



REPUBLIC OF KENYA



**Kiriitha Pyrethrum & Vegetable Growers Co-operative Society v
Njuguna & 14 others (Miscellaneous Application E516 of 2022)
[2022] KEHC 16363 (KLR) (Civ) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION E516 OF 2022
JK SERGON, J
DECEMBER 16, 2022**

BETWEEN

**KIRIITHA PYRETHRUM & VEGETABLE GROWERS CO-OPERATIVE
SOCIETY APPLICANT**

AND

**JONATHAN MUIGAI NJUGUNA 1ST RESPONDENT
KAMANDE ITUTHU 2ND RESPONDENT
PETER NDUNG’U NENE 3RD RESPONDENT
GEORGE KIBATHA KAMAU 4TH RESPONDENT
SAMUEL MUTURI NG’ANG’A 5TH RESPONDENT
WANYOIKE WAWERU 6TH RESPONDENT
NJUGUNA PETER KINYAGIA 7TH RESPONDENT
JOHN KAMAU HUHO 8TH RESPONDENT
KANGWATHA MAMIA 9TH RESPONDENT
HOSEAH MWICHIGI 10TH RESPONDENT
PETER GICHUHI MWANIKI 11TH RESPONDENT
NYOIKE WAWERU 12TH RESPONDENT
JOHN NJENGA GICECE 13TH RESPONDENT
SAMUEL MWAURA 14TH RESPONDENT
WILSON KAMONYE KURIA 15TH RESPONDENT**



RULING

1. This ruling is predicated on the notice of motion dated August 29, 2022 brought by the applicant and supported by the grounds set out on its body and the facts stated in the affidavit of Peter Muchume Gachie. The applicant sought for an order for leave to appeal out of time against the judgment and decree delivered on May 26, 2022 in Co-operative Tribunal Case No 399 of 2005 and a further order that the memorandum of appeal annexed to the application be deemed properly filed upon payment of the requisite court filing fees.
2. To oppose the said motion, the 3rd respondent swore a replying affidavit on October 29, 2022 on his behalf and on behalf of the 1st to 13th respondents, to which Peter Muchume Gachie rejoined with a further affidavit he swore on November 10, 2022.
3. The 14th and 15th respondents did not participate at the hearing of the motion or file any documents in response thereto.
4. At the interparties hearing of the motion, the parties' respective advocates chose to rely on the respective documents filed and on record.
5. I have considered the grounds laid out on the body of the motion; and the facts deponed in the affidavits supporting and opposing the motion.
6. Before I delve into the merits thereof, i note that the 1st to 13th respondents through the replying affidavit sworn by the 3rd respondent raised a preliminary issue that the deponent who swore the supporting affidavit has no authority to do so and further, that the applicant has no authority to instruct an advocate/firm of advocates to file the application in the absence of a resolution passed in the general meeting by the members of the applicant.
7. Upon my consideration of the above issue, i observed that the respondents did not bring forth any credible evidence to support their averments above. Similarly, I did not come across anything in the law to indicate that it was mandatory for a general meeting to be held in order for the applicant to instruct a firm of advocates to institute legal proceedings on its behalf.
8. Further to the foregoing, it is apparent that the deponent who swore the supporting and further affidavits did so in his capacity as the chairman of the sub-committee to the management board and a member of the applicant. in the absence of any evidence to the contrary, i am satisfied that he had the authority to swear the respective affidavits.
9. On the merits, the substantive order being sought in the motion is for leave to appeal out of time against the impugned judgment and decree.
10. Section 81(1) of the *Co-operative Societies Act*, cap 490 Laws of Kenya stipulates that an appeal against the decision of the Co-operative Tribunal ("the tribunal") may be lodged to the High Court within 30 days from the date of the decree or the order being appealed against. The provision further stipulates that the stipulated timelines may be extended by the High Court upon satisfaction that sufficient reasons have been given.
11. Moreover, under the provisions of section 95 of the *Civil Procedure Act* and order 50, rule 6 of the *Civil Procedure Rules*, the courts have power to enlarge the time required for the performance of any act under the *Rules* even where such time has expired.



12. In the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR the Court of Appeal illustrated the conditions to be met in deciding whether to extend the period for filing an appeal out of time and which I shall address hereunder.
13. Under the first condition touching on length of delay, the applicant acknowledges that there has been a delay, whereas the respondents are of the view that the delay has been prolonged.
14. Upon my perusal of the record, I note that the impugned judgment was delivered on May 26, 2022 while the motion was brought close to three (3) months later. In my mind, I do not find the delay to be inordinate.
15. Concerning the reasons for the delay, Peter Muchume Gachie explains in his supporting affidavit that the delay was occasioned by the late release of copies of the impugned judgment since the delivery of said judgment was severally postponed before eventually being delivered on May 26, 2022 in the absence of the applicant's advocates.
16. The deponent further explains that a copy of the aforementioned judgment was made only available on July 29, 2022 following which the applicant instructed its advocate to lodge an appeal, by which time the timelines for lodging an appeal had lapsed.
17. The respondents on their part aver that the applicant has not given any reasonable explanation for the delay or provided any evidence to support the averments made above.
18. Upon considering the explanation given by the applicant, I find the same to be reasonable in the circumstances.
19. As relates to the condition on whether or not an arguable appeal exists, it is the applicant's assertion that it has an arguable appeal which raises valid points of law and fact. The respondents on the other hand state that the appeal does not disclose any arguable grounds since the Tribunal properly considered the issues raised before it and arrived at a correct finding.
20. Upon my perusal of the grounds of appeal raised in the draft memorandum of appeal annexed to the motion, I note that the appeal is challenging the finding by the tribunal on issues including jurisdiction and service of summons to enter appearance. I am therefore satisfied that the applicant has demonstrated arguable points of law and fact in its appeal.
21. In addressing the final condition on prejudice, the applicant states that the respondent does not stand to be prejudiced if the motion is allowed, whereas the respondents are of the view that the applicant will not be prejudiced if the order sought is denied.
22. Upon my perusal of the record, it is apparent that the impugned judgment was in favour of the 1st to 13th respondents herein and against the applicant and the 14th and 15th respondents respectively. It therefore follows that the aforementioned respondents are lawfully entitled to enjoy the fruits of their judgment.
23. Suffice it to say that it would not be in the interest of justice to lock out the applicant who is aggrieved by the decision rendered by the tribunal. I therefore find it reasonable for the applicant to be given the opportunity of challenging the tribunal's decision on appeal.
24. The upshot therefore is that the notice of motion dated August 29, 2022 is hereby allowed on merit thus giving rise to the following orders:
 - i. The applicant is granted leave of 14 days to file an appeal out of time.



ii. Costs of the motion shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
16TH DAY OF DECEMBER, 2022.**

.....
J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant
..... for the 1st to 13th Respondents
..... for the 14th Respondent
..... for the 15th Respondent

