



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA & MURGOR, J.J.A.)

NYERI CIVIL APPLICATION NO. 199 OF 2020

BETWEEN

1. LAWRENCE MIRITI 1ST APPLICANT
2. MATHEW KAUME 2ND APPLICANT
3. JULIUS MURIUNGI 3RD APPLICANT
4. ROBERT MWENDA 4TH APPLICANT
5. JOSHUA MUTWIRI 5TH APPLICANT
6. CHARITY KARIMI..... 6TH APPLICANT

AND

MERU NORTH FARMERS SACCO LTD.....RESPONDENT

(Being an application for stay of execution pending an appeal against the ruling and consequential orders of the High Court at Nairobi (Githua, J) delivered on 14th May 2020

in

HCCC No. 363 of 2018)

RULING OF THE COURT

By way of a Notice of Motion dated 9th July 2020, **the applicants**, sought for orders of *status quo* to be maintained pending the hearing and determination of the appeal and a stay of execution in the *Co-operative Tribunal Case Nos. 177 of 2016; 181 of 2016; 182 of 2016; 183 of 2016 and 184 of 2016 (Consolidated)* at Nairobi pending the hearing and determination of the High Court Appeal No. 363 of 2018.

As a brief background, **the respondent, Meru North Farmers SACCO Ltd** sought for and obtained summary judgment from the Co-operative Tribunal on 7th May, 2009 in respect of sums it claimed from the applicants. The applicants thereafter applied for a review of the judgment on 9th May 2017 which the Tribunal declined to grant. As a consequence, they moved to the High Court seeking to appeal the Tribunal's decision, which appeal is pending before that court. To forestall execution of the Tribunal's decision, they also sought orders of stay of execution which the High Court (*Githua, J.*) partially granted, by suspending the warrants of arrest, but allowed for execution against the applicants' moveable assets.

In the motion, the applicants complained that the respondents have refused to comply with the Hon. Chief Justice's directives as Chairman of the National Council for Administration of Justice to stay execution of the Tribunal's orders, as they assert that by a Proclamation dated 12th June 2020, Bealine Kenya Auctioneers have attached their moveable properties and was intent on disposing of them at a grossly undervalued amount at a public auction. They further contended that their intended appeal from the Tribunal is still pending before the High Court; that they have an arguable appeal with a high chance of success, and that if the public auction of their moveable assets is not stayed, in the interest of justice, their intended appeal would be rendered nugatory.

The application was supported by the sworn affidavit of **Henry Kurauka** on behalf of all the applicants, and the applicants' written

submissions which repeated the averments in the body of the motion.

In a replying affidavit sworn by **Titus Munjuri**, the respondent’s Chief Executive Officer, and in the written submissions, the respondent opposed the application. It was deponed that there was no legal or factual basis for allowing the application since, following the Co-operative Tribunal’s judgment of 7th May 2009, the respondent was entitled to execute the orders against the applicants to recover the sums owed by way of warrants of arrest and attachment; that the applicants have had ample time to repay the decretal sums owed, but they have simply refused to make any payment; that they have instead embarked on delaying tactics aimed at denying the respondent the enjoyment of the fruits of its judgment. It was further contended that if the application for stay of execution were allowed the respondent would be subjected to immense suffering.

In so far as applications filed under **rule 5 (2) (b)** of this Court’s Rules are concerned, the threshold to be satisfied, as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

Turning to whether the intended appeal is arguable, the applicants have attached a memorandum of appeal dated 4th August 2018 that was filed in respect of their appeal which is pending in the High Court against the Cooperative Tribunal’s judgment. No draft memorandum of appeal was filed in this Court in respect of their grievances against the High Court’s ruling on the application for stay of execution. There is also nothing in the motion that is indicative of the nature of their grievances against the High Court’s decision. Consequently, we have no basis upon which to discern whether or not they have an arguable appeal, which as outlined above is a mandatory requirement.

In the case of **Republic vs Kenya Anti- Corruption Commission & 2 others** (*supra*) it was stated that;

“In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb will not avail him the order sought if he fails to demonstrate the other.”

With the first limb having failed, we need not go into considering the second limb.

In sum, the motion dated 9th July 2020 is without merit, and is dismissed with costs to the respondent.

It is so ordered.

Dated and Delivered at Nairobi this 4th day of December, 2020.

W. KARANJA

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR