



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MIGORI**  
**CIVIL APPEAL NO. 96 OF 2016**

1. JULIUS KONCHELLAH
2. TOM BROOKE OGWENO
3. SAMWEL O. ABUSO
4. PAMELA ABUSO
5. NEHEMIAH OTIENO LICHA
6. MARK ONGORO
7. PHELIX ONDIEGE.....APPELLANTS/APPLICANTS

-versus-

THE COMMISSIONER FOR COOPERATIVE  
DEVELOPMENT & MARKETING .....RESPONDENTS

AND

SONYGAR SAVINGS & CREDIT CO-OPERATIVE  
SOCIETY LTD .....INTERESTED PARTY

**RULING**

1. By the Notice of Motion dated 05/11/2016 the Appellants/Applicants are seeking the following orders:

- (1) The instant Application be certified urgent and same be heard Ex-parte in the first instance.***
- (2) Pending the hearing and determination of this Application, the Honourable Court be pleased to grant an Interim Order of stay of Execution and/or Implementation of the Surcharge Order by and/or at the instance of the 1<sup>st</sup> Respondent in terms of the Letter dated 13<sup>th</sup> April 2012, which was disposed of and/or dismissed on the 5<sup>th</sup> day of October, 2016 and hence the like hood of the Appellants being subjected to he Surcharge.***
- (3) The Honourable Court be pleased to grant an order of stay of Execution and/or Implementation of the Surcharge Order by and /or at the instance of the 1<sup>st</sup> Respondent in***

**terms of the Letter dated 13<sup>th</sup> April 2012, which was the subject of the KISUMU CO-OPERATIVE TRIBUNAL APPEAL NO. 5 OF 2012 which was disposed of and/or dismissed on the 5<sup>th</sup> day of October 2016 and hence the likelihood of the Appellants being subjected to the Surcharge, pending the hearing and determination of this Appeal.**

**(4) Costs of this application do abide the Appeal**

**(5) Such other and/or further orders as this Honourable court may deem just and expedient be granted.**

2. The application is premised on a total of 41 grounds appearing on the body of the said Notice of Motion. It is supported by the Affidavit of the first Applicant/Appellant herein, Julius Konchellah sworn on 05/11/2016.

3. The Respondents are both opposed to the application. The second Respondent through its Chairman one Onyango Mbai swore a Replying Affidavit on 06/12/2016 and filed Grounds of opposition as well. Likewise, the first Respondent filed a Replying Affidavit on 19/04/2017.

4. Upon concurrence of the parties, the application was heard by way of written submissions where the Applicants and the second Respondents complied hence this ruling. The first Respondent did not file any submissions.

5. The brief background to the application is that the Applicants were office bearers of the second Respondent who, upon the first Respondent undertaking an audit of the second Respondent's operations and management, surcharged the Applicants variously. The Applicants were dissatisfied with that finding and lodged Appeal No. 5 of 2012 at the Co-operative Tribunal in Kisumu (hereinafter referred to as **'the Tribunal'**).

6. Three years down the line, the second Respondent applied for the dismissal of the appeal for want of prosecution. That application was opposed by the now Applicants. Unknown to the now Applicants who were the Respondents in the application for dismissal of their appeal, the application came before the Tribunal on 05/10/2016 and the same was allowed thereby dismissing the appeal. However, the Applicants were served with a Mention Notice for 28/10/2016 on which day they found out that the appeal had been earlier on dismissed without notice to them. As that dismissal paved way to the Respondents to execute the surcharges, the Applicants were apprehensive of the eminent execution and lodged the current appeal against that dismissal and sought a stay of the execution of the surcharges through the instant application.

7. The Applicants contend that although they had opposed the application for dismissal of their appeal, they were not served with any notice of its hearing and as such they were unfairly and unlawfully condemned unheard regardless of the merits or otherwise of their opposition to the application. The Applicants annexed copies of all the documents they referred to in the current application.

8. The first Respondent revisited the background of the matter and contend that the Applicants took advantage of the stay they obtained at the Tribunal and slept on their rights and that the dismissal order was deserving given that the Applicants will not suffer any loss and the appeal will not be rendered nugatory.

9. The second Respondent in opposing the application reiterate that the Applicants were indolent as they never bothered to fix their appeal for hearing for three good years. Conversely, when the second Respondent filed the application for the dismissal of the appeal proceeded to fix it for hearing and duly served the Applicants. The second Respondent further states that the instant application is aimed at delaying the conclusion of the matter and ought to be dismissed accordingly and if the application is to be allowed then it be conditional to the Applicants depositing all the surcharged amounts in Court and that the appeal be heard within a specified time limit.

