



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**MISC. CIVIL APPLICATION NO. 211 OF 2007**

**DAVID MURIITHI  
GEORGE S. K. MBUI  
JUSTUS MUCHIRA**

**JOHN WILSON NGARI.....APPLICANTS**

**EPHANTUS RAGE MAGONDU  
EJIDOUS MWANGI  
MWANGI NJAO  
JASON MBOGO**

**VERSUS**

**RUNGETO CO-OPERATIVE SOCIETY LTD.....1<sup>ST</sup>  
RESPONDENT**

**COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT & MARKETING.....2<sup>ND</sup>  
RESPONDENT**

**RULING**

**David Muriithi and 7 Others**, hereinafter referred to as the Applicants took out the Notice of Motion dated 18<sup>th</sup> December 2007 in which they sought for an order to extend time to appeal against the order of the Commissioner of cooperatives and Marketing made on 14<sup>th</sup> December 2007. The Applicants also sought for an order of stay. The Motion is premised on the provisions of *Section 81(1)* of the Cooperative Societies Act No. 12 of 1997. The Motion is supported by the affidavit of Jason Mbogo sworn on 18<sup>th</sup> December 2007 and a further affidavit he swore on 1<sup>st</sup> December 2010. Rung’eto Cooperative Society Ltd., the 1<sup>st</sup> Respondent herein, opposed the Motion by filing the replying affidavit of Haniel Kinyua Muchiri sworn on 7<sup>th</sup> January 2008.

When the Motion came up for interpartes hearing, learned counsels appearing in the appeal recorded a consent order to have the Motion disposed of by written submissions. I have considered those submissions plus the grounds set out on the face of the Motion and the facts deponed in the affidavits filed for and against the Motion. The Applicants aver that on 24<sup>th</sup> March 2007 they were issued with a notice of intention to surcharge dated 1<sup>st</sup> March 2007. Upon receipt of the aforesaid notice, the Applicants filed an appeal before the Cooperative Tribunal on 5<sup>th</sup> April 2007 vide Tribunal Appeal Nos. 17-24 of 2007. On 14<sup>th</sup> may 2007 the applicants were again served with surcharge orders. The Applicants aver that they were prompted to withdraw the appeals when they were advised by their legal advisors that the appeals had been prematurely filed since the surcharge orders had not been issued. By that time it is said

the time limited to appeal had lapsed. The applicants stated that they misconstrued the notice of intention to surcharge to mean the order to surcharge. On the above basis the Applicants beseeched this court to grant the orders sought in the Motion.

The 1<sup>st</sup> Respondent urged this court to find that the Motion was an abuse of the Court process since a similar application was filed before the Cooperative Tribunal which was heard and dismissed. The 1<sup>st</sup> Respondent submitted that there are no good reasons given as to why the Applicants delayed infilling the Appeal.

After a careful consideration of the rival submissions, it has now emerged that the Applicants are indirectly blaming their erstwhile advocate for their failure to file their appeal within time. They have beseeched this court not to let them suffer for the mistakes of their advocates. On this score, the respondents do not dispute the fact that the Applicants' woes were as a result of counsel mistake attributed either to sheer incompetence or a mistaken view of the law. It is trite law that a litigant should not be allowed to suffer for a genuine mistake made by their counsels. The discretion to extend time under *Section 81 (1)* of the Cooperative Societies Act No. 12 of 1997 by this Court is unfettered so long as an applicant satisfies the court with sufficient reasons. The question is whether or not the issue in dispute falls within the ambit of *Section 81 (1)*. The intended appeal is said to be against the orders of the Commissioner for cooperative Development to surcharge the Applicants under *Sections 58 and 73* of the Cooperative Societies Act No. 12 of 1997. The Commissioner for Cooperative Development forwarded the surcharge order to the Applicants under *Section 73* vide his letter dated 14<sup>th</sup> May 2007. The Applicants now intend to appeal against those surcharge orders. Under *Section 74* of the Cooperative Societies Act No. 12 of 1997, the Applicants were required to appeal against those orders within 30 days. I have perused the aforesaid Act and find no provision for extension of time to Appeal. The law is very clear that under *Section 74 (1)* that any person aggrieved by an order of the Commissioner for cooperative Development under *Section 73 (1)* may appeal to the Cooperative Tribunal within 30 days. Under *Section 74 (2)* any party aggrieved by the Tribunal's decision is required to appeal to the High Court within 30 days. It is obvious from the Motion that the Applicants are seeking for the extension of time to appeal to this Court against the decision of the Commissioner for Cooperative Development made on 14<sup>th</sup> May 2007. I find the Application to be improperly before this Court. To begin with this Court has no jurisdiction to deal with an appeal directly emanating from the decision of the Commissioner for Cooperative Development under *Section 74 (1)* of the Cooperative Societies Act. I have already stated that the Applicants should have first approached the Cooperative Tribunal by way of an appeal. The Applicants admit that they actually appealed to the Cooperative Tribunal but were advised to withdraw those appeals when they realized that they had appealed against the issuance of the notice of intention to surcharge instead of appealing against the surcharge orders. This court only deals with appeals from the decisions of the Cooperative Tribunal under *Section 74 (2)* of the Cooperative Societies Act. No. 12 of 1997.

For the above reasons I think I will not exercise my discretion under *Section 81 (1)* in favour of the Applicants. The Motion is premature and improperly before this court. It would appear the Applicants had applied for similar orders before the Cooperative Tribunal but the Cooperative Tribunal dismissed the Application on the basis that it had no jurisdiction to extend time under *Section 74* and also on the basis that the Application was made too late in the day. The Applicants have not challenged the aforesaid decision on Appeal, but have instead opted to make a similar application before this court. With respect, I agree with the 1<sup>st</sup> Respondent that the Motion before this Court amounts to an abuse of the court process. On this account the Motion should be dismissed. There was also an inordinate delay in filing this Motion.

In the final analysis and on the basis of the above reasons, the Motion dated 18<sup>th</sup> December 2007 is hereby ordered struck out and dismissed with costs to the 1<sup>st</sup> Respondent.

*Dated and delivered at Nyeri this 15<sup>th</sup> day of July 2011.*

**J. K. SERGON**  
**JUDGE**

In open court in the presence of Gichohi holding brief Muchiri for Applicant and Karweru holding brief Muriuki for the Respondent.