



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. E 313 OF 2020

WYCLIFFE SHIVACHI AMUDAVI APPLICANT

VERSUS

INVEST AND GROW SACCO LTD RESPONDENT

RULING

1. Before me is a notice of motion dated 27/8/2020 and brought in pursuant to **Section 1A, 1B, 3A, 79G and Section 95 of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules** seeking;

a) Spent

b) This honorable court be pleased to grant leave to the applicant to appeal out of time against the whole judgement and decree in Nairobi C-operative Tribunal Case No. 407 of 2018 By Honorable B. Kimemia, Honorable F. Terer and Honorable P. Gichuki delivered on 9/4/2020

c) Costs be provided for.

2. The application is based on the grounds stated on the face of it and on the supporting affidavit of Wycliffe Shivachi Amudavi who stated that on 9/4/2020 Hon. B. Kimemia, Hon. F. Terer and Hon. P. Gichuki delivered their judgement in cooperative tribunal case No. 407 of 2018 in which he was the claimant.

3. Aggrieved by the aforesaid judgement the applicant instructed his advocates to file an appeal. The applicant averred that unfortunately at that time court operations had been temporarily suspended and therefore they were unable to obtain the certified copies of the judgement and proceedings in order to file an appeal within the required statutory time.

4. The applicant further stated that court operations resumed on 14/6/2020 thereafter certified copy of the judgement was ready on 22/7/2020 and certified copies of the proceedings on 7/8/2020.

5. The application is opposed by the respondent who filed grounds of opposition where it was stated that the applicant exhibited inordinate delay and latches. The respondent further argued that the applicant's intended appeal is frivolous, vexatious lacks merit and has no chances of success.

6. This court gave directions to have the application disposed of by written submissions.

7. The applicant in his submissions argued that the applicant had all intentions to file his appeal but was unable to do so due to the outbreak of Covid 19 pandemic which forced the court to scale down its operations and therefore there was no way the applicant could file his appeal in time.

8. The applicant stated that after resumption of court operations on 14/6/2020 he filed his request to be supplied with certified copies of the proceeding and judgement which he managed to get on 7/8/2020 and 22/7/2020 respectively. He further averred that the delay demonstrated was beyond the applicant's control.

9. The applicant added that the respondent would not suffer any prejudice if the extension is granted as the cause of action in this case is a claim for money that was taken away from the applicant's account procedurally and without a just cause.

10. He submitted that the intended appeal herein has a high chance of success since rule 30 of the Cooperative Society Rules was violated as prior to withdrawing the applicant's savings no notice was issued upon the applicant.

11. The respondent on the other hand argued in its submissions that on 15/3/2020 directions had already been given by the Honourable, Chief Justice regarding the court's operations and alternative forms of operations were the new normal. Physical court operations were scaled down and not completely shut down and therefore the applicant having delayed for over 67 days without taking any step is inexcusable.

12. It is the submission of the respondent that extension of time would be highly prejudicial to the respondent as the applicant slept on his rights and now wishes to drag the respondents back to court many months after the matter was concluded and urged this court to finally bring this case to definitive end.

13. The respondent finally added that the appeal is not arguable as the applicant failed to meet his obligations and the respondent used the only means available to recover the money.

14. I have considered the rival written submissions and the issue to be determined is whether to grant leave to the applicant to appeal out of time

15. Under **Section 79G of the Civil Procedure act**, an appeal from the subordinate court to the High Court shall be filed within 30 days from the date of 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 **“provided that an appeal may be admitted out of time of the appellant satisfied the court that he had good and sufficient cause for not filing the appeal in time.”**

16. The applicant assert that the delay in not filing the appeal in time was because at the time court operations had been temporarily suspended because of the outbreak of Covid 19 pandemic and he was unable to obtain certified copies of the proceedings and judgement. He however, requested for the same after resumption of operations and obtained the judgment on 22/7/2020.

17. The respondent argued that operations of the court were scaled down but not completely shut down and therefore a delay of over 67 days was inexcusable. It added that if an extension was granted the applicants would be dragging the respondent back to court months after the matter was concluded.

18. On the length of delay, this court notes that the judgement was entered on 9/4/2020 and the application for extension of time was filed on 27/8/2020 approximately 4 months after judgement was delivered. It is my considered view that the delay was not inordinate nor excessive.

19. As for the reasons for the delay, the applicant claimed that he was not able to file the appeal as there was scaled down court operations due to the outbreak of covid 19 pandemic. I have considered the said reason and found the reason to be valid as it is true that the covid 19 pandemic has caused significant disruption of the court operations. The applicant also took initiative after the courts resumed to obtain certified copies of the proceeding and judgement which have since then been made available.

20. The respondent has also asserted that he will be prejudiced if forced to wait longer to enjoy the fruits of the judgement. In the circumstances of this case, this court is of the view that the respondent will not suffer undue prejudice though there may be some delay.

21. In light of the above this court finds the applicant's application to be meritorious. Consequently, the applicant is granted leave of 14 days from today's date to file his appeal out of time.

22. Costs shall abide in the out come of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF JUNE, 2021.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent