



Kosgei v Ndege Chai Sacco Society Limited (Miscellaneous Civil Application E118 of 2023) [2024] KEHC 1060 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E118 OF 2023
RE ABURILI, J
FEBRUARY 8, 2024**

BETWEEN

ISAAK KIPARBEI KOSGEI APPLICANT

AND

NDEGE CHAI SACCO SOCIETY LIMITED RESPONDENT

RULING

1. *Vide* a Notice of motion dated 9th August 2023, the applicant herein seeks orders of this court for enlargement of time within which he should file an appeal from the judgment of the Cooperatives Tribunal in Kisumu Cooperatives Tribunal Case No 45 of 2016, which judgment was delivered on 23rd March, 2023.
2. The applicant's Notice of Motion is supported by his affidavit and the grounds on the face thereof. The applicant deposes that the judgment was delivered in his absence and that he only learnt of it after a month had lapsed and that upon trying to get a copy of judgment, the same was delayed until 21st July 2023 when it was send to him via email annexed. That there was delay in the typing of the Judgment and more, that there was lack of sufficient notice of entry of judgment. That the application had been brought promptly and in good faith hence it should be allowed in the spirit of fairness and justice. That the respondent will not suffer any prejudice and that the amount awarded to the respondent in its counterclaim was substantial and that the appeal is arguable.
3. Opposing the application, the respondent filed a affidavit sworn by Gilbert Bett the Chief Executive Officer of the respondent Cooperative Society deposing that the application is baseless, incompetent, frivolous and liable to be struck out. That the applicant has used delaying tactics as he has not even accounted for the period from 27th April 2023 when he requested for a certified copy of judgment and 9th August 2023 when he filed this application before this court. That under section 79G of the *Civil procedure Act* and Order 42 of the *Civil Procedure Rules*, the appeal should have been filed within 30 days. that vide an application dated 2nd May 2023, the applicant herein sought before the Tribunal stay



of execution of the judgment saying he intended to appeal yet he took another three months to file this application in August 2023 and no explanation for the delay has been offered.

4. That the applicant's memorandum of appeal does not disclose that he has an arguable appeal and that he has used delaying tactics to evade paying members' money from 2016 when he filed the case before the tribunal, to the detriment of the said members.
5. The parties' Counsel argued the application orally this morning reiterating the grounds and depositions as reproduced above.

Determination

6. Part XV of the [Cooperatives Societies Act](#) provides for settlement of disputes. Under section 81 of the [Act](#), appeals from the Tribunal lie to the High Court. In addition, the decision of the High Court is final. The section stipulates as follows, regarding timelines and the finality of the decision of the High Court:

81. Appeal to High Court

- (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:

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.

- (2) Upon the hearing of an appeal under this section, the High Court may—
 - (a) confirm, set aside or vary the order in question;
 - (b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;
 - (c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
 - (d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.
- (3) The decision of the High Court on any appeal shall be final.

7. From the above comprehensive provision, it is clear that section 79G of the [Civil Procedure Act](#) is not applicable as the [Cooperatives Societies Act](#) which makes provision for appeal, the time for such appeal to the High Court and even an opportunity for enlargement of such time where the time has lapsed.
8. The decision whether or not to extend time to file an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. The proviso to the section 81 does stipulate that sufficient reason must be given for such enlargement to be granted.
9. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were set out in various cases including the Court of Appeal in [Thuita Mwangi v Kenya Airways Ltd](#) [2003] eKLR.



10. In *Francis Mwanza Mulwa v Kanji Vaniian & 2 others* [2018] eKLR the court stated as follows:

“It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion This being an exercise of judicial discretion, like any other judicial discretion must on (sic) fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court’s discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in *Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others* [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in *Daphne Parry v Murray Alexander Carson* [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.”

11. On whether or not to grant leave to appeal out of time, counsel submitted that this court has unfettered discretion to enlarge time for filing of an appeal out of time in the interest of justice.

12. In *Mwangi v Kenya Airways Ltd* (supra), the Court stated that in the exercise of discretion to enlarge time, the court must consider the following factors:

- (a) The period of delay.
- (b) The reason for the delay.
- (c) The arguability of the appeal.
- (d) The degree of prejudice which could be suffered by the respondent if the extension is granted.
- (e) The importance of compliance with time limits to the particular litigant or issue; and
- (f) The effect if any on the administration of justice or public interest if any is involved.

13. The Supreme Court has also guided on the principles to be applied in extension of time in the case of *Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others* (Application 12 (E021) of 2021) [2022] KESC 3 (KLR) (10 February 2022) (Ruling) citing its earlier decision in *Salat, Nicholas Kiptoo arap Korir v Independent Electoral and Boundaries Commission & 7 others* Application No 16 of 2014; [2014] eKLR as follows:

“The guiding principles in applications for extension of time were as follows:

- a. extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;
- b. a party who sought for extension of time had the burden of laying a basis to the satisfaction of the court;



- c. whether the court should exercise the discretion to extend time, was a consideration to be made on a case-to-case basis;
 - d. whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. whether there would be any prejudice suffered by the respondents if the extension was granted;
 - f. whether the application had been brought without undue delay; and
 - g. whether in certain cases, like election petitions, public interest should be a consideration for extending time.
14. Discretion, however, must be exercised judiciously and not capriciously.
 15. The judgment intended to be impugned was delivered in the Cooperative Tribunal at Kisumu, in Case No. 45 of 2016 on 23rd March, 2023. The applicant claims that he only learnt of the delivery of the Judgment one month after time for filing of the appeal had lapsed upon which he filed this application for enlargement of time.
 16. The applicant further claims that the said judgment was send to him on 21st July 2023 and that it is in the interest of justice that the application herein be allowed since the respondent will not be prejudiced in any way.
 17. In opposing the application, the respondent annexes an application which was filed by the applicant herein before the Tribunal in May 2023 wherein the applicant was seeking for stay of execution of the judgment pending an intended appeal. At that time in May, 2023, no application for extension of time to file an appeal had been filed and it was not until 8th August 2023 that the applicant herein approached this court with this application.
 18. The question is whether this court should exercise discretion in favour of the applicant and allow him time to file the intended appeal.
 19. I note that the matter was filed before the Tribunal in 2016 therefore it has taken a while to be determined. The applicant's claim challenging the loan balances with the respondent cooperative Society was dismissed and the respondent's counterclaim for loan balance advanced to him was allowed.
 20. This court is aware of the extent of jurisdiction in matters arising from the Tribunals whereupon, the appeal to this Court is final.
 21. However, the delay in filing this application is inordinate and is not explained to the satisfaction of this court. If, indeed, the applicant knew of the judgment a month after it was delivered, and if that be so, then he had all the time to approach this court for extension of time and he did not have to wait until four months later.
 22. In addition, the applicant has also not come to this court with clean hands. He claims that the judgment of the Tribunal as delivered in March 2023 was only send to him in July 2023 yet from the annexures to the respondent's replying affidavit, and which he has not disputed, vide an application dated 2nd May 2023, the applicant had applied to the said Tribunal for stay of execution of the judgment pending an intended appeal. The question is, what judgment was he intending to appeal against as at 2nd May 2023



when he had not received it in July 2023? The applicant has not explained to this court why he did not file this application in May,2023 the time he was seeking for stay in the Tribunal.

23. It is also not clear why he failed to disclose to this court that in May 2023, he had filed an application for stay before the Tribunal, which application has not been determined yet.
24. In the grounds in support of his application dated 2nd May 2023, the applicant claims in the grounds thereof that he just learnt of the judgment and that he intended to file an appeal hence the application for stay of execution against the entire judgment.
25. Besides nondisclosure of the application that the applicant filed before the Tribunal in May 2023 even before the Judgment was filed into court for adoption and decree drawn for execution, in this application, the applicant has not found it necessary to annex copy of that judgment of the Tribunal which is in his possession, for this court to appreciate its tenor, noting that an appeal to this court is final.
26. This is not to say that the annexing of the judgment is mandatory but when the applicant claims that he now has the judgment and that the appeal is arguable then it is upon him to place material before the court to aid the court in exercising discretion in his favour, in view of the inordinate delay so that the court can ask itself the question, notwithstanding the inordinate and unexplained delay, can justice still be served and the respondent be compensated in costs? A party who keeps away from court relevant material that can assist them cannot expect the court to hand him what he wants.
27. For the foregoing reasons, I find and hold that the applicant has not satisfied this court that he is deserving of the discretion of the court to extent time for him to file an appeal from the judgment of the Tribunal.
28. I find the application dated 9th August 2023 not merited and the same is hereby dismissed with an order that each party bear their own costs of the application.
29. I so order.
30. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF FEBRUARY, 2024

R.E. ABURILI

JUDGE

