



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC CIVIL APPLICATION NO. 61 OF 2018

SISTO MURANGURI MIGWI.....APPLICANT

VERSUS

MITUNGU IRRIGATION FARMERS' COOPERATIVE SOCIETY LTD....RESPONDENT

RULING

Leave to come on record

1. The applicant herein seeks in the application dated 4th April 2018 for;

(i) Leave of court for the firm of M/S Gichunge Muthuri & Co. Advocates to come on record for the applicant in place of Matwere Asiyo & Co. Advocates

(ii) Leave of court for the applicant to appeal against the judgement delivered in Cooperative tribunal at Nairobi Case No. 69 of 2011 on 14th November 2011.

2. The application was supported by the Sworn affidavit of **Sisto Muranguri Migwi** and on the following grounds;

a. That judgement in the Cooperative Tribunal in Nairobi Case No. 69 of 2011 was delivered on 14th November 2017;

b. The applicant was dissatisfied with the said judgement;

c. That the applicant applied to be supplied with certified copies of the proceedings and judgement on 21st November 2017.

d. That he was only supplied with the certified copies of the judgement and proceedings on 28th February 2018 and also issued a certificate of delay to that effect.

e. That he failed to file the intended appeal due to the delay in issuance of the proceedings and judgement.

*f. That during the trial the applicant was represented by the M/s Matwere Asiyo & Co. Advocates who has now consented to have the firm of M/S Gichunge Muthuri & Co. Advocates take over the matter. **(The applicant attached a copy of the judgement, copy of certificate of delay and copy of consent to prove his assertion.)***

3. He lays a basis for his appeal; that the Cooperative Tribunal in Nairobi in Case No. 69 of 2011 erred in law and in fact by admitting an incompetent audit report prepared by an auditor not gazetted by the commissioner of cooperatives to audit Cooperative societies.

Respondent opposed application

4. The application was opposed by the Respondent through replying affidavit dated 30th April 2018 sworn by **Murithi Kirigi** the current chairman of the Respondent. He averred that the applicant does not explain what caused further delay in filing the application from 28th March 2018 to 5th April 2018. According to him, the certificate of delay is not a blank cheque to allow delay in filing the application for extension of time.

5. The applicant filed a Supplementary affidavit dated 12th October 2018 in response to the averments by the Respondent. He averred that the delay in filing the application was occasioned by the time taken in seeking consent of the former advocate on record.

Analysis and Determination

6. I have considered the application, affidavits filed as well as the rival submissions of parties. I take the following view of the application.

Of Change of Advocates after Judgement

7. **Order 9 Rule 9, 10 and 11 of the Civil Procedure Rules, 2010** governs change of Advocate in civil litigation after judgment. The rules provide as follows:-

9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.

11. The party who gives notice under rule 8 or obtains an order under rule 9 may perform the duties prescribed under this Order in person or through his new advocate.

8. See **Speedwall Building Technologies Limited v County Government of Migori [2018] eKLR.**

9. The application for change of advocate under rule 9 has been combined with other prayers. I shall therefore, as commanded by law determine the application for change of advocate first.

10. In this case the firm of M/s Gichunge Muthuri & Co. Advocates & M/S Matwere Asiyo Advocates filed a consent dated 23rd March 2018 at the Cooperative Tribunal allowing the firm of M/s Gichunge Muthuri & Co. Advocates to come on record in place of M/S Matwere Asiyo & Co. Advocates. I therefore give my permission to the M/S Gichunge Muthuri & Co Advocates to come on record for the applicant. Henceforth, the said firm of advocates shall perform the duties prescribed under the law for the applicant.

Of leave to file appeal out of time

11. **Section 79G of the Civil Procedure Act** and more particularly, the proviso thereto provides as follows:

“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:

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.” [Emphasis added]

12. In **County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR** the Court made reference to **Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others, [2014] eKLR** in which the principles to consider in exercise of discretion in an application for extension of time were stated as follows:

1. Extension of time is not a right of a 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 on 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 respondents if the extension is granted;

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

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

13. The judgment to be appealed from was delivered on 14th November, 2017. Hitherto, over one year has lapsed. However, the applicant applied for certified copies of proceedings and judgment on 21st November, 2017. This was barely seven days thereto. Proceedings were only supplied to him on 28th February 2018. A certificate of delay was also issued on the delay. In computing time, you exclude 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. This initial delay is not therefore the issue here. In any case, the applicant took appropriate steps towards commencement of his appeal.

14. The delay of 36 days is the one in contention. This delay ought to be explained to the satisfaction of the court. The applicant explained the delay; obtaining consent of change of advocates from the previous legal counsels took considerable time. This explanation is reasonable and depicts practical realities of such transactions. The applicant herein filed a consent to the change of advocates on 28th March 2018. This was one week prior to filing of this application.

15. In light thereof, I am satisfied the delay has been sufficiently explained. I also do not foresee any prejudice being occasioned to the respondent.

16. Accordingly, I hereby grant leave to the applicant herein to file its appeal within thirty (30) days of the delivery of this Ruling. Given the circumstances of this application and my findings on the delay, I order each party to bear own costs of the application.

Dated, signed and delivered this 25th day of July 2019

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F. GIKONYO

JUDGE

IN PRESENCE OF

Thangicia for Gichunge for applicant

Theuri for Mutegi for respondent

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F. GIKONYO

JUDGE