



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. APPEAL NO. 37 OF 2014

UFUNDI SAVINGS & CREDIT

CO-OPERATIVE SOCIETY LTD.....APPELLANT

VERSUS

FRANCIS GITARI NDIRANGU & 99 OTHERS.....RESPONDENTS

TITUS E. OBARA & 199 OTHERS

ALEX G. MARATE & 19 OTHERSINTERESTED PARTIES

(Being an appeal from the majority joint ruling of Madam Jillo and G.O Ochich being members of the Co-operative Tribunal at Nairobi Tribunal Case No. CTC 375 of 2010)

FRANCIS GITARI NDIRANGU & OTHERS.....CLAIMANT

VERSUS

UFUNDI SACCO LIMITED.....RESPONDENTS

TITUS E. OBARA & 199 OTHERS

ALEX G. MARETE & 19 OTHERS.....INTERESTED PARTY

RULING

Coming up before me for determination is the Notice of Motion dated 8th January 2015 in which the Appellant/Applicant seeks for an order of stay of Award/Judgment of the Co-operative Tribunal delivered on 9th December 2014 pending the hearing and determination of this Appeal.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Gamaliel Hassan, the Chief Executive Officer of the Appellant/Applicant, sworn on 8th January 2015 in which he averred that the matter in respect of which this Appeal has been filed is a

dispute which came before the Co-operative Tribunal (the “Tribunal”) between the Appellant/Applicant which was seeking to sell the building known as Ufundi Sacco Plaza located on L.R. No. 209/2571 (hereinafter referred to as the “suit property”) which was registered in its name and some members of the Appellant/Applicant who were seeking to stop the sale thereof. He further averred that the authority to sell the suit property came from the members’ general meeting of 29th April 2010 for the purpose of offsetting the Appellant/Applicant’s financial liabilities, jumpstart the core business and ensure compliance with the **Sacco Act 2008 Regulations**. He stated further that the Award/Judgment of the Tribunal which was delivered by the majority member bench of Mr. Ochich and Ms. Jillo with a dissent of the Chairman of the Tribunal did not independently and objectively consider all the facts and the evidence in the documents and arguments raised before them hence this appeal. He added that on the date of delivery of the Award on 9th December 2014, the Tribunal granted a stay for 30 days pending the Appeal to this Honourable Court and that this notwithstanding, the Respondents had proceeded to organize and call for meetings, wrote letters purporting to be the bona fide and elected officials and registered a society purporting to take over the affairs of the Appellant/Applicant in the management of the suit property. He averred further that if the order sought is not granted, the affairs of the Appellant/Applicant and the interest of the majority of the members in excess of 8000 as opposed to the 100 members represented by the Respondents will be adversely affected. The Appellant/Applicant further filed a Further Replying Affidavit sworn by Gamaliel Hassan on 30th January 2015.

The Application is contested. The Respondent filed their Grounds of Opposition dated 19th January 2015 in which they stated that granting the order for stay of execution would deprive the Respondent together with 14,999 other members of the fruits of the Judgment which they have been denied for a period of over 15 years. They added that the Judgment benefitted the Appellant/Applicant enormously by excusing them from paying rental income of about Kshs. 500 million received over the 15 years of the dispute which they will not be in a position to refund owing to the financial quagmire that they are in due to mismanagement and bad debts. The Respondent further filed the Replying Affidavit of Francis Gitari Ndirangu sworn on 22nd January 2015 and a Further Replying Affidavit sworn on 10th March 2015.

The 1st Interested Parties filed the Replying Affidavit of Titus E. Obara sworn on 19th January 2015 in which they supported the granting of the prayers sought by the Appellant/Applicant herein and a Further Replying Affidavit sworn on 10th March 2015.

The issue I am called upon to determine is whether or not to grant the Appellant/Applicant stay of the Award/Judgment of the Tribunal pending the hearing and determination of this appeal. The Appellant/Applicant has brought this Application under **Order 42 rule 6(1) and (6)** of the **Civil Procedure Rules, 2010** which states as follows:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

Order 42 Rule 6(2) provides as follows:

“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.”**

I have considered this Application and have observed that the dispute before the court is in regards to the ownership of the suit property. This issue was the subject of the suit before the Tribunal which rendered itself vide an Award/Judgment delivered on 9th December 2010 in which it essentially declared that the suit property should be transferred to the Respondents. The Appellant, which is the current registered proprietor of the suit property, was aggrieved by that decision and filed this Appeal together with this Application. Shall the Appellant/Applicant suffer substantial loss if the orders of stay are not granted? To that question, my answer is in the affirmative as if the suit property is transferred to the Respondents as ordered by the Tribunal, this Appeal will be rendered nugatory and the Appellant/Applicant shall lose the suit property which to my opinion qualifies to be categorized as substantial loss. Has this Application been made without unreasonable delay? To that question, my answer is also in the affirmative. This Appeal was filed on 9th January 2015 after the Award/Judgment had been delivered on 9th December 2014. The last question to answer is whether to order the Appellant/Applicant to furnish security for due performance of such decree or order as may ultimately be binding on it. To that question, my answer is that the suit property shall remain intact during the hearing of this Appeal until its determination. Should the Respondents succeed in this appeal, they will take over the suit property and will thus suffer no loss. However, in the intervening period of the hearing and determination of this Appeal, I shall order the Appellant/Applicant to deposit all rental proceeds from the suit property to this court for safekeeping until this Appeal is heard and determined.

The upshot of the above is that I do allow this Application subject to the direction that the Appellant/Applicant do deposit all rental income from the suit property to this court pending the hearing and determination of this Appeal. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 17TH

DAY OF JULY 2015.

MARY M. GITUMBI

JUDGE