



REPUBLIC OF KENYA

High Court at Bungoma

Petition 7 of 2012

IN THE MATTER OF:

ALEX MALIEKHE WAFUBWA.....1ST PETITIONER

SAMUEL NGATI.....2ND PETITIONER

DAVID KIBERENGE.....3RD PETITIONER

TOM KUKUBO.....4TH PETITIONER

EDWARD KISIANG'ANI.....5TH PETITIONER

ERASTUS WECHULI.....6TH PETITIONER

BENAINA SISUNGO.....7TH PETITIONER

ROBERT MAMAYI.....8TH PETITIONER

AND

IN THE MATTER OF THE MANEDED BY-LAWS OF BUNGOMA DISTRICT CO-OPERATIVE UNION LTD

AND

IN THE MATTER OF RIGHTS AND FUNDAMENTAL FREEDOMS AS ENSHIRINED BY ARTICLES 38 (2) & (3) AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF ENFORCEMENT OF BILL OF RIGHTS UNDER ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CO-OPERATIVE SOCIETIES ACT

AND

IN THE MATTER OF THE BUNGOMA DISTRICT CO-OPERATIVE UNION

VRS

ELIAS NAMBAKHA WAMITA.....1ST RESPONDENT

JONATHAN WAFULA.....2ND RESPONDENT

BENARD SIANGU.....3RD RESPONDENT

MARTIN LUSWETI.....4TH RESPONDENT

BENARD SIMIYU.....5TH RESPONDENT

COMMISSIONER FOR CO-OPERATIVES.....6TH RESPONDENT

AND

NATHAN MUKWESO.....7TH RESPONDENT

HEZBON AMUNGA.....8TH RESPONDENT

JANE OMUKABA.....9TH RESPONDENT

ELIAS NAMBAKHA WAMITA.....10TH RESPONDENT

JONATHAN WAFULA.....11TH RESPONDENT

BERNARD SIANGU.....12TH RESPONDENT

MARTIN LUSWETI.....11TH RESPONDENT

BERNARD SIMIYU.....12TH RESPONDENT

RULING

The Application

[1] Mr. Kituyi applied on 5th February, 2013 for stay of the petition pending the hearing and determination of an intended appeal. I gather from the application that to be the significant prayer. The major grounds on which he premised his application are:

- a) *That he had filed a notice of appeal*
- b) *That his intended appeal has high chances of success*
- c) *That his intended appeal will be rendered nugatory if the order of stay is not granted.*

Respondents opposed application

[2] Mr. Kraido opposed the application. He argued that:

- a) *The application is frivolous*
- b) *The application does not meet the legal thresholds for stay i.e. that the appeal is arguable, and it will be rendered nugatory if the order is not granted.*
- c) *That the intended appeal relates to a ruling and not the entire petition.*

d) *Nothing is capable of being rendered nugatory in the intended appeal.*

COURT'S VIEW AND DETERMINATION

[3] The issue at hand, is whether or not the court can stay the entire proceedings when the intended appeal relates only to a ruling in which the court refused to review its order made on 5th November, 2012. The order was an intermediate measure to restrain the 1st-5th Respondents from running the affairs of the Bungoma District Co-operative Union pending the determination of an interlocutory application for an injunction that had been filed by the petitioners.

[4] What Mr. Kituyi is asking in his present application, as I have stated earlier, is a stay of proceedings pending the intended appeal, and the cornerstone of the jurisdiction of the High Court to issue such order is engraved in Order 42 rule 6 of the CPR: that the party applying must establish substantial loss will result if the proceedings are not stayed. Substantial loss is what such order prevents; a rip-off of the subject matter of the suit which literally speaking, completely reduces the success in the appeal to a pious venture, a barren result. **See BGM HCCA No 31 of 2012 Tarbo Transporters v Absalon Dova Lumbasi [2012] e KLR.**

[5] Has the Applicant convinced the court that he will suffer such substantial loss unless the order of stay is granted? Plainly, other than stating that the intended appeal will be rendered nugatory, the Applicant has not shown the indispensable co-relation between the intended appeal and the necessity for an order staying the entire proceeding. Mere pendency of an appeal does not entitle a party to an order of stay, and the Civil Procedure Rules clearly say so. Much more is needed to demonstrate that unless the proceeding is stayed the corollary brood will be a total rip-off of the subject of appeal. I am convinced there is merit in the argument by Mr. Kraido that there is nothing that will be rendered nugatory should the appeal succeed. The perspective taken by Mr. Kituyi is rather mind boggling, and presumptuous in another sense; that by reviewing the order of 5th November, 2012, the petition will have been spent, and that the petition will succeed respectively. The order of 5th November, 2012 is a limited order, an interlocutory order that is merely a saddle on the petition and not the other way round. I do not, therefore, find any possibility that the success in the intended appeal will be blown off unless an order for stay of proceedings is granted.

[6] After all, the court is aware and it is on record, that, circumstances have completely changed in this case such that elections have already been held and new officials were elected; although the Respondents have disputed that election as having been conducted in disobedience of a court order, and they have cited the Applicants for contempt of court. In the circumstances, and at least in practical terms, I do not accept as tenable, the argument that the orders of 30/1/2013 or of 5/11/2012 are affecting the Respondents.

[7] I have considered fundamental legal tones and the circumstances of this case, which convince that, it will not be prudent to issue an order of stay of proceedings as that would be ambitious and an extravagant exercise of jurisdiction. The Applicants should have been limited themselves to the particular orders appealed from and not the entire proceedings.

[9] For those reasons, I have formed a strong deprecation to resist the kind of venture by the Applicants, and I hereby decline to stay these proceedings. The application dated 5/2/2013 is dismissed with costs to the Respondents.

Dated, signed and delivered in open court at Bungoma this 8th day of May, 2013

F. GIKONYO

JUDGE

In the presence of:

Madam Makhoha for Respondent

Kituyi for Applicant absent

F. GIKONYO
JUDGE