



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

MISC CIVIL APPLICATION NO. 55 OF 2020

BETWEEN

YETU SACCO SOCIETY LTD..... APPLICANT

VERSUS

ALICE KAGWIRA MBURUGU..... RESPONDENT

RULING

1. By a judgment dated 12th March, 2020, the Co-operative Tribunal in **COOPERATIVE TRIBUNAL CASE NO. 427 OF 2018** entered judgment for the Respondent as against the Applicant for Kshs. 77,198/- together with costs of the suit.

2. By a notice of motion dated 09th July, 2020 filed on 10th July, 2020 brought under Order 50 Rule 6 and Order 51 Rule 1 and Sections 1B,3A, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya, Applicant prays for orders THAT-

1. That the Applicant be granted leave to file an appeal out of time against the judgment delivered in COOPERATIVE TRIBUNAL CASE NO. 427 OF 2018.

2. Stay of execution of the judgment in COOPERATIVE TRIBUNAL CASE NO. 427 OF 2018 pending the hearing and determination of the appeal

3. Costs be provided for

3. The application is based on the grounds among others that due to the Covid-19 pandemic, the Cooperative Tribunal was closed during the period 24th March, 2020 to June,2020.

4. The application is supported by the affidavit sworn on 09th July, 2020 by **PATRICK MWENDA MUGAMBI** who describes himself as the Chief Executive Officer in which he reiterates the grounds on the face of the application.

5. Annexed to the affidavit is a draft memorandum of appeal and a notice dated 24th March, 2020 informing the general public that staff of the Cooperative Tribunal will be working from home.

6. The application was served and not opposed.

Analysis and Determination

7. The powers of the court in determining an application for extension of time to file an appeal are discretionary and unfettered

8. The law on extension of time is to be found in Section 95 of the Act which states as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

9. Order 50 rule 6 of the Civil Procedure Rules on the other hand states that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed”.

10. The parameters for exercise of court’s discretion were concisely laid out in the case of Mwangi v Kenya Airways Ltd [2003] KLR where the Court of Appeal 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”.

11. Additionally, a party seeking the court’s discretion for extension of time has a duty to prove sufficient cause. (See *Dilpack Kenya Limited v William Muthama Kitonyi [2019] eKLR*).

12. I have considered the application in the light of the supporting affidavit, annexures and submissions on behalf of the Applicant and cited authorities. The issue for determination is whether the Applicant has met the threshold for granting of leave to appeal out of time and stay of execution pending appeal.

i. Length of delay

13. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which states:

“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 anytime 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”.

14. The judgment from which the Applicant proposes to appeal against was delivered on 12th March, 2020. The present application was filed on 10th July, 2020 which was 4 months after the after the judgment was delivered and the length of delay is therefore inordinate.

ii. Reason for delay

15. As pointed out hereinabove, the reason for the delay has been explained to have arisen from the fact that the Cooperative Tribunal was closed during the period 24th March, 2020 to June,2020 due to the Covid-19 pandemic.

iii. The chances of appeal succeeding if the application is granted

16. Determining at this juncture that the appeal does or does not raise triable issues will amount to deciding on a matter not before this court. All that this court needs to determine is whether the applicant has a *prima facie* case that is triable. (See *Nicholas Kiptoo Arap Korir Salat v. The Independence Election & Boundaries Commission & 7 Others, [2014] eKLR*).

16. I have considered the issues raised in the memorandum of appeal mainly that the sum ordered paid to the Respondent had been recovered for loan owed by the Respondent, an issue which in my considered view is triable.

iv. The degree of prejudice to the respondent if the application is granted.

16. Article 50 (1) of the Constitution underscores the right to be heard and provides that:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

17. After considering the application in its totality, I am persuaded that the Respondent does not stand to suffer any prejudice if the Applicant is granted leave to ventilate the issues in its intended appeal.

18. From the foregoing analysis, motion dated 09th July, 2020 filed on 10th July, 2020 succeeds in the following terms:

1. The applicant is granted leave to appeal out of time

2. The intended appeal shall be filed within 30 days from today’s date

3. There shall be a stay of execution of the judgment in COOPERATIVE TRIBUNAL CASE NO. 427 OF 2018 upon the Applicant depositing into this court Kshs. 77,198/- within 7 working days from today’s date

4. Costs shall be costs in the Appeal

DATED IN MERU THIS 16TH DAY OF DECEMBER, 2021

WAMAE. T.W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For the Applicant - Ms. Muriithi for Kiautha Arithi & Co. Advocates

For the Respondent - Mr. Kariuki for Kariuki, Kiplagat, Lesaigor Associates Advs