



REPUBLIC OF KENYA



**Kiamumbi Multi-Purpose Co-op Coc Ltd v Commissioner for Co-Operatives & 6 others
(Civil Appeal E516 of 2022) [2023] KEHC 21880 (KLR) (Civ) (15 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21880 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E516 OF 2022

AN ONGERI, J

AUGUST 15, 2023

BETWEEN

KIAMUMBI MULTI-PURPOSE CO-OP COC. LTD APPELLANT

AND

COMMISSIONER FOR CO-OPERATIVES 1ST RESPONDENT

FRANCIS NGURE NJOROGE 2ND RESPONDENT

DAVID KIHARA MWANGI 3RD RESPONDENT

FRANCIS GITAU NG'ANG'A 4TH RESPONDENT

LEONARD NDUNG'U MBUGUA 5TH RESPONDENT

LUCY NYOKABI MIMANO 6TH RESPONDENT

SUSAN WANJA MWANGI 7TH RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated November 8, 2022 brought under Section 81 of the *Cooperative Societies Act*, Section 3A of the *Civil Procedure Act*, Order 42 Rule 6(1), (2) & (4) Order 50 Rule 1 & 3 of the *Civil Procedure Rules 2010* and other enabling provisions seeking the following orders;
 - i. That this application be and is hereby certified as urgent and service of the same be dispensed with in the first instance.
 - ii. That leave be granted to file the intended appeal out of time



- iii. That pending the interpartes hearing of this application, an order of stay of execution be and is hereby granted staying execution of the judgment issued on April 21, 2022 in Co-operative Tribunal Appeal Case No of 2020 and which judgement also applied to CTA No 7 of 2020, CTA No 8 of 2020, CTA No 8 of 2020, CTA No 9 of 2020, CTA No 10 of 2020, CTA No 11 of 2020 & CTA No 12 of 2020 and/or any decree issued subsequent to the said Judgment.
 - iv. That an order of stay of execution of the judgment issued on April 21, 2022 or any decree issued subsequent to the judgment be and is hereby granted pending the hearing and determination of the intended appeal to be preferred herein.
 - v. That this Honourable Court does make any other or further orders to safeguard the interests of the applicant/appellant.
 - vi. That the costs of this Application be provided for.
2. The application is supported by the affidavit of Stanley Nderitu, the chairman of the appellant who stated that he is authorized and competent to swear the affidavit which was sworn on November 8, 2022.
 3. The said chairman of the appellant stated as follows in the supporting affidavit;
 1. The second to eighth respondents filed an Appeal against the Appellant at the co-operative Tribunal in Nairobi and judgement delivered virtually on April 21, 2022 without notice to the Appellant or it's Advocates.
 2. The Appellant intends to prefer an Appeal against that judgement in the High Court of Kenya and is seeking leave to appeal out of time.
 3. The Judgement had found that the 2nd to 8th Respondents has misappropriated funds belonging to the Appellant and its members and should repay Kshs 12,565,912.00 and if the decision was not stayed, the appeal would be rendered nugatory resulting to irreparable loss and damage to the appellant and its members if the respondents enforce the judgement.
 4. The appellant annexed a draft Memorandum of Appeal which has set out its grounds for Appeal.
 5. The Appellant is also willing and able to provide reasonable security if the court deems it necessary to grant the orders sought.
 4. The 7th respondent filed a replying affidavit sworn on April 11, 2023 opposing the application in which she deposed as follows;
 1. That the Appellant is knowingly misleading the court by claiming that judgement was delivered on notice, the matter was always listed on the cause list and differed for the Appellant to get ready and
 2. The Commissioner of Co-operatives refused to appear before the Tribunal to justify the inquiry report causing the tribunal to agree with the Respondents that the report was tainted with irregularities and improprieties.
 3. The Judiciary e-filing portal published the judgement from June 12, 2022, the Appellant's application was filed on November 8, 2022 but the respondents were never served until March 2023.



4. The Appellants and their Advocate had fallen out and the application from proceedings, pleadings and other documents was done by the Appellants acting in person.
 5. She asked the court to dismiss the Application with costs to the Respondents.
5. The parties filed written submissions as follows;

The Respondents submitted that the 1st Respondent surcharged the other Respondents which decision was appealed at the Co-operatives Tribunal.

Section 74(2) of the *Co-operatives Societies Act* provides that

“ A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of Law.

The respondents submit that the quoted section has no provision for extension of time, yet the Appellant had filed an Appeal before extending time or making an Application under section 81 of the Act. The Appellant is asking the court to sanitize an illegality by asking for leave to do what is already done.

The Respondents referred to the decision in Civil Application Number 3 of 2016: County Executive of Kisumu v County Government of Kisumu and 8 others (paragraphs 35 and 37) where the Court “termed such documents as a nullity, of no legal consequences, and struck out the offending documents with costs”.

The respondents also argued that section 81 of the Act is not available to the Appellants because in matters surcharges, parties aggrieved by a decision of the Tribunal could only Appeal under Section 74(2) within 30 days with no provision of extension of time.

The respondents also argued that the Appeal violates Section 74(2) of the Act as it does not contain any matters of Law yet the Appeal is based on matters of fact.

The Respondent also submit that the Appellants filed the Appeal while acting for themselves yet they had not filed a notice of intention to act in person and thus their Advocate before the tribunal remains on record until such notice is filed. The respondents also argue that the firm of H. T. Associates Advocates should have filed a Notice of Change of Advocates instead of a Notice of Appointment.

6. The issues for determination in this application are as follows;
 - i. Whether the appellant should be granted stay of execution pending appeal.
 - ii. Whether the appellant should be granted leave to appeal out of time.
 - iii. Who pays the costs of this application?
7. On the issue as to whether stay of execution should be granted pending appeal, I find that the appeal is seeking to set aside the order of the Cooperative Tribunal which order had set aside a surcharge order.
8. In the circumstances I find that there is nothing to stay since the 2nd to 8th Respondents surcharge was set aside.
9. On the issue as to whether leave should be granted to appeal out of time, the applicant states that judgment was delivered at the Cooperative Tribunal on April 21, 2022 without notice to the appellant.
10. I find that it is in the interest of justice that the appellant be given an opportunity to exercise its right of appeal.



11. I grant the appellant an extension of 30 days to file the notice of appeal.
12. The appeal to be prosecuted within 90 days of this date.
13. Failure to execute the appeal within that period the same to stand automatically dismissed at the expiry of 90 days from today.
14. The costs of the application to abide the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF AUGUST, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent

