Opondo & 4 others v Commissioner for Co-operative Development, Ministry of Industry Trade & Co-Ooperatives & another (Miscellaneous Civil Application E703 of 2022) [2023] KEHC 24079 (KLR) (Civ) (26 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24079 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS CIVIL APPLICATION E703 OF 2022

CW MEOLI, J

OCTOBER 26, 2023

BETWEEN

JOSEPH OWINO OPONDO ..... 1ST APPLICANT

FREDRICK ONYANGO ..... 2ND APPLICANT

SIPORAH ACHIENG RACHUONYO ..... 3RD APPLICANT

PIUS OUMA OMONDI ..... 4TH APPLICANT

NELLY AKINYI JUMA ..... 5TH APPLICANT

AND

COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT, MINISTRY OF INDUSTRY TRADE & CO-OOPERATIVES ..... 1ST RESPONDENT

MASENO UNIVERSITY SACCO LTD ..... 2ND RESPONDENT

RULING

1. For determination is the motion dated 14.11.2022 by Joseph Owino Opondo, Fredrick Onyango, Siporah Achieng Rachuonyo, Pius Ouma Omondi and Nelly Akinyi Juma (hereafter the 1st, 2nd, 3rd, 4th & 5th Applicant/Applicants). Seeking inter alia that the honorable court be pleased to enlarge time for the Applicants to file their appeal against the decision of the Commissioner for Co-operatives (hereafter the 1st Respondent) of 05.02.2019 and adopted by the Co-operatives Tribunal (hereafter the Tribunal) in Tribunal Case Nos. 270 of 2019, 276 of 2019, 274 of 2019, 275 of 2019 and 273 of 2019; that the court be pleased to enlarge time for the Applicants to file their appeal against the decision of the Tribunal dated 19.10.2022 in Tribunal Case Nos. 270 of 2019, 276 of 2019, 274 of 2019, 275 of 2019 and 273 of 2019; that pending hearing and determination of the intended appeal there be a temporary

stay of execution of the orders of the Tribunal dated 01.11.2022 in Tribunal Case No. 270 of 2019; and that the annexed memorandum of appeal be deemed as duly filed upon payment of court fees.

2. The motion is expressed to be brought under Section 1A, 1B, 3 & 3A of the *Civil Procedure Act* (CPA), Order 50 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules* (CPR) and is premised on the grounds thereon, as amplified in the supporting affidavit sworn by 1st Applicant, being duly authorized by the other Applicants to depose on their behalf.

3. The gist of his depositions is that the Applicants are aggrieved by the decision of the 1st Respondent as they were not afforded a fair hearing or an opportunity to be heard. That on 01.11.2022 the Tribunal committed the Applicants to civil jail in default of payment of Kshs. 300,000/- each as an installment to the decretal sum of Kshs. 4,877,200/- against each Applicant. He goes to assert that due to inability to pay the foregoing amount the Applicants were sent to Industrial Area Remand Prison until 09.11.2022 when their respective families were able to raise the instalment sum.

4. That on the former date the Tribunal directed that the Applicants appear before it on 17.11.2022 to confirm compliance with its earlier orders as such there is a reasonable apprehension that they will be sent back to civil jail whereas the judgment in question arose from proceedings they did not participate in, nor did they benefit from the purported sums decreed against them. He goes on to deposes that the Applicants earn meagre salaries and will suffer if incarcerated again and possibly lose their present employment thereby compounding their misery, as they have no other source of income.

5. He states further that delay in filing the appeal arose out of an excusable misapprehension that they could challenge the decision of the 1st Respondent through other proceedings filed by Maseno University Sacco Society Limited (hereafter the 2nd Respondent) before the Tribunal, being Tribunal Case Nos. 270 of 2019, 276 of 2019, 274 of 2019, 275 of 2019 and 273 of 2019, to enforce the impugned decisions of the 1st Respondent. Hence the delay was not inordinate as the said matters were still active and were finalized on 19.10.2022. He swears that it is only upon engaging new counsel that they were advised that the impugned decision could be challenged through an appeal and that the court has jurisdiction to grant the reliefs sought in favour of the Applicants who have a meritorious intended appeal with a high chance of success.

