



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**MISCELLANEOUS APPLICATION NUMBER 87 OF 2017**

**SAMUEL WERU AND 17 OTHERS.....APPLICANTS**

**VS.**

**AGUTHI FARMERS CO-OPERATIVE**

**SOCIETY LIMITED.....RESPONDENT**

**RULING**

The application before me is the Chamber summons dated 29<sup>th</sup> August 2017 brought under certificate of urgency and under Articles 50(1) and 159(2) (d) of the Constitution, Sections 1A, 3A, 75G and 95 of the Civil Procedure Act Cap 21, Order 42 rule (6) of the Civil Procedure Rules 2010, Section 81 (1) of the Co-operative Societies Act Cap 490 of the Laws of Kenya and other enabling provisions of the law.

The application seeks a raft of orders:

1. Spent
2. Spent
3. Spent
4. That this Honorable Court be pleased to grant stay of execution of the ruling of Hons. Alex Ithuku, H Shidiye, R Mwambura delivered on 13 July 2017 the Cooperative Tribunal at Nairobi CTC 03 of 2011 pending the lodgment hearing and determination of the intended appeal by applicants herein
5. That this Hon Court be pleased grant the applicants extension of time to enable the lodgment, and filing of the intended appeal against the entire ruling of Hons. Alex Ithuku, H Shidiye, R Mwambura delivered on 13 July 2017 in the Cooperative Tribunal at Nairobi CTC 03 of 2011.
6. That these court be pleased to visit the locus quo to ascertain the facts pleaded before it.
7. That the costs of and incidental to this application be costs in the intended appeal
8. That the honorable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case

It is supported by the affidavit and further affidavit sworn by Samuel Weru on 29<sup>th</sup> August 2017 and 18<sup>th</sup> September 2017, on behalf of the applicants and opposed by the replying affidavit sworn by James Wachira Ndiangu on 7<sup>th</sup> September 2017 on behalf of the respondent.

The applicant's case is that they are dissatisfied with the Ruling of the Cooperative tribunal in CTC 3 of 2017. That their intended appeal raises fundamental issues of law including *inter alia* General meetings, amalgamation and division of cooperative societies that go to the very root of the decision of the cooperative tribunal, that the applicants will suffer irreparable loss that cannot be compensated by way of costs, that they will be disenfranchised if they are not accorded the opportunity to be heard as the decision weighs heavily on all the members of the Gaaki Coffee Factory.

Further that the applicant's lawyer died while preparing to file the appeal, and they had instructed the firm of Wahome Gikonyo who had not taken the necessary action.

The application is opposed on the grounds that the applicants are not members of Gaaki Coffee factory, that the factory is not a legal entity, that the right of appeal has been extinguished and the present application has no merit, that applicant's advocate died on 7<sup>th</sup> August 2017 long after the time of the statutory period of filing the appeal and no explanation had been given for the delay, that the court has no jurisdiction to hear the application as no appeal has been filed, that there was no urgency as the decree in the tribunal case had not been extracted, neither the costs taxed, the applicants had not given any security for the performance of the decree of the tribunal.

Parties agreed to file written submissions which counsel for each highlighted.

I have considered the application, the rival affidavits, submissions and authorities.

The matter was filed at Milimani law courts on 30 August 2017 and a certificate of urgency.

This was provoked by the Cooperative tribunal at Nairobi in CTC 3/2011 ruling delivered on the 13<sup>th</sup> of July 2017, the effect of which was to be the eviction of the applicants from Gaaki Coffee Factory, and the payment of Ksh one million general damages plus costs and interests to the respondent.

The applicants had a right of appeal within 30 days. No appeal was filed, and fearing the impending execution of the above orders, filed this application seeking the foregoing orders.

On 30<sup>th</sup> August 2017 the matter was before placed Mboghli Msagha J where among other orders he issued a prohibitory order restraining the respondent whether by itself its agents / employees and or servants or otherwise from entering into, trespassing or breaking in at Gaaki Central Farmers' Cooperative Society Limited hereinafter (Gaaki Coffee factory) from interfering in any manner whatsoever with the applicant's quiet possession thereof to last for 14 days.

On 11<sup>th</sup> of September the matter was placed before Hon Riechi J. An application to transfer the matter to Nyeri High Court was made and allowed.

On 22<sup>nd</sup> of September the matter was before Justice Ngaah where parties agreed to dispose of the application by way of written submissions and to highlight the submissions on 23 October 2017.

From the submissions by counsel for the applicants, they seek mainly the two orders;

1. Stay of execution of the ruling of Hon Alex Ithuku, Hon. H. Shidiye, and Hon. R. Mwambura, delivered on the 13<sup>th</sup> July 2017, in the Cooperative Tribunal at Nairobi in CTC number 03 of 2011, pending the lodgment, hearing and determination of the intended appeal by the applicant herein.
2. An extension of time to enable the lodgment and filing of the intended appeal against the entire ruling

Mr. Abdiaziz appeared for the applicants. Mr. Macharia Waweru for the respondents.

The applicants right of appeal emanates from Section 81 of Cap 490 provides for appeals to 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:***

Things do not always work as expected and that is why the law provides the court is with discretion to extend this 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.

The ruling was delivered on the 13<sup>th</sup> July 2017. Thirty days were to end on the 13<sup>th</sup> August 2017. No appeal had been filed by then. This application was filed on the 30<sup>th</sup> August 2017, 17 days after the deadline.

To explain the delay Mr. Abdiaziz submitted that there was sufficient reason for the delay.

See **Application no. 16 of 2014; Nicholas Kiptoo arap Korir Salat v IEBC&7 Others [2014] eKLR**

The death of counsel for the applicants Mr. Muthui Kimani on the 7<sup>th</sup> August 2017. This ended a seven-year relationship between the applicants and their counsel and it took them some time to recover. His death came at about the time they were supposed to be filing the appeal. The applicants instructed another law firm, Wahome Gikonyo, but they too did not file the appeal

The delay was not deliberately caused by the applicants. See **Delta Haulage Service Ltd v Complast Industries Limited. [2017] eKLR**

The delay was not inordinate. The proceedings were certified on 19<sup>th</sup> of July 2017 and the 30 days would be lapsing on the 18<sup>th</sup> August

2017. On 21<sup>st</sup> of July 2017 counsel had written seeking copies of the Judgment and the proceedings of the case. He died on 7<sup>th</sup> August before he could file the appeal. The applicants then approached their current counsel who filed this application on 30<sup>th</sup> August 2017. That leaves only 12 days and it is within these 12 days that the applicants learnt about the demise of the advocate. **Section 79(G) CPC time for filing appeals from subordinate courts** which provides for the exclusion of the time taken for the preparation of the decree or order.

On the issue of stay of execution Mr. Abdiaziz argued that the applicants just needed to establish that they would suffer substantial loss, that the application was brought without unreasonable delay, and whether security had been deposited for costs see Order 42 rule 6 CPR 2010

He argued that if the stay was not granted the applicants would suffer substantial loss that could not be compensated by way of costs. See **Corporate Insurance Company Limited v Emmy Cheptoo Leting and another [2015] eKLR**.

That the demand letters dated 14<sup>th</sup> August 2017, sent to each of the applicants stating that *'this is the final notice and there shall be no further communication before the execution of decree'* indicated that the respondent was seeking Ksh. 1 million damages from each one of them with a threat of eviction and attachment of their property,

That an eviction would render the appeal nugatory.

That the applicant had come to court without unreasonable delay.

In his response Mr. Waweru Macharia submitted that no sufficient reason was laid out for the delay in failing to file the appeal.

That it was not in dispute that Mr. Muthui counsel for the applicants died on the 7<sup>th</sup> August 2017. However, there was a whole week within which to file the appeal. That on the 15<sup>th</sup> August they instructed Wahome Gikonyo but still no appeal was filed, or application for extension.

That the applicants had not filed a memorandum of appeal from which the court could discern that they had an arguable appeal and upon which they would be seeking the exercise of this court's discretion to grant the stay of execution.

That the applicants had not offered any security for costs. See **Northwood Service Limited v Mac &More Solutions Ltd [2015] eKLR**

That the applicants were seeking injunctive relief yet they already had interim orders. The orders sought could not be granted. See **Abraham Lenauia Lenku v Charles Katekeyo Nkaru [2016] eKLR**

In his rejoinder Mr. Abdiaziz urged the court to find that the applicants had done everything within their power to have the appeal filed in time in vain. That their lawyer had died and the one whom they instructed thereafter failed them. That the grounds for the stay of execution were there for the court to see. That on the issue of security the applicants were willing to give furnish a reasonable security.

Analysis and determination.

**Section 79(G) CPC** provided for time for filing appeals from subordinate courts

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.**

This provision echoes the provisions of s. 81(1) of Cap 490. In addition, section 95 of the CPC provides for enlargement of time;

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.

In determining the issue, I take into consideration that the principles for applicable in the extension of time were set out in the Supreme Court Case of Nicholas **Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** after an exhaustive analysis of case law on the issue;

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.

In this case the applicants have given what I consider to be a reasonable explanation. In addition, the delay is not inordinate being 12 days. They took the necessary actions and were let down by counsel.

I am fortified in finding that the explanation for the delay is reasonable by the Judge's finding in the case of **Delta Haulage Service Ltd v Complast Industries Limited [2017] eKLR** where the delay seeking extension of time was 27 days following the death of the father to the advocate. The Judge while noting that counsel ought to have acted with dispatch to seek the extension of time, considered that his state of bereavement contributed to the delay in filing the notice of appeal. He also observed that it was important that the applicant's appeal be heard and determined on merit.

Hence despite there being some delay the Judge was of the view that it was a matter of importance that the matter be determined on merit.

The need to hear and determine matters on merit was also the position taken by Riechi J in **Lavington Security Ltd v Flora Kamene Kavoi [2017] eKLR** that the primary concern of courts is to have matters determined on their merits.

From the foregoing I am satisfied by the reasons given by the appellants for the delay in filing the appeal.

Should the stay of execution be granted pending the lodgment, hearing and determination of the appeal?

**Order 42 rule 6 CPR 2010** provides for stay in case of appeal in the following terms;

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such **decree or order**, and whether the application for such stay shall have been granted or refused by the court appealed from, **the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the court is satisfied that **substantial loss may result to the applicant** unless the order is made and that **the application has been made without unreasonable delay**; and

(b) such **security as the court orders for the due performance of such decree** or order as may ultimately be binding on him **has been given by the applicant.**

It is clear from the provision above that an appeal cannot by itself act as stay of execution. Hence an order giving extension of time, may not secure the applicant's right to an appeal if the same is rendered nugatory by execution of the decree or order from which the appeal is intended.

No memorandum of appeal was filed with the application but it is clear from the affidavits sworn on behalf of the applicants that they intend to appeal against the two orders issued by the cooperative tribunal; of giving vacant possession of the Gaaki Coffee factory to the respondent, and the damages of Ksh 1 million awarded to the respondent. This is not lost to the respondent as it is very well expressed in the applicant's affidavits.

Aburili J in **Edward Kamau & another; v Hannah Mukui Gichuki & another [2015] eKLR** Expressed herself thus The right of appeal, it has been held time and again, is a Constitutional right which is the cornerstone of the rule of law. To deny a party that right, would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial of a right to a fair hearing guaranteed under Article 50 (1) of the Constitution which latter right cannot be limited under Article 25 of the said Constitution.

I am in agreement with this line of thought and find the case **Abraham Lenauia Lenkeu v Charles Katekeyo Nkaru [2016] eKLR** distinguishable, because in that case, the matter apparently had not 'matured for this court to be seized of jurisdiction' and the matter was 'released and returned to the Chief Magistrate's court for adjudication and determination'. That scenario does not hold here as this case has already been determined by the tribunal and there is nothing to return to it for adjudication and determination.

The omission to file the memorandum of appeal, in my humble view ought to be seen in the circumstances of this case.

Have the applicants demonstrated that they will suffer substantial loss?

The question of what is substantial loss was dealt with in **Antoine Ndiaye vs. African Virtual University [2015] eKLR** which cited Ogola J in **Tropical Suppliers Limited case** and was in turn cited in **Corporate Insurance Company Limited v Emmy Cheptoo Leting and another [2015] eKLR** that substantial loss to an applicant is the cornerstone of the High Court's Jurisdiction to grant stay of execution. That Substantial loss does not represent any particular mathematical formula. Rather it is a qualitative concept. It refers to any loss, great or small,

that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.

In this case it goes without saying that on the face of it an eviction of the applicants from the Gaaki Coffee Factory would amount to substantial loss, as it involves not only themselves but other persons whose livelihoods depend on it. The respondent will not suffer prejudice. The factory was found to be a going concern. Anything due to the respondent would be available from the accounts.

On the issue of security for costs the respondent referred me to Northwood Service Ltd v Mac & More Solution Ltd [2015] eKLR where the judge allowed stay of execution subject to the deposit of the full decretal sum including costs and interests. The applicants have demonstrated the willingness to deposit reasonable costs. In my view the respondent would not be unable to refund anything paid to it as it is also a going concern. There was nothing before the tribunal or before me that it would be unable to refund the decretal sum if the appeal were to succeed.

I find that the applicant has fulfilled the condition for substantial loss, for bringing the application without inordinate delay. The final one is for the applicant is the security for the performance of the decree.

I make the following orders;

That the application for extension of time to lodge an appeal herein is allowed. The appeal to be filed and served on the respondents within 30 days hereof.

That stay of execution of the order of the Cooperative tribunal in CTC 3 of 2017 made on the 13<sup>th</sup> July 2017 be and is hereby issued pending the lodgment, hearing and determination of the appeal herein.

That the applicants to pay the respondent the damages of Ksh 1 million plus costs and interest accrued from the date of the order and outstanding as at the date of this order within 30 days hereof. In default of payment of the Ksh 1 million plus costs and interest the stay herein will lapse.

I make no orders with regard to the prayers that were not urged before me.

The costs of this application be costs in the appeal.

Right of Appeal 30 days.

**Dated, delivered and signed this 27<sup>th</sup> November 2017 at Nyeri**

**TERESIA MATHEKA**

**JUDGE**

In the presence of

Court Assistant Harriet

Ms. Mwikali holding brief for Mr. Abdiaziz for the applicants

Mr. Waweru Macharia for the respondent