



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 47 OF 2016

JAMES MWANGI KIBUCHI.....1ST APPELLANT

REGINA WANJIRU MWANGI2ND APPELLANT

VERSUS

GIKANDA FARMERS CO-OPERATIVE SOCIETY LTD.....RESPONDENT

RULING

1. The Applicants filed a Notice of Motion under a Certificate of Urgency dated 5th September, 2016; the application was brought under Rules 3 and 6 of the Co-operative Tribunal (Practice and Procedure) Rules, 2009 and Order 22 Rule 22 of the Civil Procedure Rules and all other Enabling Provisions of the Law.

2. The Applicant prayed for the following Orders;

(i) Spent;

(ii) That the hearing of the garnishee proceedings be stayed pending the hearing and determination of this application;

(iii) This Honorable Court direct that the subject files for CTC No.26/2010 and 27/2010 be transmitted to the High Court immediately;

(iv) The execution of the decree of the tribunal be stayed pending hearing and determination of this appeal;

(v) The hearing determination of the garnishee proceedings before the tribunal be stayed pending the hearing determination of his appeal;

(vi) The funds being held by TAIFA SACCO SOCIETY LTD be transferred to an interest account at commercial bank rates or at court whichever is greater;

(vii) This Honorable Court do issue such further or alternative orders as it may deem fit in the circumstances;

3. The Applicants relied on the grounds on the face of the application and on the Supporting Affidavit made by JAMES MWANGI KIBUCHI and is dated the 3rd September, 2016.

4. Hereunder is a summary of the rival parties submissions.

APPLICANT'S SUBMISSIONS

(i) A judgment/ award was delivered by the Tribunal on the 6th February, 2015 in the two consolidated cases; a Notice of Appeal and an application for certified copies of proceedings and the award was filed and served on the 10th and 11th February, 2015 respectively; the required document had not been supplied to date;

(ii) The time to file an appeal in the High Court should commence or run from the date the Certificate of Delay is supplied;

(iii) TAIFA SACCO SOCIETY LTD holds the funds in trust for the sole benefit of the applicants herein; and in the circumstances of the case the garnishee order is not in terms as contemplated under Order 23 Rule 1(1) of the Civil Procedure Rules;

(iv) That the attachment of the funds while the appeal is pending and time to file an appeal had not lapsed would be unconscionable and grossly prejudicial to the applicants right of appeal;

(v) The hearing of the garnishee application filed by the respondent should be stayed pending the hearing and determination of the appeal; the applicant also prayed for a stay of execution pending appeal;

RESPONDENT'S SUBMISSIONS

(i) In response Counsel stated he would rely on the Replying Affidavit sworn by James Wanjohi; that the matter was concluded by the Tribunal and the Decree issued is very clear and seeks Kshs.1,242,030/- against the 1st Appellant and Kshs.284,800/- against the 2nd appellant; Costs were assessed at Kshs.102,742/75;

(ii) The garnishee proceedings were filed at the Tribunal targeting the funds held by TAIFA SACCO; an application for Stay of the Garnishee proceedings was filed on the 25/07/2016 and the ruling dismissing the application was delivered on the 9/09/2016 and both appellants were aware of the date but were absent; an application for Stay of Execution dated the 20/03/2015 was made also dismissed on the 2/02/2016;

(iii) The instant application was wrongly headed and ought to have been Under Section 81 of the Co-operative Societies Act and Order 42(6) of the Civil Procedure Rules; instead of Order 22 which deals with applications made to the court of first instance;

(iv) Under the provisions of Order 42(6) the applicant must satisfy the court that there was no undue delay in filing the appeal; that substantial loss will occur if order sought is not granted; and must provide security for costs;

(v) That the application is unfounded as the applicants have not complied with the basic rules; the award was made on the 6/02/2015 and appeal filed on 2/09/2016 therefore there has been undue delay in filing the appeal which must be done within 30 days; Section 79(G) of the Civil Procedure Act is reproduced in Section 81 of the Co-operative Societies Act; there is therefore no substantive appeal for this court to grant a stay of execution pending appeal;

(vi) Respondent a successful litigant has pursued claim for over six (6) years; litigation must come to an end; Counsel prayed that in the interest of justice that the application be dismissed and appeal be struck out;

REJOINDER

(i) The applicants filed Notice of Appeal on the 10/02/2015 and on the same date applied for certified copies of the proceedings and the award; to date nothing has been received;