6. He asserts that the Respondents will not be prejudiced by the appeal as they will have an opportunity to present their respective cases while the Applicants stand to suffer irreparably due to the amounts decreed against each of them should the application be declined. In conclusion he deposes that it is in the interest of justice and fairness the Applicants are afforded an opportunity to challenge the 1st Respondent's decision.

7. The 2nd Respondent opposed the motion by way of a replying affidavit sworn by Prof. Andrew Oduor, described as the duly elected Treasurer of the 2nd Respondent, conversant with the issues herein and duly authorized to depose. He states that the Applicants were surcharged by the 1st Respondent for theft, embezzlement, and or misappropriation of funds belonging to the 2nd Respondent. That there being no appeal against the 1st Respondent's decision, the 2nd Respondent moved the Tribunal for the entry of summary judgment against each Applicant and which was entered as per the 1st Respondent's surcharge order and that the Applicants failed to make due payment despite several issuances of Notice to Show Cause (NTSC).

8. He confirms that the Applicants having made part payments in respect of the surcharge order after committal to civil jail reached out to 2nd Respondent's management with payment proposals for the remaining surcharged sums a manifestation that the Applicants have accepted liability. Hence the motion having thus been overtaken by events would dissipate precious judicial time and amounts to

abuse of the court process. In conclusion, he states that the motion is a delaying tactic by the Applicants and ought to be dismissed with costs.

9. The motion was canvassed by way of written submissions. Counsel for the Applicants contemporaneously submitted on the reliefs in the motion. Addressing the question whether the Applicants are entitled to the orders sought, counsel submitted that the Applicants have reasonably explained the delay in filing the memorandum of appeal. Counsel further stated that it was upon conclusion of the Tribunal matters that the Applicants filed the instant motion. The decisions in *Stecol Corporation Limited v Susan Awour Mudemba* [2021] eKLR, *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015] eKLR and *Ngei v Kibe* (Civil Appeal (Application) E359 of 2021) [2021] KECA 243 (KLR) were called to aid in support of the foregoing.

10. Concerning stay of execution, it was submitted that there is reasonable apprehension that the Applicants will be committed to civil jail again, thereby prejudicing them. Yet, they neither participated in the proceedings leading to the judgment nor benefitted from the surcharged sums that are the subject of the intended appeal. Citing the decision in *Charles Kariuki Njuri v Francis Kimaru Rawara (suing as administrator of the Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased)* [2020] eKLR, counsel contended that the Applicants are further likely to suffer substantial loss due to their meagre salaries hence will endure prolonged punishment by further incarceration. Counsel concluded by arguing that the intended appeal has a high chance of success therefore the motion ought to be allowed as prayed.

11. On the part of the 2nd Respondent, counsel for the Respondent began by restating the events leading to the present motion. He confined his submissions into two (2) cogent issues. Addressing the question of extension of time within which to appeal the decision of the 1st Respondent, counsel anchored his submissions on the provisions of Section 74(1), 75(1) & 76 of the *Co-operative Societies Act*, to submit that there is no legal avenue through which this court and Tribunal can grant a party leave to appeal against the decision of the 1st Respondent.

12. He asserted that the instant motion is untenable as the 2nd Respondent having obtained judgment proceeded to enforce the surcharge order. Hence, there is no room for extension of the said period by either the Tribunal or this court. It was further submitted that this court lacks jurisdiction to entertain the instant motion as any dispute between a Co-operative Society, its members and or officials in the first instance first falls within the jurisdiction of the Tribunal pursuant to the *Co-operative Societies Act*.

13. Concerning extension of time within which to appeal the decision of the Tribunal dated 19.10.2022 in Tribunal Case Nos. 270 of 2019, 276 of 2019, 274 of 2019, 275 of 2019 and 273 of 2019, counsel cited the provisions of Section 74(2) of *Co-operative Societies Act* and the decision in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR as cited in *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR on the factors to be considered when granting extension of time within which to file an appeal.