10. The conditions to be considered in dealing with an application seeking a stay of execution pending appeal in the High Court are clearly provided for under Order 40 Rule 6 of the Civil Procedure Rules 2010. They are: -

- a) The Applicant should demonstrate substantial loss that may result if stay is not granted;*
- b) There should be no delay in the making of the application; and,*
- c) The Applicant must provide security for the due performance of such decree or order which the court may ultimately grant.*

11. **On the issue of substantial loss**, the Applicants submit that the root cause of all the litigation over this matter rests on the contention that they were never summoned to appear and make any representations before the Commission of inquiry set up by the first Respondent to investigate the affairs of the second Respondent whereas the inquiry covered such a period when the Applicants were office bearers of the second Respondent. That lapse led to the filing of the appeal before the Tribunal. Again, when the application for dismissal of their appeal was fixed for hearing by the second Respondent, the Applicants were not served and the matter proceeded without them being heard.

12. As matters now stand, the Applicants contend that they stand to be surcharged such amounts of money and yet they were not given an opportunity to be heard in opposition to the application to dismiss their appeal. To them, the surcharges which are certainly being challenged, will impoverish and render them destitutes moreso given that the same are not deserving in the first instance and that will make them suffer substantial loss. In support of that submission, the Applicants relied on **Articles 10, 27, 47, 50(1) and 159 of the Constitution of Kenya** and the cases of **Onyango vs Attorney General (1987) KLR 711**, **Butt vs. Rent Restriction Tribunal (1982) KLR 417** and **Reliance Bank Limited vs. Norlake Investments Limited (2002)1 EA 227**.

13. On the other hand, the Respondents argue that the Applicants have failed to demonstrate any substantial loss since the allegation that they stand to be rendered destitutes is not holding. They cited the High Court decision in **Socfinac Company Limited vs. Nelphat Kimotho Muturi (2013) eKLR** in urging this Court to so find.

14. I have considered the rival submissions. I do not find it difficult to hold that the allegation that the Applicants will be rendered destitutes when the surcharge orders are executed against them does not itself demonstrate any loss leave alone any substantial loss. First, the Applicants have not rendered any evidence in support of that allegation and as such the same is heresay at its best. Second, the execution is premised on the fact that the Applicants misappropriated monies belonging to the second Respondent while they were in office thereby unless such an order is set-aside the monies are recoverable.

15. To me, the crux of the appeal before this Court is that the Applicants were not given an opportunity to be heard in opposition of the application for dismissal of their appeal before the Tribunal. The second Respondent contends that it filed, fixed a hearing date and served the application for dismissal of the appeal on the Applicants. However, I have not seen any evidence of service in the instant application. Maybe the position will change on the filing of the Record of Appeal. That being so for now, it can be said that the application for dismissal of the appeal was determined without giving the Applicants an opportunity to be heard and without any justification. That is unconstitutional and renders the Applicants to lose their constitutionally-guaranteed right under **Article 50(1) of the Constitution**. On that score, even their right to human dignity under **Article 28** of the Constitution stands threatened and as such the Applicants will suffer irreparable loss. There can be no larger loss than that which arises from contravening the Constitution. I therefore find that the Applicants have demonstrated the first ingredient affirmatively.

16. **On the issue of delay**, the dismissal order was made on 05/10/2016 and the Applicants became aware of the same on 28/10/2016 when they attended the Tribunal on invitation. On such realization, they filed the instant application together with the appeal on 07/11/2016 barely ten days later. By considering the

intricacies of filing an appeal and such an application, there can be no justification in any argument that the Applicants are guilty of inordinate delay.

17. The last issue of consideration is that of **security**. The Respondents submit that if the stay is to be granted then the same ought to be conditional on depositing the surcharge sums in Court and rightly so, cites several decisions. In as much as the general position in law is that stay orders in money decrees ought to be conditional to depositing the whole amount or part thereof as security, each case must be considered on its own unique circumstances. In this case, the contention rests on whether the Applicants were accorded the opportunity to present their case at the Tribunal. Issues of infringement of their constitutional rights hence arise. Under those circumstances, I find that it is not reasonable to order any security but to fast-track the determination of the appeal.

18. In the end, and with a view to determine this matter earliest, this Court hereby makes the following orders: -

***(a) There shall be a stay of execution and/or implementation of the surcharge order by and/or at the instance of the First Respondent in terms of the Letter dated 13<sup>th</sup> April 2012 pending the hearing and determination of the appeal herein.***

***(b) The Applicants shall file the Record of Appeal within 21 days of the date hereof and in any event the appeal shall be listed for directions within the next 45 days of today's date.***

***(c) Costs of the application shall be in the appeal.***

Those are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 15<sup>th</sup> day of June 2017.**

**A. C. MRIMA**

**JUDGE**