice of Motion dated 22nd November, 2017 filed under the provisions of Section 81 (1) of the Co-operative Societies Act, Orders 42 Rule 6 and Order 51 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The Appellant seeks orders for stay of execution of the judgment and decree entered in Co-operative Tribunal Case No. 35 of 2015 on 19th October, 2017 pending the hearing and determination of the Appeal.

2. In support of the Application, the Appellant adduced grounds on the face of the Application, and filed a Supporting and supplementary affidavits dated 22nd November, 2017 and 15th December, 2017 respectively both sworn by WILSON KIIGI KABACHIA, the Appellant's Chairman.

3. The Application is premised on the grounds that the Appellant would suffer substantial loss if the order requiring them to conduct fresh elections within 45 days from 19th October 2017 is not stayed for the reason that the Appeal would be rendered nugatory. It was further deponed that the Appellant had raised a preliminary objection on 22nd February, 2017 on the grounds that the tribunal did not have the requisite jurisdiction to hear and determine the suit which objection was dismissed with costs. The Appellant has already filed its Memorandum of Appeal against the said judgement mainly on the grounds that the tribunal erred in holding the interim committee members of the appellant personally liable to pay costs of the suit and that the tribunal did not have the jurisdiction and powers to direct the Appellant to hold fresh elections.

4. In the supplementary Affidavit, it was deponed that the Respondent has already filed a bill of costs with the tribunal claiming the sum of Kshs. 210,000/= in costs and that if the said amount is paid, the Respondent will not be able to refund the same in the event the Appeal is successful as he is a man of straw who appears in person. It was also deponed that the Respondent has filed an application for contempt of court with the tribunal which application is premature. It is deponed that the Applicant is a body corporate and its willing to furnish security in any terms the Court deems fit for the purposes of a stay of execution of the judgment. It was also deponed that the Application was filed without delay.

5. This Application was canvassed orally in Court on 20/12/2017. Mr. Munene appearing for the Applicant submitted that the Applicant filed the Appeal on 16/11/2017 which was within the timelines and has already applied for the typed proceedings. That the Applicant would suffer substantial loss if the stay is not granted as the elections would have been held by the time the appeal is heard hence rendering the Appeal nugatory. It was also submitted that the Respondent is not financially capable of refunding the costs of Kshs. 210,000/= in case of a successful appeal. The Applicant further submitted that they are ready to abide by any terms as to security as the court deems fit to grant.

6. I have considered the Application and the response by the Respondent together with the arguments advanced in Court. The disputed judgment required the Applicant to hold elections within 45 days of the judgment which period has already lapsed and it is the Applicants argument that if the judgment is not stayed and the Appeal is successful, then the same would be rendered nugatory. It is true that the nature of the orders in the judgment are such that if they are not stayed, the Appeal would, if successful, be rendered nugatory. By the time the Appeal is heard and determined it is very likely that new officials would have been elected and removing them from office might be another tedious process. I also concur with the Applicants that they would suffer substantial loss in case the Respondent is paid the costs of the suit if the Appeal succeeds. This is because the Respondent has not demonstrated that he would be able to refund the same despite the Applicant's contention that he is a man of straw.

7. The Respondent has submitted that the Appeal ought to have been filed after the preliminary objection was dismissed and that the same had been filed out of time. At this stage, I would not like to dwell on the merits of the Appeal as that would embarrass the judge who will

hear the Appeal. **Order 42 Rule 6 of the Civil Procedure Rules** provides the conditions for granting an order of stay of execution being that the application has been made without unreasonable delay, security for the decree or order has been given, and that substantial loss may result to the Applicant unless the order for stay is made.

8. This Application was filed a month after the judgment sought to be appealed against was delivered. Ordinarily, this would have been unreasonable delay considering that the orders issued were to be executed within 45 days of the judgment. However, the Applicant averred that they had filed a previous application for stay of execution at the Tribunal on 20th November, 2017 but the Applicant's advocate was informed that the Application could not be heard in the year 2017 as there were no dates available. In such a situation, it would be fair to excuse the delay in the prevailing circumstances. The Applicant has also indicated that they are ready to abide by any terms as to security as the court may deem fit to grant.

9. The purpose of an application for stay of execution pending an appeal is to preserve the status so that the rights of the appellant are safeguarded and the appeal, if successful, is not rendered nugatory. The Applicant has demonstrated that the nature of the orders issued are such that if a stay is not issued, then the appeal would be rendered nugatory as well as that the Respondent may not be able to refund the costs of the suit. It is my view that the Applicant has made a case for granting of the orders sought.

10. The upshot of the above is that the Application dated 22nd November, 2017 is therefore allowed. I further direct that the Appeal be prosecuted within the next 120 days from the date of this ruling considering that the orders being stayed ought to have been executed within a period of 45 days.

11. The costs of the Application shall abide the outcome of the Appeal.

Dated, Signed and Delivered at Nairobi this 10th Day of May, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*