



IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KIHARA KARIUKI (PCA), GITHINJI & MWILU, JJ.A)
CIVIL APPLICATION NO. NAI. 5 OF 2016 (UR 4/2016)

BETWEEN

GODFREY KINUU MAINGI.....1ST APPLICANT

JUSTUS MURUNGI.....2ND APPLICANT

JOSEPH NTURIBI MWITHIMBU.....3RD APPLICANT

HARUN MBURUGU.....4TH APPLICANT

ANDREW GIKUNDI.....5TH APPLICANT

AND

NTHIMBIRI FARMERS CO-OPERATIVE SOCIETY.....RESPONDENT

(An application for leave to appeal to the Court of Appeal and for orders of stay of execution pending lodging, hearing and determination of an intended appeal from the judgment and order of the High Court (Sergon, J.) dated 22nd May, 2015

in

Civil Appeal No. 199 of 2009)

RULING OF THE COURT

1. The respondent is a co-operative society registered under the provisions of the Co-operative Societies Act, Chapter 490 of the Laws of Kenya. The applicants are former members of the management committee of the respondent. The 1st applicant was elected the chairman of the management committee of the respondent to serve from the 15th April, 1999 to the 26th November, 2003.

During his term, some members of the respondent raised complaints, claiming that the members of the management committee had mismanaged the financial affairs of the respondent thereby causing the respondent to incur serious financial losses amounting to the sum of Kshs. 5,075,224.50/-.

2. On the 26th November, 2003, the Registrar of Co-operative Societies, in exercise of his powers under **section 58** of the Co-operative Societies Act, appointed Mr. Hesbon Kiura and Mr. L.K. Metha to conduct an inquiry into the workings and financial status of the respondent. The resulting report, which was

adopted by the members of the respondent, found the applicants guilty of mismanagement of the respondent's finances and recommended that they each compensate the respondent various sums of money, all amounting to the total sum of Kshs 5,075,244.50.

3. On the 27th March 2006, the Commissioner for Co-operative Development moved to recover the money from the applicants by way of a surcharge order as provided in **section 73** of the Co-operative Societies Act. The respondent filed separate statements of claim against each of the applicants before the Co-operative Tribunal. In those claims, the respondent sought orders of summary judgment against the applicants. In their defences, the applicants denied the claims. They contended that the proceedings against them were instigated for the purpose of removing them from office. These applications were all allowed by the Tribunal in an award made on the 2nd April 2009.

4. Being aggrieved by that award, the applicants lodged an appeal in the High Court under **section 74(2)** of the Co-operative Societies Act. In that appeal, they alleged that the inquiry was conducted in violation of the rules of natural justice and that they were not accorded a fair hearing under **section 77(9)** of the Constitution of Kenya (retired). In a judgment delivered on the 22nd May 2015, the High Court held that there was no breach of the rules of natural justice and that the constitutional issues raised by the applicants lacked merit.

Consequently, the appeal was dismissed and the Tribunal's award was upheld.

5. The applicants have now approached this Court by way of a notice of motion application dated the 13th January, 2016, and brought under Rules 5(2)(b), 39, 42 and 43 of the Court of Appeal Rules, 2010, seeking orders as follows:

- i. ***Leave to appeal against the Judgment of the High Court in Civil Appeal No. 199 of 2009 (Godfrey Kinuu Maingi & 4 others vs. Nthimbiri Farmers' Co-operative Society) delivered on the 22nd May, 2015; and***
- ii. ***Stay of execution of the orders made by the Co-operative Tribunal on the 2nd April, 2009, pending the lodging, hearing and determination of the Applicant's intended appeal to the Court of Appeal against the said judgment.***

6. In support of their application, the applicants would have us grant them leave to appeal the award, and an order of stay of execution of that award. They claim to have an arguable appeal which raises serious issues. According to the applicants, **section 81(3)** of the Co-operatives Societies Act, which provides that the decision of the High Court on any appeal shall be final, thus limiting the right of appeal, is ultra vires section 84(7) of the Constitution of Kenya (retired). The applicants further contend that their rights to a fair trial under section 77 of the Retired Constitution were violated when the High Court confined itself to the language of section 81(3) of the Co-operative Societies Act, which limits the right of appeal. In addition, section 84(7) of the retired Constitution of Kenya, was contravened as it confers a right of appeal to the Court of Appeal by providing that:

84. (7) A person aggrieved by the determination of the High Court under this section may appeal to the Court of Appeal as of right.

7. The applicants further submit that if this Court does not grant the orders of stay they seek, the intended appeal will be rendered nugatory as the respondent will move to execute the award given by the Co-operative Tribunal with the likelihood that they will be committed to civil jail.

8. The respondent opposes this application by way of a replying affidavit sworn on the 5th March 2016 by Justus K. Nyiruu, who is its Chairman. The respondent contends that the application is frivolous, has no basis in law and is aimed only at ensuring that the respondent and its members do no benefit from the award of the Co-operative Tribunal.

9. The first order that the applicants are seeking, essentially, is leave to prefer a second appeal from the decision of the Co-operative Tribunal to this Court. Section 81 of the Co-operative Societies Act provides in part that:

***“(1) Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court.*”**

2. ...

3. ***The decision of the High Court on any appeal shall be final.***”

10. This is the provision that the applicants contend is ultra vires the retired Constitution. Section 84 of the retired Constitution, related to the procedure for the protection of fundamental rights and freedoms of the individual. Section 84(7) which we have reproduced hereinabove, provided for a right of appeal where a person was aggrieved with the determination of the High Court on a matter concerning the protection of the fundamental rights and freedoms that had been provided for under Chapter 5 of the repealed Constitution. Thus, the applicants’ contention that this section conferred an automatic right of appeal in their matter cannot be sustained. The jurisdiction of the Court of Appeal under the retired Constitution flowed from section 64 which provided that:

“There shall be a Court of Appeal which shall be a superior court of record, and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law.”

11. In the instant matter, the Co-operatives Societies Act specifically limited the jurisdiction of the Court of Appeal, by providing that an appeal to the High Court shall be final. No appeal lies to this Court from the High Court and in the circumstances, we cannot therefore purport to grant leave to the applicants to file an appeal to this Court.

12. In view of the finding that we would not have jurisdiction to grant the applicants leave to appeal against the decision of the Tribunal to this Court, it follows that we cannot grant the orders of stay of execution of the award of the Tribunal. Accordingly, this application must fail and we order that it be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 6th day of May, 2016.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR