



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC CIVIL APPLICATION NO. 463 OF 2007**

**KANDUTURA FARMERS CO-OP SOCIETY.....APPLICANT**

**VERSUS**

**BENJAMIN MAINA MACHARIA.....RESPONDENT**

**RULING**

1. The Application dated 14<sup>th</sup> March 2014 has been brought under Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Section 81 (1) of the Co-operative Act No. 12 of 1997. The applicant seeks the following orders:
  - (a) spent
  - (b) spent
  - (c) pending the hearing and determination of this application there be a stay of proceedings in NKR. H.C Misc. Civil Application No. 495 of 2006.
  - (d) that this honourable court be pleased to grant leave to the applicant to file appeal out of time.
  - (e) the costs of this application be provided for.
2. The Application is supported by the affidavit of the Applicant's secretary Bernard Githu Methu sworn on 14<sup>th</sup> March 2014.
3. The intended appeal is against the decision of the Commissioner of Co-operatives made on 4<sup>th</sup> March 1997 in Arbitration Case No. 32 of 1996. The Applicant filed that case claiming legal title over the parcel of land known as Plot No. 125. In a decision made on 4<sup>th</sup> March 1997, the Arbitrator found in favour of the Respondent and against the Applicant.
4. Aggrieved, the Applicant appealed to the Minister of Co-operatives vide Arbitration Appeal Cause No. 4 of 1997. While this appeal was pending, the Respondent filed in the High Court, Nakuru Misc. Civil Application No. 495 of 2006 wherein he sought the adoption of the arbitration award.
5. Shortly thereafter, the Applicant instituted these proceedings by way of an application dated 30<sup>th</sup> August 2007 wherein it sought orders to transfer or call for the arbitration case from the Commissioner of Co-operatives to the High Court for hearing and determination.

6. The Applicant alleged that this application was necessitated by the fact that Co-operatives Act Cap. 490 Laws of Kenya was repealed and replaced by the Legal Notice No. 12 of 1997. The new Act which came into force on 1<sup>st</sup> June 1998, required all appeals from the Commissioner's decision be filed in the High Court.
7. Instead of an order to transfer or call for the appeal that is pending before the Minister of Co-operative Development, the Applicant seeks leave to file a fresh appeal in this court.
8. The Applicant explains that it did not prosecute the earlier application because the file was misplaced. On the advice of its new Counsel, it felt that it was more prudent to file the appeal in this court directly. The Applicant now seeks leave of court because the time for filing an appeal has expired.
9. The application is opposed by the Respondent who filed the Replying Affidavit sworn on 11<sup>th</sup> April 2014. His case is the intention of the Applicant is to prevent him from enjoying the fruits of the judgment made in his favour by the Arbitrator. That when the Applicant appealed to Ministry of Co-operative Development, the Respondent promptly filed his response. However, the Applicant delayed in prosecuting the appeal and as a result, the Respondent applied to the Ministry to dismiss the appeal for want of prosecution. To the best of his knowledge, this was done because thereafter the process of enforcing the decision of the Commissioner was commenced.
10. The Respondent contended that the explanation by the Applicant is not satisfactory. He believes that the Applicant's appeal was precipitated by the Respondent's application dated 23/10/2006 in High Court Misc Application No. 495 of 2006. It is an abuse of the court process and should be dismissed.
11. The application was argued in court on 24<sup>th</sup> February 2015. Counsel for the Applicant submitted that the Applicant filed its appeal to the Ministry of Co-operative Development within time. However, this appeal was not prosecuted because following the amendment of the Act in force at the time, the Ministry was not the proper forum to determine the appeal.
12. Counsel submitted that the Applicant has abandoned its prayer to have the appeal transferred to this court because this is not provided for under Section 96 of the Legal Notice No. 12 of 1997. The only option available to the Applicant was to file a fresh appeal in the High Court. Although time has run out, Section 81(1) of the Co-operatives Act Counsel vests this court with powers to extend the time within which an appeal may be admitted.
13. Counsel for the Respondent argued that Section 81 which required that appeals be filed in the High Court, became operational when the Act came into force on 1<sup>st</sup> June 1998. This provision was not intended to apply retrospectively because the Ministry was not made dysfunctional. It is for this reason that the Parties were invited by the Ministry on its own motion to appear before it when the matter was to be mentioned.
14. That there was no reasonable explanation offered for the delay. Further the Applicant has not annexed the relevant evidence to enable this court evaluate whether he has an arguable appeal.
15. The issue for determination is whether the this appeal should be admitted by this court in exercise of its powers under Section 81 of the Legal Notice No. 12 of 1997.
16. The decision that is being appealed against was made on 4<sup>th</sup> March 1997. The Appellant alleges that it was aggrieved by this decision and wished to appeal against it. However, 17 years later its grievance has not been heard and determined and this can only be attributable to indolence on its part. From the evidence, this has been due to reluctance on its part to pursue its claim.
17. In the first instance, the Applicant filed its appeal in the Ministry of Co-operative Development on 1<sup>st</sup> April 1997. The Applicant admitted that it did not prosecute this appeal. The fate of the appeal is not clear because although on the 13<sup>th</sup> March 2000 the Respondent applied for the appeal to be dismissed, there is no order to that effect.
18. The Applicant alleges that its inaction was because the Co-operatives Act in force at the time was repealed by Legal Notice 12 of 1997. The new Act required all appeals to be filed in the High Court. As this Act came into force on 1<sup>st</sup> June 1998, there is no explanation why it waited until the year 2007 to file the application to transfer the appeal to the High Court.
19. The only conclusion is that the Applicant was moved into action when the Respondent filed an application in the High Court Misc Application No. 495 of 2006 for adoption of the award and not because there was a genuine grievance to be determined.

20. Its actions are aggravated by the fact that even after filing the application for transfer, the Applicant did not prosecute it for another about 7 years. The reason, it is alleged is that the file, although the Applicant does not clarify whether it was the one in the Ministry or in the High Court, was misplaced.
21. However, as rightly pointed out by the Respondent, the Applicant not only failed to indicate the period for which this file was missing, but also failed to show any steps taken during this period to either trace or reconstruct the file.
22. The Applicant has not satisfied the court that if granted leave, it would move expeditiously to have the matter determined. To the contrary, the evidence suggests that the Applicant is not interested in the case and is moved by other considerations other than final determination of the rights of the parties. In the meantime, the Respondent has been unable to enjoy the fruits of his award.
23. For this reason, I find that the Applicant has been guilty of laches and is therefore undeserving of the court orders.
24. Accordingly, the application amended on 14<sup>th</sup> March 2014 is hereby dismissed with costs.

Orders accordingly.

**Dated, Signed and Delivered at Nakuru this 29th day of May, 2015.**

**A. MSHILA**

**JUDGE**