



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 151 OF 2020

VIPINGO SACCO SOCIETY LIMITED.....APPLICANT

-VERSUS-

MOHAMED A. SHEIKHDINI & 7 OTHERS.....RESPONDENTS

KILIFI KARISA KALAMA & 24 OTHERS.....INTERESTED PARTIES

RULING

1. There are two applications in this matter which are subject of this ruling. The first one is a Notice of Motion Application dated 5/8/2020 and is filed by the Applicant (Vipingo Sacco Society Ltd) whilst the Second one is a Notice of Motion dated 17/12/2020 and is filed under a certificate of urgency by the Interested Parties.

2. I found it necessary to deal with the two applications simultaneously.

3. The first application dated 5/8/2020 by the Applicant is brought under the strength of Articles 50 & 159 of the Constitution of Kenya, 2010, Section 79 (4) and 81 of the Co-operative Societies Act Cap 490, Section 63 (e) of the Civil Procedure Act Cap 21, Order 42 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and seeks for prayers that:

a) Spent

b) Spent

c) Pending hearing and determination of the intended appeal, the Honourable Tribunal's entire Ruling dated 26/2/2020 be stayed.

d) The Appellant be granted leave to appeal out of time the decision of the Honourable Tribunal in Mombasa Co-operative Tribunal Case No.23 of 2017 Mohamed Sheikhdini & 7 others –vs- Vipingo Sacco Society Limited.

e) The annexed memorandum of Appeal dated 5/8/2020 be deemed as duly filed.

f) Costs of this application be provided for.

4. The application is supported by grounds on its face and the supporting affidavit of Weston Banda Sworn on 5/8/2020. The Applicant's case as I understand it is that it is aggrieved by a ruling delivered on 26/2/2020 by the Co-operative Tribunal sitting in Mombasa and intends to appeal against it.

5. According to the Applicant, there is need to grant orders for stay of the said ruling because the consequent decree has been issued and the Respondents may initiate the execution process. It is also averred that if in the mean time the Respondents are not restrained from executing the decree, it is the Applicant's case that the appeal which has high chances of success will be rendered nugatory.

6. It is further argued that before execution is commenced this court should determine on some issues which the Tribunal did not make a determination on, and more specifically the issue as to whom the dividends shall be paid to, that is whether it is the 8 Respondents only or all the shareholders who include the proposed Interested Parties?

7. As regards the delay in filing the appeal, it is explained that the same was occasioned by challenges brought about by the Covid-19

pandemic which were beyond the control of the Applicant. It is averred that there were difficulties in accessing the court as well as the members of the Applicant's board owing to cessation of movement that had been imposed in a bid to prevent spreading of the corona virus (Covid 19). Considering those factors, the Applicant has sought that the court extends the time frame for filing the appeal and the draft memorandum of appeal to be deemed as having been duly filed.

8. The Respondents opposed this application and jointly filed a replying affidavit sworn by **Mohamed A. Sheikh dini** on 13/8/2020. According to him, the instant application is simply an abuse of the court process. He fortifies the assertion by stating that the Applicant's application dated 28/8/2019, the ruling thereof, being the basis of the proposed appeal, had sought a main prayer for the Tribunal's leave to pay the decretal sum by monthly instalments of Kshs. 46,093.75 until payment in full. That the prayer was not opposed and the same was gradually allowed. He also avers that the Applicant is now making an effort not to pay the installments as ordered as this application is geared to defeat a lawful Judgment by the Tribunal.

9. It is further asserted that the Applicant having sought review, it cannot go for an appeal more than a year after Judgment was delivered. If, in any event the court will be considerate to allow the application, the Respondents are of the view that the Applicant should be ordered to deposit all the installments it was ordered to pay as from 10/9/2019.

10. The Second application is dated **17/9/2020** and was filed by the proposed Interested Parties and seeks for orders that: -

a) Spent

b) Kilifi Karisa Kalama & 24 others be Joined herein as an Interested Parties in this appeal.

c) Spent

d) Ruling entered on 26/2/2020 by the Honourable Tribunal in Mombasa Co-operative Tribunal Case No.23 of 2017 Mohamed Sheikh dini & 7 others –vs- Vipingo Sacco Society Limited be reviewed and set aside by this honourable court to prevent an injustice from being occasioned to the shareholders, the Interested Parties and the society.

e) The sum of Kshs. 553,125/= to be paid as dividends by the society, be paid to each and every shareholder and not the 8 Respondents only.

f) The costs of this application be rewarded to the Interested Party.

11. The application is based on nine (9) grounds on its face and the affidavit of **Kilifi Karisa Kalama** sworn on 17/9/2020. The gist of the proposed Interested Parties' case is that the 8 Respondents instituted the suit before the Tribunal without the consent of all the shareholders and purported to claim payment of dividends. As such, the suit proceeded ex-parte and the Interested Parties came to know of the existence of the suit after the ruling had been delivered on 26/2/2020.

12. According to the Interested Parties, the Tribunal erred in ruling that Kshs. 553,125/= be paid to the 8 Respondents only as dividends and ignored the fact that the Sacco has more than 100 shareholders including the 8 Respondents. It is argued that the 8 Respondents will unjustly enrich themselves at the expense of the other shareholders if the said ruling is not reviewed to the extent of stating that the dividends should be paid to all shareholders and not the 8 Respondents only.

13. The Application is opposed by the Respondents vide the Replying Affidavit sworn by Mohammed A. Sheikh din on 28/9/2020 and filed on 29/9/2020. He deposited that the Interested Parties have all along been aware of the case herein. There is annexed a copy of minutes dated 7/3/2020 where the status of the case was discussed and the names of the Interested Parties do appear signifying his/their attendance to the meeting. Also attached are handwritten minutes dated 16/9/2017 when the resolution to initiate the suit before the Tribunal was authorized and the Interested Parties' name do appear.

14. He reiterated that the Judgment of the Tribunal was clear and more specifically at page six (6) that the dividends were to be paid to the Shareholders and not only to the eight (8) Respondents as alleged. He maintains the earlier view that the Applicants having opted to seek review cannot again seek to walk on the path of an appeal and the Interested Parties cannot come on board on the basis of facts that do not even exist to re-open a case which has already been heard and determined.

15. The deponent was also apprehensive that the Interested Party has been lured by the Applicant (**Vipingo Sacco Society Ltd**) into filing the instant application. Further, that among the 24 persons listed as Interested Parties in the application, some are non-existent as they are already dead. It is also averred that some of those who allegedly signed their consent to the filing of the application, were tricked into it and have so far disowned those signatures.

16. The Proposed Interested Parties filed a supplementary affidavit in response to the Respondent's Replying Affidavit. It was averred that although the Interested Party, Kilifi Karisa Kalama had attended some meetings especially the Meeting held on 7/3/2020 and 16/9/2017, no agenda about any court case was discussed. That the minutes now presented to court were prepared after the meetings had been conducted and are a complete falsehood.

17. As regards the assertion that some of the Interested Parties are dead and some having had been coerced to sign their consent, the deponent responded by saying that they had signed the same on behalf of their deceased parents who were members of the society. His further view is that at the same time the Judgment by the tribunal was delivered, only the 8 Respondents had been described as shareholders in the suit and unless this court dictates that the dividends be paid to all shareholders, then the 8 Respondents will benefit through an unfair economic advantage at the expense of the other more, than 112 shareholders.

18. Parties agreed to file written submissions in respect of the two applications which they later highlighted on 11/11/2020. The Submissions mirrored the pleadings which I need not replicate here as they are well captured in the facts of this case as restated above.

Analysis and Determination

19. I have carefully considered the applications, the affidavits in support, the replying affidavits, the memorandum of appeal, the submissions and the authorities that were cited by the parties. To set on foot my analysis, I think it is necessary to sketch the background to the dispute between the parties herein. The Respondents appear to have been aggrieved on how the Applicant was running the Vipingo Sacco Mill allegedly purchased by the 112 shareholders including the Respondents. On 25/4/2017, the Respondent filed a suit against the Applicant seeking for orders that the Shareholders should be allowed to manage the Posho Mill without interference by the Applicant herein, and further, for the payment of the unpaid dividends for the Posho Mill for the years 2012, 2013, 2014 and 2015 totaling to Kshs. 553,125/=.

20. After considering the claim and the Response thereto as well as totality of evidence presented by the parties, the Tribunal found on 4 issues for determination namely; (a) **who owns Vipingo Posho Mill**, (b) **who should manage and run the posho mill**, (c) **has the Kilifi inspection report been complied with, and Has the Sacco failed and refused to pay dividends to the shareholders?**

21. In its decision the Tribunal found that although the posho mill machine is owned by the shareholders, its business is run by the sacco for the benefit of its members as well as the shareholders. Further, that the rights of the sacco vis-a-vis those of the shareholders are not well defined. The tribunal was also of the view that the Sacco should continue running the affairs of the Posho mill but to include the shareholders by forming a Separate Management committee specifically for Vipingo Posho Mill. The committee was then expected to oversee the implementation of the Kilifi Inspection Report. Lastly, the Tribunal found that as per the Report, there was a surplus of Kshs. 553,125/= not paid as dividends and the Sacco was obliged to pay those dividends to its shareholders.

22. As regards this point, this court's interpretation is that the Tribunal intended that the dividends be paid to the 112 shareholders and not the 8 Respondents as insinuated by the Applicant herein as well as the proposed Interested Parties. Nothing could have been easier than the Tribunal stating that the dividends were to be paid to the 8 Respondents ONLY, if it so intended. And since it is not so stated, this court draws the inference that by the Judgment, it was intended that the dividends be paid to the 112 shareholder in accordance with their share capacity.

23. In my understanding, the 8 Respondents brought the case on behalf and for the benefit of the other shareholders and not for their own benefits.

24. Be that as it may, the 8 Respondents are not opposed to the dividends being paid to all shareholders and I find it hard to understand why the Applicants in conjunction with the proposed Interested Parties allege that the 8 Respondents will gain for an unfair economic situation.

25. Back to the events of the instant case, after the delivery of the Judgment on 26/7/2019, the Applicant (the Sacco) filed an application dated 28.8.2019 seeking for *inter alia* orders that the Tribunal does review its Judgment of 26/7/2019, the Applicant be allowed to pay the decretal sum of Kshs. 553,125/= together with the costs of Kshs. 13,840/= by monthly installments of Kshs.46,093.75 starting from 10/9/2019 until payment in full.

26. In considering the Applicant's case, the Tribunal delivered its ruling on 26/2/2020 and found that the Applicant had not established a case for review as provided for under Order 45 of the Civil Procedure Rules. Accordingly, the prayer seeking review of the Judgment was dismissed.

27. The Applicant's prayer seeking to pay the decretal sum by monthly instalments was however allowed and the Applicant was then directed to settle the decretal amount by way of monthly installments of Kshs. 46,093.75 to be paid on or before the 5th of every month starting from 5.3.2020 until payment in full.

28. It is this Ruling that prompted the instant litigation. The Applicant had a right of appeal within 30 days. However, no appeal was filed, and fearing the impending execution of the above orders, the Applicant filed this application substantially seeking the orders for stay of execution and leave to appeal out of time.

29. The Applicant's right of appeal emanates from Section 81 of Cap 490 which provides for appeals to the High Court and also sets the time limits.

*(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:***

30. The Section echoes provisions of **Section 79 (G) of the Civil Procedure Act** which provides for time for filing appeals from subordinate courts. Things do not always go as planned and that is why Section 81 of Cap 490 further provides that the court has discretion to extend the time for **sufficient reason**, with conditions it so deems fit.

*Provided that the High Court may, where **it is satisfied that there is sufficient reason** for so doing, **extend the said period of thirty days upon such conditions, if any, as it may think fit.***

31. The ruling being appealed against was delivered on the 26/2/2020. Thirty days were to end on 27/3/2020. No appeal had been filed by then. This Application was filed on the 06/8/2020, more than four months after deadline. To explain the delay, the Applicant submitted that the conditions were beyond its control and occasioned by challenges in accessing court during Covid-19 pandemic. This court was also invited to have judicial notice on the same challenges.

32. In determining the issue, I take into consideration that the exercise of this Court's discretion to extend that the time frame for appeal is unfettered and there is no limit to the number of factors the court would consider as long as they are relevant. Some of those factors that need to be taken into consideration may include but not limited to the period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.

33. The principles were reiterated by the Court of Appeal in the case of **Mwangi v Kenya Airways Ltd (2003) KRL 486**. The court cited with approval the dicta in the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** and expressed itself thus: -

“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 in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

34. Applying the principles above and having examined the application dated 5/8/2020, the affidavits in support of the application as well as the replying affidavit thereof, it is imperative to state that the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.

35. In this case, the Applicant attributes the delay to challenges occasioned by Covid-19 leading to closure of court. I take judicial notice to the fact that Covid-19 was declared not only a national but global pandemic. To that extent I do find that the delay in filing the appeal can be explained. The delay can partly be attributed to the prevailing Covid-19 pandemic which cannot be visited on any of the parties.

36. As for whether the appeal is arguable, the Applicant contended that it has an arguable appeal. I have perused the Draft Memorandum of Appeal and find that the Applicant intends to persuade this court at the hearing of the appeal, that the tribunal erred in determining on among other issues, who the dividends are to be paid to, that is, whether it is the 8 Claimant/Respondents only or each and every shareholder. It also contended that the tribunal failed to consider the discovery of new evidence and the impact of that evidence to this matter.

37. As regards the first issue, on whom the dividends should be paid to, I have considered the same under paragraph 19 above. I wish to reiterate its content and state that the dividends were intended to be paid to all shareholders. This of course addresses the concerns of the Interested Parties. They were apprehensive that their rights would be affected if the dividends were to be paid to the 8 Respondents only.

38. Secondly, on whether the tribunal failed to consider any new material evidence on the application for review, I find that the Applicant has not explained what new evidence was discovered to warrant the review of the Judgment. At the end, it is my considered view that these issues are frivolous and do not deserve consideration and determination by this court.

39. Be that as it may, it is evident from the record that the appeal only intends to challenge the application for review and not the Judgment that was rendered by the Hon. Tribunal on the matter. Even assuming that the intended appeal was to succeed, the best this court could have ordered is that the tribunal could have upheld the application for review but not setting aside the Judgment of Tribunal.

40. In the upshot this court is of the considered view that the intended appeal raises no arguable points and the prayer for extension for time to appeal out of time cannot issue. That being the case, having declined the prayer for extension of time, I will say no more to the other issues raised in the applications.

41. Accordingly, the application dated 5/8/2020 is unmerited and the same is hereby dismissed with costs to the Respondents. Consequently, the Proposed Interested Parties' application dated 17/9/2020 is automatically dismissed but with no orders as to costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 19th day of January, 2021.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O. CHEPKWONY

JUDGE