



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO (P), NAMBUYE & KOOME, J.J.A)

CIVIL APPLICATION NO. 76 OF 2020

BETWEEN

STEPHEN KAMAU NJOROGE.....1ST APPLICANT

DORIS WANGUI GITHUA.....2ND APPLICANT

ANTONY MAINA WAITHAKA.....3RD APPLICANT

AND

CABINET SECRETARYMINISTRY OF TRADE & INDUSTRY.....1ST RESPONDENT

COMMISSIONER OF CO-OPERATIVES.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JOSEPHAT KIMANI GACUGU.....4TH RESPONDENT

SOLOMON NDUU MBOE.....5TH RESPONDENT

PETER KAREGA NGUGI.....6TH RESPONDENT

PETER WANGEGI NGANGARI.....7TH RESPONDENT

KARANJA GATHURI.....8TH RESPONDENT

(Being an application for stay of execution of the judgment and decree of the

High Court of Kenya at Nairobi pending the hearing and determination of the

appeal (Nyamweya, J.) dated 10th February, 2020

in

NRB Jud. Rev. Misc Appl. No. 263 of 2019)

RULING OF THE COURT

[1] It is discernible from the record that Kenya Planters Coffee Union (KPCU) a Coffee Farmers Union has been riddled with disputes of mismanagement, lack of accountability, unfair representation of farmers, corruption among other ills that were complained about in **Judicial Review Misc. Case No. 263 of 2019** (suit) and other suits that were filed before. What gave rise to the notice of motion before us dated 12th March, 2020 was a ruling delivered on 10th February, 2020 in the said suit by **Nyamweya, J.** In a nutshell the Judge ruled that the 2nd

respondent had acted *ultra vires* and with ulterior motives when she cancelled the registration of KPCU and placed it under liquidation; that such a decision was unprocedural, unfair, unconstitutional, and quashed the decision and ordered that KPCU to revert to the state it was in before cancellation.

[2] Aggrieved by the said decision, the applicants who had been appointed as joint liquidators of KPCU, filed the instant application seeking an order of stay of execution of the aforesaid orders pending the hearing and determination of their intended appeal. The application is supported by the grounds that emphasize the arguability of the intended appeal and an affidavit sworn by **Stephen Kamau Njoroge** on 20th March, 2020 on behalf of his co-applicant. The applicants state that since their appointment on 2nd August, 2019 and the cancellation of registration of KPCU, they embarked on their mandate and as at the time the impugned judgement was rendered, they had made much progress towards: -

1. **Relieving the staff and working out the exit dues as part of the liquidation.**
2. **Receiving a grant of cherry fund to the tune of 3 billion from the government.**
3. **Registering a new outfit, "New Kenya Planters Union Public Limited Company.**
4. **Appointment of new directors with the mandate to manage the cherry fund.**
5. **Settlement of farmers debts as well as loans with KCB using the cherry fund.**

[3] The applicants further alleged that the 4th to the 8th respondents were busy bodies who did not demonstrate their shareholding or interests in KPCU that would transcend a membership of over 700,000 small scale farmers, 400 cooperative societies and 300 coffee estates. That it was premature for the 4th to the 8th respondents, to have invoked the jurisdiction of the High Court in view of the decision made in **Kenya Planters Co-operative Union Ltd (in receivership) & 12 others vs. The Minister for Co-operative Development & Marketing & 6 Others High Court Petition No. 343 of 2012** where **Majanja, J.** held that elections of a Co-operative Union (KPCU being one) are better resolved by the Tribunal. That KPCU was a co-operative society and pursuant to the provisions of **Section 62 (1) (b) and (c) of the Co-operative Service Act**, the Commissioner was authorized to cancel the licence after it failed to achieve its objectives. Moreover, if the respondents were aggrieved by the decision of the Commissioner, the remedy provided under the Act was an appeal to the Cabinet Secretary within thirty (30) days of the order.

[4] The applicants have given a long list of the grounds they wish to raise in the intended appeal but also on the nugatory aspect, it is stated that unless an order of stay of execution is granted, there is going to be a state of anarchy as the board of directors that was ousted will continue to hold coffee farmers at ransom and the gains made by the applicants towards revamping the coffee sector will be frustrated to the detriment of the coffee farmer.

[5] The motion was opposed by the 4th to the 8th respondents through some grounds of opposition (a strange procedure not provided for in the Court Rules), but they also filed written submissions. It is stated that the application fails to detail how the intended appeal is arguable and how it will be rendered nugatory should the stay of execution not be granted. This is because the Judge merely quashed the decision of the 2nd respondent cancelling the registration of KPCU and issuance of stay orders would empower the applicants to proceed with the said liquidation process thereby defeating the whole purpose of their suit. Moreover, they alleged that the applicants have been proceeding with the prohibited liquidation process hence they were in contempt of the court orders and they cannot seek equitable orders with dirty hands.

[6] By the respondents' written submissions dated 29th September 2020, they emphasized the same points that the applicants were restrained from disposing the assets but that notwithstanding, there has been much restructuring of the KPCU and the applicants were in the process of transferring the assets of KPCU to a new entity known as 'New KPCU'. On whether failure to issue stay of execution will render the appeal nugatory, it was the respondents' opinion that the effect of the orders appealed against, was that the Gazette Notice that placed KPCU under liquidation that was quashed. Therefore, granting the orders will be tantamount to a blank cheque issued to the applicants to proceed with the liquidation before the appeal is heard and determined, and in the end KPCU will not be existing.

[7] We have considered the motion and the rival submissions which was done virtually vide GOTO MEETING Platform pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Pandemic. The applicants have cited many enactments of the law as the foundation of the motion but in our view it basically falls under **Rule 5 (2) (b)** of this Court Rules. Under the said rule, for the applicants to succeed, they must establish that; the appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus:-

"The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (see also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)"

[8] We now wish to consider the motion within the above set out principles. The applicants have raised several issues which they intend to pursue during the intended appeal. Key among them is whether the 4th to the 8th respondents claiming to be coffee farmers filed a suit prematurely before following the laid down procedure of challenging the decision of the Commissioner as provided in the Co-operative Act. Secondly, whether they demonstrated their interests in KPCU which had a membership of 700,000 coffee farmers, 400 cooperative societies and 300 coffee estates as members. We are persuaded *prima facie* that these issues are arguable although we wish to throw the usual caution

that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court. We are satisfied that the intended appeal is arguable. See **Kenya Railways Corporation vs. Erdemann Property Limited [2012] eKLR**

[9] The applicants state that if the orders are not stayed, the assets of KPCU and the restructuring of the coffee sector that was started was likely to be endangered. It is common ground and even the 4th to the 8th respondents did not deny that KPCU has many other shareholders and that the government pumped in a cherry fund of 3 billion Kenya shillings towards the settlement of farmers debts and other debts. The respondents are also accusing the applicants of being in contempt of the orders although they did not file any application to commit them for the alleged contempt. As matters stand, we think the interest of the coffee farmers is paramount and until the appeal is heard and determined, the order that commends itself is one maintaining the *status quo ante*.

[10] Considering the public interest implication of the matters raised herein, we direct that the appeal once filed be fast tracked. Accordingly, we order as follows; -

1. *There be an order maintaining the status quo ante.*
2. *The applicants to file and serve the record of appeal within sixty (60) days from the date hereof.*
3. *Civil Appeal No. 367 of 2014 be tied together with the instant appeal for case management.*
4. *Both appeals be given a priority hearing date.*
5. *Costs of the application to abide the outcome of the appeal.*

Dated and delivered at Nairobi this 19th day of March, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR