



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**ELC APPEAL CASE NO. 12 OF 2017**

**PETER WANJOHI**

**(OFFICIAL LIQUIDADOR - DRUMVALE FCS LTD)..APPELLANT**

**- VERSUS -**

**PIUS MUSIMBA MUASYA.....1ST RESPONDENT**

**NORMAN MUTUA KIMATU.....2ND RESPONDENT**

**JOHN NZOMO KIOKO.....3RD RESPONDENT**

**RULING**

1. On 28/11/2016, the appellant filed a notice of motion of even date in the Co-operative Tribunal, seeking an order setting aside the interim injunctive orders which the Tribunal had issued against him. The Tribunal heard the application and rendered a ruling on 17/3/2017 dismissing the application. Dissatisfied with the decision of the Tribunal, the appellant lodged the appeal herein. The appeal was heard and on 19/9/2018 this Court (Eboso J) rendered a judgment in which the court dismissed the appeal on ground of lack of merit. The court directed that parties were to bear their respective costs.

2. Subsequently, the appellant brought a notice of motion dated 2/10/2018 seeking orders of stay of execution in the following verbatim terms:

**1. Spent**

**2. That pending filing, hearing and determination of the intended appeal, this honourable court be pleased to stay execution of judgment of this honourable court delivered on 19th September 2018.**

**3. That there be temporary orders of stay of execution in terms of prayer (2) above pending interpartes hearing of this application.**

**4. That costs of this application be provided for.**

3. That said application dated 2/10/2018 is the subject of this ruling. It is supported by the appellant's affidavit sworn on 2/10/2018. The application is opposed by the respondents through an affidavit sworn on 21/2/2020 by the 1st respondent. The application was canvassed through written submissions.

4. The appellant deposed in the supporting affidavit that the judgment delivered herein was likely to occasion massive loss and damages to the liquidation process which had already commenced. Further, the appellant deposed that it was in the interest of justice that temporary orders of stay of execution be issued pending the filing, hearing and determination of the intended appeal.

5. Urging the court to grant the order of stay, Mr Wachakana, Learned Counsel for the appellant, submitted that if this court does not grant the orders of stay, the intended appeal shall be rendered nugatory as the respondent will move to execute the award given by the co-operative Tribunal with the likelihood that the applicant will be committed to civil jail.

6. Opposing the application, the 1st respondent deposed in his replying affidavit that the application was an after-thought whose purpose was to further frustrate and/or thwart proceedings in **Co-operative Tribunal Case No 720 of 2016**. He added that the application was frivolous and an abuse of the court process.

7. Urging the court to reject the application, Mr Kimanthi, Learned Counsel for the respondents submitted that the reason why the appellant was pursuing the application was to defeat the contempt application pending before the Co-operative Tribunal. Relying on the decision in **Catherine Njeri Maranga v Sarah Chege & Another [2017] eKLR**, counsel argued that there was no positive order made in the judgment rendered on 19/9/2018 to warrant an order of stay of execution. Counsel added that the appellant remained in the position he was in before coming to this court to pursue an appeal and as such, the question of substantial loss and the probability of the appeal being rendered nugatory did not arise. Counsel urged the court to dismiss the application.

8. I have considered the application together with the rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence on the key question in this application. The key question falling for determination in this application is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant an order of stay of execution.

9. When exercising that jurisdiction, the court would of necessity have to satisfy itself that there is a positive order in the judgment/decreed or ruling, capable of execution. If there is no positive order capable of execution, the court will not grant an order of stay of execution. Restating this principle, the Court of Appeal rendered itself in the **Kenya Commercial Bank Limited v Tamarind Meadows Limited 7 Others [2016] eKLR** as follows:

**“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only...”**

10. Secondly, a party seeking a stay order is required to satisfy the requirements of Order 42 rule 6 (2) which provides as follows:

**2) No order for stay of execution shall be made under subrule (1) unless—**

**a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

11. The appeal giving rise to the judgment rendered by this court on 19/9/2018 challenged a decision of the Co-operative Tribunal declining to set aside its injunctive orders. This court did not find merit in the appeal and dismissed the appeal. The court did not condemn any party to bear costs of the appeal. The disposal orders in the judgment of the court reads thus:

**“14. The net result is that this court does not find merit in any of the grounds set out in the memorandum of Appeal dated 23/3/2017. Consequently, the appeal herein is dismissed.**

**15. Because the appellant is a statutory liquidator, each party shall bear own costs of the appeal:**

12. It is clear from the above disposal orders that no positive orders capable of execution were made in the judgment rendered on 19/9/2018. Consequently, there is no positive order of this court to be stayed. To this extent, I do not find merit in the present application.

13. Besides, no attempt was made by the applicant to demonstrate that the present application met the requirement of substantial loss arising from a positive order of this court.

14. In light of the foregoing, my finding on the appellant's notice of motion dated 2/10/2018 seeking orders of stay of execution of the judgment rendered on 19/9/2018 is that the application does not satisfy the criteria upon which the jurisdiction to grant an order of stay of execution is exercised. Consequently, the said notice of motion dated 2/10/2018 is dismissed. The applicant shall bear costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF JUNE 2020**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Court clerk - June Nafula