



REPUBLIC OF KENYA

IN THE CO-OPERATIVE TRIBUNAL AT NAIROBI

TRIBUNAL CASE NO. 612 OF 2017

MEK SACCO SOCIETY LIMITED.....CLAIMANT

VERSUS

SAMSON OMONDI CHILO & 6 OTHERS.....RESPONDENTS

RULING

The matter for determination is a Notice of Motion application dated 21.6.19 seeking stay of execution of the judgment decree entered on 8.1.2019 and other prayers on the face of the application :-

- (a) This application be certified urgent and the same be heard ex-parte in the first instance.*
- (b) There be stay of execution of the judgment decree herein pending hearing and determination of this application.*
- (c) The ex-parte judgment herein entered on 8th January 2019 against the 7th respondent be set aside.*
- (d) Cost of this application be in the cause.*

Based on the grounds on the face of the application and supported by an affidavit of *SIMON OTIENO ADEDE* filed on 21.6.19.

The same is opposed vide the grounds of opposition filed on 26.7.2019, and the replying affidavit of *SIMON OTIENO ADEDE* in opposition of the grounds of opposition dated 25.7.19. Parties canvassed their application by way of written submission as ordered on 19.8.19 and 4.10.19. Only the claimant /respondent filed their written submissions on 14.10.19.

We note the orders issued on 4.10.19 pending the two other similar applications filed on 23.9.9 and 25.9.19.

The respondents judgment creditor was granted 7 days to file their written submissions and the ruling of their application was maintained for 7.11.19 as ordered on the 19.8.19 and they filed on 20.9.19.

We have perused the records and noted that the substance of the claim is in surcharge order against all the respondents for a sum of Kshs.16,772,074/= with the individual, respondents having their apportioned amount.

We have noted the ruling dated 8.1.19 when judgment was entered in favour of the claimant and it was held that the position of the tribunal was that,

“we cannot go into the merit of the surcharge order. The defence filed in this matter has no place when we considered section 73,74,and 75 of the Cooperative Society Act.”

The applicant has submitted that they were never served and they were shocked to receive the decree.

That he was appointed the position of General Manager in January 2013. The applicant contends that he was condemned, unheard and that he has a good defense raising triable issues.

That section 74 (1) is clear that any party aggrieved by the orders of the Tribunal appeal to the Tribunal which has discretion to dispatch without undue regard to technicalities .

That the applicant suit is probably before the tribunal because he has not exhausted his remedy to enable him move to the High Court.

That the period within which he was to approach the tribunal has since expired in a misleading statement intended to forestall the applicant's right to justice.

That he was not aware of the suit and being condemned to pay without an opportunity to be heard is contrary to the principles of natural justice.

The applicant has cited various authorities in the violation of his constitutional rights. Therefore, a stay of execution should issue.

The respondent/claimant has submitted that the applicant is among the seven former officials of MEK SACCO.

That after inquiry by the commissioner for cooperatives they were found culpable and were surcharged but an intention to surcharge was issued on 7.11.2016 and surcharge orders on 7.3.2017.

That two other officials fully complied with the surcharge orders.

That no appeal against the inquiry proceedings was filed with the tribunal and there is no appeal against the order of this tribunal before the high court.

That the respondent moved the tribunal was cited section 58,73,74 and 75 to enforce the finding of the commissioner and judgment was issued on 8.1.19.

That the application is defective, bad in law and lacks merit because the applicant has not challenged the findings of the commissioner and has not demonstrated the existence of any appeal on law before the High Court.

That the office of the commissioner and the tribunal are institutions whose functions are complementary and the tribunal is the forum for appeal to those dissatisfied with the orders of the commissioner , and the applicant should have filed an appeal within 30 days if dissatisfied by the orders of the commissioner.

That the applicants having failed to move to the tribunal and the High Court of Appeal there is no legal basis for stay of execution.

That the applicant has no superior rights to the members of MEK Sacco who lost over 45million shilling and for which upon full hearing of all parties, scrutiny of the evidence found the applicant and all the others culpable for the loss.

That the Co-operative Act provides the framework under which the applicant should have sought redress yet the applicant deliberately failed to take the appropriate steps provided for under the law after the conclusion of the inquiry and subsequent issuance of intention to surcharge culminating to the surcharge orders.

That the Respondent simply moved the tribunal to enforce the surcharge orders.

On the issue of stay of execution this is a discretionary power and the application for stay presupposes the existence of an

appeal or application to review the orders being executed.

That the applicants' failure to challenge the commissioner's findings in time or file and appeal out of time cannot be remedied by the Tribunal even when the parties rely upon Article 159 (21) (a) of the constitution owing to the fact the Cooperative Society Act is a substantive statute.

That the tribunal's role after surcharge is to enforce findings of the commissioner.

We have carefully considered the submissions of the parties and note that in this matter the applicant has brought their application under order 22 Rule 22 Civil Procedure Rule and under order 10 Rule 11 Civil Procedure Rule.

We note that this is an application that invokes discretionary powers of the tribunal and these discretionary powers must be exercised judiciously. This was held in **BUTT VS RENT RESTRICTION TRIBUNAL (1992) KLR 472**

We note that the stay of execution pending the hearing and determination of the application that is prayer (b) of the Notice of Motion of the application was already granted in the first instance and the only prayer that is pending is prayer (c) setting aside ex-parte judgment.

The principles for setting aside ex-parte judgment as held in SHAH VS MBOGO are that :

(a) Either the defendant was not probably served with the summons or

(b) That the defendant failed to appear at the hearing due to sufficient cause .

In this matter we note that the ex-parte judgment is of a different nature on the issue in regard to surcharges under section 73,74 and 75 of Cooperative Society Act.

In this matter we note that the claimant moved the tribunal in a summary manner pursuant to the surcharge orders issued on 1.3.17 by the commissioner for co-operative development. The judgment was issued.

The ruling on 8.1.19.

The Co-operative Society Act is clear on the issues of surcharges and under section 73, the commissioner ordered a surcharge against the respondent after inquiry. Section 74 is clear that any person aggrieved by an order of the commissioner may within 30 days appeal to the tribunal. And any person aggrieved by the decision of the tribunal may within 30 days appeal to the High Court. Section 75 which provides that the tribunal shall without prejudice to any mode of recovery recover the same amount as ordered in the surcharge as a civil debt recoverable summarily.

In the circumstances therefore, this judgment entered against the respondents was not ex-parte judgment *per se* but a surcharge recoverable in a summary manner under section 74 of the Cooperative Society Act.

It is not the duty as enumerated in the ruling dated 8.1.19 for the tribunal to look into the merits of the surcharge. The duty of the tribunal is to enforce the surcharge order and not to go into the merits or demerits of the surcharge orders unless the same has been brought by way of an appeal as enumerated under section 74(1) of the Cooperative Society Act.

We therefore totally agree with the submissions of the claimant and accordingly dismiss the application dated 21.6.19 with costs.

This order to apply to all respondents in the matter.

Read and delivered in open court, this 7th of November, 2019.

In the presence of:

Claimant: Miss Obuori holding brief for Onyango Martin

Respondent: Mbuthia holding brief for miss Kamari for 7th Respondent

Court Assistant: Leweri and Buluma

B.Kimemia - Chairman-signed

R.Mwambura – Member-signed

P.Swanya - Member-signed



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)