



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 630 OF 2017**

**KOMOTHAI COFFEE GROWERS CO-OPERATIVE SOCIETY LIMITED.....APPELLANT**

**VERSUS**

**STEPHEN NDUNGU KANJI.....RESPONDENT**

*(An appeal from the Judgment of the Chairman of the Co-operatives Tribunal*

*in case number 35 of 2015 on 19<sup>th</sup> October, 2017)*

**RULING**

The Appellant/Applicant has moved the court by way of a Notice of Motion dated the 20<sup>th</sup> day of August, 2018 under Section 1A, 1B, 3A and 95 of the Civil Procedure Act and Order 50 Rules 5, 6 and Order 51 of the Civil Procedure Rules seeking an order for enlargement of time within which to prosecute the appeal.

The application is supported by the annexed affidavit of Munene Ng'ang'a Advocate sworn on the 20<sup>th</sup> day of August, 2018 and on the supplementary affidavit sworn by Daniel Kiunyu on the 3<sup>rd</sup> July 2019.

The same is premised on the grounds that, the Appellant was granted a stay of execution pending appeal, on the 10<sup>th</sup> May, 2017 on condition that, the appeal be prosecuted within 120 days from the date thereof but it was unable to comply with the timelines as it received certified copies of the proceedings late, in July 2018.

That upon receipt of the proceedings it filed its record of appeal on the 17<sup>th</sup> day of August, 2018 and the Appellant was apprehensive that by the time it filed the present application, the remaining period would not be sufficient for it to prosecute the appeal as the High Court was proceeding on summer vacation. The Appellant thus sought for the listing of the appeal for directions or in the alternative enlargement of time within which to prosecute the same.

The Respondent has opposed the application by way of a replying affidavit sworn on 24<sup>th</sup> June, 2019 in which he has deponed that the appeal herein has been overtaken by events. He has averred that the Appellant has wasted time in the matter by its failure to fix its application for hearing and only moved the court after he filed and served his application dated the 5<sup>th</sup> day of February, 2019. He stated that the interim management committee officials who were liable to pay costs are no longer in the office to defend themselves even if time is extended by the court. He has urged the court to dismiss the application with costs to him.

In his supplementary affidavit, Danie Njuguna Kiungu, who is the chairman of the Appellant, avers that the motion to extend time within which to prosecute the appeal was necessitated by the summer vacation of the High Court which commenced on 31<sup>st</sup> July, 2018 and that they had sought orders to have the appeal heard during the vacation as the time to prosecute the same was running out shortly after the new term commenced on September, 2018.

That at the hearing which was scheduled for 25<sup>th</sup> September, 2018, its counsel sought an adjournment on the grounds that they had no instructions given the dissolution of the then management committee by members of Komothai Coffee Growers Society on or around 13<sup>th</sup> September, 2018.

He further averred that it was not until mid October, 2018 when the new officials were sworn in, and had to deal with many urgent issues that were pending for lack of office holders. That there have been supervening events at the Appellant society including the intervention of Kiambu County Government in the elections of the society, which have contributed to the delay in prosecuting the present motion.

The deponent further contended that they represent 10,000 members and if the motion is dismissed, it will have a severe impact on members who deserve to have their appeal heard on merits as opposed to technicalities. He has urged the court to extend time as the Appellant has already filed a record of appeal and it's ready and willing to abide by any conditions to be imposed by the court.

The court has considered the application together with the supporting affidavit, the replying affidavit in opposition to the application and the supplementary affidavit. The order directing prosecution of the appeal within 120 days was given on the 10<sup>th</sup> May, 2018.

The Appellant did not comply with the directions as to the timelines within which to prosecute the appeal. The Appellant has given reasons why it did not prosecute the appeal as ordered by the court and most importantly that the management committee which could have given instructions to its advocate vacated office and it took time before another committee was elected and sworn in.

The other reason given was that part of the 120 days period fell within the High Court vacation and counsel had to file an application for the appeal to be given directions during the vacation. I note that the application for extension of time was done before the period within which to prosecute the Appeal had lapsed but the same could not be heard during the vacation.

The Respondent in opposing the application argues that the appeal has been overtaken by event as it was not prosecuted within the timelines set by the court. He has also contended that there is a new management committee in the office, the old one having been voted out.

With regard to the Respondent's contention that the old management committee has already left the office, the court notes that the Appellant is a Limited Liability Company and the committee members while in the office acts on behalf of the company and has perpetual succession and therefore enlargement of time will not cause any prejudice to the Respondent. In my view, the reasons given by the Appellant for failure to prosecute the appeal within the time ordered by the court are plausible. It is only fair that parties to the appeal herein are heard on merits in line with the spirit of Article 159 of the Constitution which enjoins this Honourable Court to promote substantive justice as opposed to procedural technicalities.

Accordingly, I find the application has merits and the same is allowed in terms of prayer 2 thereof. Time within which to prosecute the appeal is extended by a further 30 days from the date of this ruling. Costs of the application assessed at Kshs. 10,000/= is awarded to the Respondent and the same to be paid within fourteen (14) days from the date of this ruling failing which the orders granted herein shall be vacated.

**Dated, Signed and Delivered at Nairobi this 24<sup>TH</sup> Day of October, 2019.**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... For the /Appellant/Applicant

.....For the Respondent