14. Concerning the period and reasons for delay it was argued that the present application is six (6) months late and despite the Applicants being aware of the decision delivered on 19.10.2022, they have not sufficiently explained delay in appealing the tribunal's decision , while evincing the intention to settle the decretal amount. On whether the appeal is arguable, the decision in *Alfayo Nyairo v Nyabomite Farmers Co-op Society Limited* [2021] eKLR was relied on to contend that a party who has lost the opportunity to appeal under Section 74 of the *Co-operative Societies Act* cannot intercept the decree by seeking to file an appeal under the latter provision as sought by the Applicants herein.

15. On the likelihood of prejudice being visited upon the Respondents and the importance of compliance with time limits on filing of pleadings, it was submitted that protracted litigation would disenfranchise

some of the 2nd Respondent's members who have already retired and require a refund of their savings, yet relevant documents cannot be traced. He reiterated that the Applicants are liable for the debt due to the 2nd Respondent.

16. Lastly, with respect to the prayer seeking stay of execution, counsel buttressed his submissions on the provisions of Order 42 Rule 6 of the (*CPR*), by citing the decisions in *Vishram Ravji Halai v Thornton & Turpin*, Nairobi Civil Application No. 15 of 1990 [1990] KLR 365 as cited in *Ena Investment Limited v Benard Ochau Mose & 2 Others* [2022] eKLR, and *David Nyaribo & 3 Others v Nyabomite Farmers Co-op Society Limited* [2021] eKLR [2013] eKLR. In submitting that the Applicants have neither given sufficient cause why there should be stay of execution nor shown willingness to furnish security in the event stay is granted. Counsel asserted that the Applicants have not met the test to warrant granting of an order of stay of execution and in the alternative, if the court is inclined to grant the same, an order for deposit of the entire decretal sum in an interest earning account ought to issue. The court was urged to dismiss the motion with costs.

17. The 1st Respondent did not participate in the instant proceedings.

18. The Court has considered the rival affidavit material and submissions in respect of the motion. Alongside the prayers for leave to appeal out of time against the decisions of the 1st Respondent and Tribunal dated 05.02.2019 and 01.11.2022 respectively, the Applicants have equally sought a temporary stay of execution of the orders of the Tribunal in Tribunal Case No. 270 of 2019 pending hearing and determination of the intended appeal. It is evident on a plain reading of Order 42 Rule 6(1) of the *CPR*, that an order to stay execution pending hearing and determination of an appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the *Civil Procedure Rules*.

19. Therefore, the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the *Civil Procedure Rules* must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the *Civil Procedure Rules*). Thus, where a party specifically seeks stay of execution pending hearing and determination of an appeal not yet filed, the court may be acting in vacuo by considering a prayer for stay of execution pending what is essentially a non-existent appeal. The Court of Appeal in *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR while citing with approval the decision of the High Court in *Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased))* [2017] eKLR concurred and adopted the reasoning that stay of execution pending appeal must be preceded by a filed appeal.

20. Earlier, the Court of Appeal in the case of *Equity Bank -Vs- Westlink MBO Limited* [2013] eKLR while commenting on Rule 5 (2) (b) of the *Court of Appeal Rules*, whose wording is substantially similar to Order 42 Rule 6 (1) of the *Civil Procedure Rules*, and on Order 42 Rule 6 (6) of *Civil Procedure Rules*, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also *Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga* [2012] eKLR). Order 42 Rule 1 of the *CPR* provides that an appeal to the High Court shall be in the form of a memorandum of appeal.

21. In this case, an appeal is yet to be filed and therefore, there is no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter. If the Applicants desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. A draft memorandum of appeal in a miscellaneous cause even if leave were granted, cannot be deemed as a duly filed appeal as sought here by the Applicants.

22. In my considered view, the words that "an appeal may be admitted out of time" in Section 79G, appears to admit both retrospective and prospective applications. So that leave under the Section may be sought before or after filing a proper memorandum of appeal. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance. In the circumstances, the prayer seeking a stay of execution of the orders of the Tribunal dated in Tribunal Case No. 270 of 2019 pending hearing and determination of the intended appeal has no legal anchor and cannot be entertained.

23. Turning now to the prayer seeking leave to appeal out of time, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the *Civil Procedure Act* and other relevant statute. Section 79G of the *Civil Procedure Act* provides that:

> " Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
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> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

24. The general principles governing leave to appeal out of time are settled. The successful applicant must demonstrate "good and sufficient cause" for not filing the appeal in time. In *Thuita Mwangi* (*supra*), the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

> " It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."

25. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

> " (T)he underlying principles a court should consider in exercise of such discretion include;
>
> 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;

6. Whether the application has been brought without undue delay.

7. ....."

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

26. That said, the Applicants by their motion seek leave to appeal two decisions out of time. First, the decision of the 1st Respondent rendered on 05.02.2019 and adopted by the Tribunal in respect of each Applicant in in Tribunal Case Nos. 270 of 2019, 276 of 2019, 274 of 2019, 275 of 2019 and 273 of 2019; and secondly, the decision of the Tribunal rendered on 19.10.2022 in Tribunal Case Nos. 270 of 2019, 276 of 2019, 274 of 2019, 275 of 2019 and 273 of 2019. As a preliminary issue, the 2nd Respondent contends that there is no legal avenue through which this court and Tribunal can grant a party leave to appeal out of time against the decision of the 1st Respondent. That the instant motion is untenable as the 2nd Respondent obtained judgment and proceeded to enforce the surcharge order. Hence there is no room for extension of the said period by either the Tribunal or this court. It was further argued that this court lacks jurisdiction to entertain the instant motion as any dispute between a Co-operative Society, its members and or officials in the first instance fall within the jurisdiction of the Tribunal pursuant to the *Co-operative Societies Act*. The Applicants did not pick up the gauntlet in this regard.

27. Undisputedly, at the heart of the Applicants' intended appeal is a surcharge order by the 1st Respondent as captured in bundle of documents annexed as "JOO 1" to Applicants affidavit material in support of the motion. Part XIV of the *Co-operatives Societies Act* is tilted 'Surcharge'. Section 73, 74 and 75 of the C*o-operatives Societies Act* therein provide for the procedure in relation to issuance of surcharge order by the 1st Respondent, the appeal procedure and enforcement of the said surcharge order. The foregoing provisions provides as hereunder; -

"73

(1) Where it appears that any person who has taken part in the organization or management of a co-operative society, or any past or present officer or member of the society—

(a) has misapplied or retained or become liable or accountable for any money or property of the society; or

(b) has been guilty of misfeasance or breach of trust in relation to the society, the Commissioner may, on his own accord or on the application of the liquidator or of any creditor or member, inquire into the conduct of such person.

(2) Upon inquiry under subsection (1), the Commissioner may, if he considers it appropriate, make an order requiring the person to repay or restore the

money or property or any part thereof to the co-operative society together with interest at such rate as the Commissioner thinks just or to contribute such sum to the assets of the society by way of compensation as the Commissioner deems just.

(3) This section shall apply notwithstanding that the act or default by reason of which the order is made may constitute an offence under another law for which the person has been prosecuted, or is being or is likely to be prosecuted.

74

(1) Any person aggrieved by an order of the Commissioner under section 73(1) may, within thirty days, appeal to the Tribunal.

(2) A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law.

75

(1) Subject to section 74, an order made pursuant to section 73 for any moneys to be repaid or contributed to a co-operative society shall be filed with the Tribunal and shall, without prejudice to any other mode of recovery, be a civil debt recoverable summarily.

(2) Without prejudice to the powers by the Committee of a society to act for recovery of the sum surcharged under section 73, the Commissioner may, on behalf of the society, institute such action".

28. Thus, by dint of Section 74 an order of the 1st Respondent may be appealed to the Tribunal within 30 days and where a party is aggrieved with the decision emanating from the Tribunal, prefer an appeal to the High Court within 30 days of the said decision to the High Court on matters of law only. A detailed review of the Applicants' draft memorandum of appeal that was curiously not annexed to the Applicants' affidavit material, reveals that the Applicants ideally intend to challenge the decision of the 1st Respondent dated 05.02.2019. An appeal from the decision of the 1st Respondent lies to the Tribunal in the first instance. As such the court is perplexed that in drafting the motion the Applicants counsel simultaneously sought leave to appeal both the Tribunal's decision delivered on 19.10.2022 in Tribunal Case No. 270 of 2019, 276 of 2019, 274 of 2019, 275 of 2019 and 273 of 2019 while simultaneously seeking to appeal the 1st Respondent decision.

29. In any event, the Tribunal's decision in Tribunal Case No. 270 of 2019, 276 of 2019, 274 of 2019, 275 of 2019 and 273 of 2019 is procedurally a culminative decision arising from the surcharge order issued pursuant to Section 75 of the *Co-operatives Societies Act*. The proceedings in the Tribunal did not amount to an appeal as anticipated in section 74 (1) of the *Co-operative Societies Act*. Nor present an opportunity to challenge the decision of the 1st Respondent in any manner, other than prescribed in the Act, namely, via an appeal. Where a party does not file an appeal within the stipulated period of 30 days to the Tribunal, from the decision of the 1st Respondent and the latter provision is subsequently invoked, no further recourse exists for challenging the decision of the 1st Respondent.

30. The Applicants seek leave to appeal the decision of the 1st Respondent before this court, whereas a first appeal against the decision of the 1st Respondent lies with the Tribunal and thereafter to this court on issues of law only, effectively as a second appeal. In the absence of an appeal filed and determined by

the Tribunal, this Court would have no jurisdiction to entertain any direct appeal from the decision of the 1st Respondent or from the proceedings of the Tribunal under section 75 of the *Co-operative Societies Act*. This Court therefore agrees with the dicta *Alfayo Nyairo* (*supra*) where similar issues was canvassed. The court observed that;-

> "The wording of Section 74 is plain and unambiguous and does not require any interpretation. Section 75 (1) of the *Co-operative Societies Act* requires the Commissioner to file the surcharge order made pursuant to Section 73 at the Tribunal and the Section provides that without prejudice to any other mode of recovery, the sum shall be a civil debt recoverable summarily. My reading of Section 75 (1) of the Act is that in the event that there is no appeal or if appeals are lodged and lost the surcharged amount becomes a civil debt recoverable summarily and cannot be defended at that point. As I have already stated the language of the provisions regarding surcharge is plain and unambiguous. Once the Commissioner makes an inquiry whether on his own motion or on the application of a liquidator, creditor or member of a society and he considers it appropriate to make an order for a surcharge the person affected can only have the order set aside upon an appeal first to the Co-operative Tribunal within thirty days and if not satisfied with the decision of the Tribunal to the High Court within thirty days on matters of law. The procedure is not only simple but clear. In essence it leaves no doubt that the law contemplated that one must first appeal to the Co-operative Tribunal before coming to the High Court. The aggrieved party only comes to the High Court by way of an appeal against the decision of the Tribunal but not otherwise. The appeals herein are not against the decision of the Tribunal sitting on appeal against the order of the Commissioner as provided in Section 74 (1) but rather appeals against the Tribunal's decision to strike out their statements of defence." (sic)

31. It is the court's view therefore that its jurisdiction has in this instance been erroneously invoked. The Supreme Court in *Albert Chaurembo Mumba &7 others v Maurice Munyao & 148 others* [2019] eKLR while contemplating a comparable scenario stated that: -

> "In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute....
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> ..... To give a prescriptive answer to the jurisdictional question, the first port of call is to determine the nature of the dispute."

32. In the premise, the court will not consider the merits the motion dated 14.11.2022 and will instead strike it out with costs to the 2nd Respondent. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicants: N/A

For the 2nd Respondent: Ms. Ariga

C/A: Carol