



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 514 OF 2018**

**RELI SACCO SOCIETY LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**CORNEL AWUONDO OKOTH & 11 OTHERS.....RESPONDENTS**

*(Appeal from the Ruling of Honourable Ms. Cecilia Kithinji (Deputy Chairman) and Mr. H. Shidiye (Member), Mr. R. Mwaura (Member), Mr. R. Lewen (Member) dated the 15<sup>th</sup> day of October 2018, in the Co-operative Tribunal at Nairobi, Tribunal Case No. 92 of 2003)*

**RULING**

The motion dated the 14<sup>th</sup> day of November 2018 seeks a stay of further proceedings in Nairobi Co-operative Tribunal Case Number 92 of 2003 pending the hearing and determination of the Appellant's Appeal. The Application is by the Appellant/Applicant.

The application is premised on the grounds set out on the body of the same and it's supported by the affidavit sworn by Leonard Anyonje on the 14<sup>th</sup> November, 2018. The Appellant/Applicant has sought stay of proceedings pending the hearing and determination of the Appeal filed on the 26<sup>th</sup> October, 2018 against the ruling of the Tribunal dated the 15<sup>th</sup> day of October, 2018 in the Co-operative Tribunal at Nairobi in Tribunal Case No. 92/2003.

The said ruling was for a preliminary objection dated the 22<sup>nd</sup> July 2018 in which the Applicant had raised an objection to the Respondents' suit on the grounds that the Tribunal is *functus officio* in as far as the hearing of the suit is concerned, the Tribunal having on 9<sup>th</sup> July, 2003, ordered that the same be referred to the Minister on Appeal since it touched on surcharge. The other ground was that the Tribunal lacked jurisdiction to hear the suit, since, the claimants pursuant to the Tribunal's order, had, on 30<sup>th</sup> July, 2003 referred the dispute to the Minister for determination. The applicant alleged that the claimants ought to have appealed the Minister's decision, if any, to the High Court.

The Preliminary objection was argued before the Tribunal and in its ruling dated the 15<sup>th</sup> October, 2018, it dismissed the same and found that it has jurisdiction to consider the issues before it.

The Applicants herein being dissatisfied with that ruling, appealed to this court and have vide the application herein sought stay of proceedings in the matter pending before the Tribunal.

In the affidavit of Leonard Anyonje, it is averred that on the 9<sup>th</sup> July, 2003 the Co-operative Tribunal ordered that the Respondent's claim should be before the Minister on Appeal since it touches on surcharge and that, prompted the Respondents to amend their claim. That, on 9<sup>th</sup> July 2003, the Tribunal had the suit stood over generally and thereafter on 2nd July 2018, the Applicant filed the preliminary objection aforesaid. The applicants contend that the Tribunal having found that the claimant's claim was a surcharge of which they ought to have appealed to the Minister, the Tribunal should not have stood over the matter generally but should have found it lacked jurisdiction to hear and determine the suit and dismiss the claim with costs. Further, the claimants having filed an Appeal to the Minister on the 30<sup>th</sup> July 2003, their recourse was by way of an Appeal to the Tribunal against the order of the Minister, if any, and not to return to the Tribunal for the hearing of the claim.

The applicants are apprehensive that unless an order for stay of proceedings is granted, the matter before the Tribunal shall proceed on the 11<sup>th</sup> December 2018, thus rendering the Appeal nugatory whereas the Tribunal lacks jurisdiction to hear and determine the claim. They have urged the court to grant the orders sought.

The Respondents filed a replying affidavit sworn by Rodgers Were Washiko, on the 20<sup>th</sup> November, 2018 wherein they depone that they opposed the applicant's preliminary objection on the ground that the same was not in law a preliminary objection as the facts relied on by the applicant were false and therefore, the Tribunal cannot be *functus officio* as it assumed that the facts as pleaded by the applicants herein are correct.

It was further averred that the Respondents filed a chamber summons dated 18<sup>th</sup> June 2013 seeking an injunction against the Respondents by themselves, their servants, agents or employees for wrongfully attaching the claimants' salaries or surcharging them and that the elections of the Respondents of 8<sup>th</sup> February 2003 be declared null and void. That, when the same came up for hearing on 9<sup>th</sup> July 2003 the Tribunal made an order that the matter should be before the Minister as agreed, since it touches on surcharge.

The Respondent avers that the word surcharge has been loosely used in the proceedings which confusion was caused by the previous advocates in using the word surcharge in the amended claim. That the claim before the Tribunal is for refund of unauthorized deductions among other prayers and that the Tribunal did not make a finding that the claim was a surcharge but rather it stated that the matter "touches on surcharge" and therefore, the taking of the matter to the Minister appears to have been made by consent of the parties.

The Respondent further averred that the matter was stood over generally without the objection of the Appellant and that they had partaken in the proceedings thereafter and even amended their defence. That, the application is unmerited since the Appellant has failed to show the substantial loss that it would suffer if the order is not granted and that there is no bar to the appellant canvassing and agitating the matters raised in the preliminary objection at the full hearing.

In a further affidavit sworn on 23<sup>rd</sup> November, 2018, it is deponed that the claimants appealed to the Minister under Section 74 of the Co-operative Societies' Act as the issue was in regards to the surcharge.

Counsel for both parties made their respective submissions which the court has duly considered. The court is called upon to determine whether the applicant deserves the orders sought. I wish to observe that, at this juncture, the court is not dealing with the Appeal but an interlocutory application. The principles that should guide the court when dealing with an application of this nature were considered by Justice Ringera in the case of **Global Tours & Travel Limited Cause No. 43 of 2000 (UR)** where the learned Judge observed that in considering the matter, the court should bear in mind such factors as the need for expeditious disposal of cases and whether the Appeal will be rendered nugatory should stay be refused.

The ruling in this case was made at an interlocutory stage. The court in considering whether the appeal shall be rendered nugatory has to consider what will happen if the order for stay is not granted. As argued by the Respondent, should the Appeal succeed, the parties can still be heard substantively before the Tribunal and therefore the applicants will not have anything much to lose.

As to whether the Appeal is arguable, the court has perused the documents annexed to the affidavits and the ruling the subject matter of this appeal. The Applicant has argued that the Respondent appealed to the Minister vide a letter dated 30<sup>th</sup> July 2003. In the said letter, it is clearly stated that the decision to surcharge the claimants was neither deliberated upon nor approved by the Annual delegates meeting. The court has also perused the letter dated 1<sup>st</sup> August 2003 wherein, the Registrar of Co-operative Societies advised the Managing Director, Kenya Railways Corporation Limited to stop further deductions from the claimants and any such funds which have been recovered from them should be refunded forthwith. This letter was written subsequent to the one dated 30<sup>th</sup> July 2003 to the Minister and it was not written by the Minister and therefore it cannot be said to be a determination of the Appeal for purposes of Section 73 of the Co-operative Societies Act.

As rightly argued by Counsel for the Respondent, the Applicant did not show any evidence of the recommendations and findings of the registrar which was put to the general meeting of the society. In view of the foregoing, the court is of the view that the Applicant does not have an arguable Appeal to justify granting of the orders sought.

In the premises, the court declines to grant a stay of proceedings and hereby dismiss the application dated the 14<sup>th</sup> November 2018 with no orders as to costs.

**Dated, signed and delivered at NAIROBI this 6th day of December, 2018.**

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent