



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 446 OF 2016**

**NANZALA JONATHAN.....APPELLANT**

**- V E R S U S -**

**NJIWA SAVINGS & CREDIT CO-OPERATIVE SOCIETY..... RESPONDENT**

**RULING**

1) Nanzala Jonathan, the appellant herein, took out the motion dated 13<sup>th</sup> July 2016 in which he sought for *interalia*:

**1. .... spent**

**2. .... spent**

**3. THAT this honourable court be pleased to order a stay of execution of the judgment/decree issued by The Cooperative Tribunal on the 3<sup>rd</sup> June 2016 pending the hearing and determination of Civil Appeal Number 446 of 2016 lodged by the applicant herein.**

**4. THAT costs of this application be in the cause.**

2) The motion is supported by the affidavit of Nanzala Jonathan. When served, Njiwa Savings and Credit Cooperative Society, the respondent herein, filed the replying affidavit of David Mutisya to oppose the application. When the motion came up for interpartes hearing learned counsels recorded a consent order to have the motion disposed of by written submissions.

3) I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. It is the appellant's submission that he has filed an appeal against the judgement of the Cooperative Tribunal delivered on 3<sup>rd</sup> June 2016. The appellant further avers that the appeal has high chances of success and that if the decree executed is the appeal will be rendered useless therefore it is in the best interest of justice that an order for stay be granted.

4) The respondent on the other hand has argued that the application lacks merit since the appeal was filed out of time and without leave of court. It was also pointed out that the applicant has not given any security for the due performance of the decree. It is further argued by the appellant that the application for stay was filed after an undue delay and that the applicant has not shown the substantial loss he would suffer if the order for stay is not granted.

5) It is the submission of the respondent that it is ready to refund the decretal sum if the appeal turns successful.

6) The brief history of this dispute started when the respondent filed a statement of claim against the appellant before the Cooperative Tribunal in which it sought to recover a sum of kshs.2,109,066/= plus interest. The Cooperative Tribunal heard the claim and in the end it entered judgment in the sum of ksh.2,109,066 in favour of the respondent and against the appellant in respect of unpaid loan.

7) The principles applicable in determining an application for stay of execution are well settled. Those principles are stated in Order 42 rule 6 of the Civil Procedure Rules. First, an applicant must show the substantial loss he would suffer if the order for stay is denied. Secondly, the application must be filed timeously. Thirdly, the court should consider the provision for security for the due performance of the decree.

8) It is appropriate to start by considering the second principle. The decision of the Cooperative Tribunal was delivered on 3<sup>rd</sup> June 2016 and the motion for stay was filed on 21.7.2016. The delay of 1½ months in my view is not inordinate. I am satisfied the motion dated 13<sup>th</sup> July 2016 was filed without unreasonable delay.

9) The second principle is whether the applicant has shown the substantial loss he would suffer if the order for stay is not granted. In the

motion, the appellant has averred that he would suffer substantial loss if she is denied the order. In the affidavit filed in support of the motion, the appellant does not specify the substantial loss she would suffer. However in the written submissions the appellant argues that if the order is not given she would be subjected to paying a huge amount that was not mathematically ascertained thus putting her in untold financial burden.

10) The respondent on the other is categorical, that the appellant has not demonstrated the substantial loss she may suffer. The respondent stated that it is a reputable savings and credit society which is liquid and is capable of refunding the decretal sum if required to do so at the conclusion of the appeal. With respect, I agree with the appellant that if the order for stay is denied, the respondent will move to execute the decree to recover the decretal sum. The appellant will suffer some loss which in my view is not substantial. The respondent has clearly stated that it is in a financial position to refund the decretal if the appeal turns successful. The respondent's assertion on its financial status is not controverted. For this reason I find that the appellant will not suffer substantial loss if the order for stay is denied.

11) The third principle is the provision of security for the due performance of the decree. This principle is applied when the court is satisfied that it should grant the order for stay. In the case before me I am inclined to deny the order for stay. Consequently, I do not want to belabour to consider the third principle because it is a dependent on the grant of the order for stay.

12) In the end, I find the motion dated 13.7.2016 to be without merit.

It is dismissed with costs.

**Dated, Signed and Delivered in open court this 11<sup>th</sup> day of May, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondents