



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 282 OF 2016

CO-OP HOLDINGS CO-OPERATIVE SOCIETY LIMITED. APPELLANT

VERSUS

MIGORI TEACHERS SACCO SOCIETY LIMITED. RESPONDENT

(Being an appeal against the ruling and order of the Co-operative Tribunal (Hon. Alex Ithuki – Chairman) dated and delivered on 6th May, 2016 in Co-operative Tribunal Case No. 5/2016)

R U L I N G

The application the subject of this ruling is the Notice of Motion dated 2nd June, 2016 by the Appellant/Applicant. It is brought under Sections 3A, 75, 78 and 79G of the Civil Procedure Act and Order 42 Rule 6 and Order 51 of the Civil Procedure Rules. The Applicant has sought the following orders: -

1. Spent
2. Spent
3. That this honourable court be pleased to grant a stay of execution of the decree extracted in Co-operative Tribunal Case 5 of 2016 dated 24th February, 2016 pending hearing and determination of the appeal against the Ruling/order made by Honourable Alex Ithuku (chairman of the Co-operatives Tribunal) on the 6th May, 2016.

It is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit of Fredrick Ndegwa sworn on the 2nd day of June, 2016.

The summary of the facts as captured in the said affidavit are that on the 6th day of May, 2016, the Honourable chairman of the Co-operative Tribunal dismissed the Applicants application seeking leave to file a reply to the statement of claim out of time on the basis that it did not disclose any triable issues. The Applicant has appealed against the said judgment and it's apprehensive that unless a stay of execution is granted, the Respondent is likely to execute the decree. It contends that its appeal has a reasonable chance of success. That if execution is levied, the appeal shall be rendered nugatory if it succeeds as it's not likely to recover the decretal sum and it will be liable to 3rd party contempt proceedings by a third party who is in an ownership dispute with the Respondent regarding the dividends in question. The Applicant avers that it is willing to abide by any request for security expected of it.

In a replying affidavit filed in court on the 13th June, 2016, the Respondent contends that it is the registered owner of approximately 8,574,300 Co-op Holdings shares whose value as at 2nd April, 2015 was Ksh.95,792,080/- and it has been receiving yearly dividends from the Appellant until May, 2014

when the Appellant without any specific Court order stopped remitting the dividends to the Respondent. Following the said refusal, the Respondent filed Co-operative Tribunal Case No. 5 of 2016 seeking the release of the dividends.

The Applicant was served with the summons on the 13th January, 2016, it filed an appearance on the 27th January, 2016 but failed to file a defence within the stipulated period of 15 days. In default of filing a defence the Respondent requested for judgment which was entered and on seeking to set aside the same the Applicant's application was dismissed.

The Applicant avers that it has a good defence to the suit which ought to be heard on merits.

In his submissions, counsel for the Applicant submitted that the applicant has already filed the appeal. He argues that his application is not opposed in that the Respondent in its replying affidavit did not address itself to the application but instead, it has dealt with the merits of the appeal. The Respondent has not addressed the requirements of Order 42 Rule 6.

On the requirements of Order 42 Rule 6, the Applicant has submitted that the application was filed timeously as it was filed 27 days after the ruling.

On the issue of security, it was submitted that paragraphs 9 and 10 of the supporting affidavit demonstrates that the applicant is willing to abide by any Orders that the court shall give with regard to the issue of substantial loss. The Applicant avers that if the decretal sum is released to the Respondent, it will not be able to recover it in the event that the appeal succeeds considering that the Respondent has admitted that it has financial problems which confirm that substantial loss may result. To support his contention, counsel for the Applicant relied on the case of **Industrial Credit Bank Ltd Vs Aquinas Francis Wasike** which states that once the Applicant has raised an issue with regard to substantial loss, the evidential burden shifts to the Respondent to disprove the allegation but in this case the Respondent has not addressed itself to that issue in its replying affidavit.

On his part counsel for the Respondents has submitted that the application should be dismissed as it has no merits. That the issue of ownership of the shares and dividends it is not disputed. On the issue of security, it has been submitted that the Appellant having admitted the money is not in dispute, it should not use the same money as security. On the substantial loss, it has been averred that the Respondent has not shown what loss it will suffer if the money is released yet they are not claiming the money. The counsel for the Appellant relied on the case of **Richard Ouma Nyamai Vs The Co-operative Tribunal & 2 Others**, Petition No. 520/016 where the learned Judge held that the constitution has given powers to the Co-operative Tribunal and the High Court should not interfere with it. It was submitted that if the stay is granted, the activities of the Respondent will be crippled.

The court has considered the material before it. The Applicant has moved the court under Order 42 Rule 6 for a stay of execution pending appeal. Under the said provision the Applicant is required to satisfy the court that: -

- a. It will suffer substantial loss if a stay is not granted.
- b. Such security as the court orders for due performance of the order or decree as may be binding has been given by the Appellant.

On substantial loss, the Appellant avers that if the money is released to the Respondent, it may not recover the same should the appeal succeed. The Respondent has not disputed that fact. In fact, the Respondent admits that it is experiencing financial problems. The Respondent did not discharge its evidential burden see the case of **Industrial Credit Limited (supra)**. The Applicant has offered to comply by any conditions, that the court shall impose. On the issue of delay, there was no unreasonable delay in filing the application. The court notes that the Respondent did not challenge the assertion by the Applicant but instead, it submitted on the demerits of the appeal and ignored the application. However, it has been submitted that the Appellant has admitted that it has been holding the money for the

dividends that belong to the Respondent. This fact has not been denied by the Appellant herein. It would not be fair in the circumstances, for the Appellant to continue holding and depriving the Respondents of what is rightfully its. I am alive to the fact that an application for stay of execution is discretionary and the court has wide latitude of discretion which allows it to make orders in the interest of justice.

In the upshot, this court finds that the application dated 2nd June, 2016 has no merits and in the interest of justice it is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 8th day of November, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... *for the Appellant*

..... *for the Respondent*