(ii) Counsel urged the court to exercise its discretion on the Notice of Appeal and the Memorandum of Appeal dated 2/09/2016 as the court had jurisdiction to extend the period for filing even when the time had expired under the provisions of Section 29(2) of the Civil procedure Act;

(ii) That the substantial loss will be that the applicants will be removed from the membership; the undue delay was not on the applicants part but that of the tribunal; the security offered is the monies held by TAIFA SACCO which can be held in an interest earning account to be held in the joint names of both Counsel;

ISSUES FOR DETERMINATION

5. Taking into consideration the above submissions this court has only framed one issue for determination;

(i) Whether this case is a suitable one for this court to exercise its discretion to grant the orders sought.

ANALYSIS

6. The applicant has moved this court by way of Notice of Motion and is seeking orders stay of execution proceedings pending an intended appeal from an award made by the Co-operatives Tribunal;

7. The award was made on the 6/02/2015 and notably an appeal ought to have been filed within a period of thirty (30) days; the applicants aver that despite them having applied for the proceedings the same have not been forthcoming from the Tribunal; the applicants nevertheless proceeded to file a Notice of Appeal on the 10/02/2015 and a Memorandum of Appeal on the 2/09/2016;

8. The application can be deemed to be devoid of a holding Memorandum of Appeal as the same has been filed out of time and without leave of this court; even though the delay in obtaining the proceedings has been occasioned by factors beyond their control it would have been prudent for the applicants to have filed an holding appeal as of right within the statutory time so as to demonstrate the sincerity in their intention and keenness of their endeavours' to seek justice;

9. The courts discretion in granting the orders sought is fettered and therefore the applicants need to satisfy the criteria laid down for a grant of the orders for stay of execution pending appeal; which are that there was no inordinate delay in bringing the current application; that the applicants stand to suffer substantial loss if the orders sought are not granted; and they must also tender security for due performance;

10. The relevant provisions of the law are captured under the provisions of Section 81 of the Co-operatives Societies Act reproduces Section 79G of the Civil Procedure Act; it outlines the time for appeals to be filed from the Tribunal to the High Court ; the intended appellants are required to file appeals within a period of thirty days excluding the time which the lower court may certify as being required for the preparation and delivery to the appellant copy of decree or judgment.

11. The first application for stay of execution was made at the Tribunal on the 20th March, 2015; the current application herein is dated the 5th September, 2016 which translates to a delay of over a period of one and a half (1½) years; there are legions of authorities that have held that a period of four (4) months as being inordinate; and therefore the period of 1 ½ years is deemed as being inordinate delay in bringing the application; as for substantial loss the applicants submit that the loss they stand to suffer will be occasioned by their removal from membership of the SACCO and they will not be able to enjoy the dynamics of the Saccos; which is found not to be a satisfactory reason; the only criteria the applicants have partially satisfied is by having offered security that the sums held by TAIFA SACCO be deposited

in an interest earning account in the joint names of both Counsel;

12. This court finds that the Memorandum of Appeal was filed out of time which means that there is no substantive appeal before this court that can be the basis for granting an order for stay of execution pending appeal; unfortunately the Notice of Appeal does not suffice; it would have been prudent and that it is also good practice to file an appeal as of right within the statutory window whilst awaiting for the proceedings; the decree, award and proceedings can always be annexed to a Supplementary Record of Appeal;

13. Justice must also seem to be done and the decree-holder must also be allowed to enjoy the fruits of the outcome of its litigation; the applicants have also not demonstrated that the respondent is bankrupt and incapable of refunding the decretal sum;

14. In the absence of a holding appeal there is clearly no justification in granting an order for stay of execution pending appeal and the applicants have not fully satisfied the grounds upon which an order for stay of execution pending appeal may be granted;

15. This court is not satisfied with the explanation given by the applicants as to why they could not proceed to file a holding appeal within the stipulated time; the delay in bringing this application is found to be inordinate and devoid of intention to bring closure to litigation; public policy demands that at some point litigation must come to an end; and finds that this is a not suitable case for it to exercise its discretion in granting an order for stay of execution pending appeal.

DETERMINATION

16. The application for stay of execution pending appeal is found not to be merited and is hereby dismissed.

17. The Respondent shall have costs of this application.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 9th day of February, 2017.

HON.A. MSHILA

JUDGE