



Ushuru Savings & Credit Co-operative Co. Ltd v Mathenge & 9 others (Miscellaneous Civil Application E564 of 2023) [2024] KEHC 4624 (KLR) (Civ) (2 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4624 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION E564 OF 2023

CW MEOLI, J

MAY 2, 2024

BETWEEN

USHURU SAVINGS & CREDIT CO-OPERATIVE CO. LTD APPLICANT

AND

AGNES GATHONI MATHENGE 1ST RESPONDENT

JULIUS NGARE 2ND RESPONDENT

CHRISTOPHER KURIA 3RD RESPONDENT

TEDDY WAMUYU WAMBURU 4TH RESPONDENT

SERAH GATHIRIMU 5TH RESPONDENT

RICHARD MUSAU 6TH RESPONDENT

BONIFACE MACHARIA NGOCHUA 7TH RESPONDENT

JANE WANJIKU KAMAU 8TH RESPONDENT

SAMUEL KINUTHIA 9TH RESPONDENT

GEORGE MAINA GITHUA 10TH RESPONDENT

RULING

1. For determination is the motion dated 21.07.2023 by Ushuru Savings & Credit Co-operative Co. Ltd (hereafter the Applicant) seeking inter alia that the Court be pleased to grant the Applicant leave to file and serve its Memorandum of Appeal and Record of Appeal out of time, against the judgment delivered on 19.10.2022 by the Co-operative Tribunal in Nairobi CTC No. 514 of 2016 in favour of Agnes Gathoni Mathenge, Julius Ngare, Christopher Kuria, Teddy Wamuyu Kuria, Serah Gathirimu,



Richard Musau, Boniface Macharia Ngochua, Jane Wanjiku Kamau, Samuel Kinuthia and George Maina Githua (hereafter the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondent/Respondents.

2. The motion is expressed to be brought under Section 1A, 1B, 3A & 79G of the *Civil Procedure Act* (CPA), Section 4 of the *Fair Administrative Action Act*, Order 22 Rule 22, Order 50 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules* (CPR) among others. On the grounds thereon, as amplified in the supporting affidavit sworn by Edwin Odhiambo Abuya, counsel on record for the Applicant.
3. The gist of his depositions is that on 19.10.2022 the Co-operative Tribunal (hereafter Tribunal) in Nairobi CTC No. 514 of 2016 delivered its Judgment in favour of the 2nd to 10th Respondent; that aggrieved by the said decision the Applicant successfully sought stay of execution for thirty (30) days pending appeal; that immediately thereafter his firm engaged the Tribunal in pursuit of certified copies of the judgment and typed proceedings to enable him lodge a Memorandum of Appeal; and that by 06.02.2023 and 08.06.2023, when the Tribunal forwarded to his firm the requested documents the statutory period within which to lodge an appeal had lapsed by three (3) and seven (7) months respectively.
4. He therefore deposes that the motion ought to be allowed as delay on the part of the Applicant is not intended or inordinate; that unless the motion is allowed the Applicant will be deprived of its Constitutional right to a fair hearing; that the Respondents will not suffer any prejudice or irreparable loss that cannot be compensated by damages; that the Applicant should not be penalized for circumstances beyond its control; and that the motion has been brought without unreasonable delay. He concludes by deposing that the intended appeal is arguable with a high chance of success and the Court has the inherent power and discretion to issue the prayers sought.
5. The 2nd to 10th Respondent oppose the motion through a replying affidavit deposed by 2nd Respondent, who was duly authorized by his Co-Respondents. He views the motion as an afterthought and an abuse of the judicial process by the Applicant who is guilty of laches. He further deposes that the Applicant has not explained the delay in filing its appeal within time and that it ought not hide behind Article 159(2) of the *Constitution*. In his view, the motion has been filed for the sole purpose of delaying execution and will cause great prejudice to the Respondents, if allowed. In summation, he states that the appeal has a no chance of success and the motion ought to be dismissed with costs.
6. The motion was canvassed by way of written submissions. Counsel for the Applicant began by restating the contents of his affidavit material before proceeding to address the Court on the merits of the motion. Counsel invoked the provisions of Section 79G of the *CPA*, Section 81 of the *Co-operative Societies Act*, Order 50 Rule 6, the decisions in *National Bank of Kenya Limited & Anor v Solomon Ndibui Ngecha*, Misc. Civil Appl. No. 121 of 2018 [2019] eKLR, *James S. M. Waruiru & Anor v Rlijah Karanja Muriu & Anor*, Civil Case No. 169 of 2018 [2020] eKLR, *Nicholas Salat v Independent Electoral & Boundaries Commission & 7 Others* [2014] eKLR, *Thuita Mwangi v Kenya Airways [2003] eKLR and Otieno v Colour Print Limited & Another* (Civil Application E007 of 2021) [2023] KECA 1012 (KLR).
7. To submit that a party can be accorded additional time within which to lodge an appeal provided a good and sufficient cause for delay is demonstrated by the said party. That the Applicant through the affidavit in support of the motion has proffered an explanation and supporting evidence for the delay in lodging an appeal which is not inordinate. It was further submitted that the Respondents have not demonstrated the prejudice they would suffer if the motion is allowed, or that such prejudice cannot be mitigated by an award of damages or costs. Counsel concluded by submitting that the Applicant is willing to abide by any conditions the Court may impose and reiterated that the motion ought to be allowed as prayed.



8. On the part of the 2nd to 10th Respondent, counsel filed terse submissions wherein he contended that there has been inordinate delay by the Applicant in filing the intended appeal and instant motion. That it was the duty of the Applicant to follow up and collect proceedings from the Tribunal. That to deny the 2nd to 10th Respondent the fruits of their judgment, because of laxity on the part of the Applicant, would amount to a miscarriage of justice. In summation, counsel maintained that the intended appeal is not arguable. He therefore urged that the motion ought to be dismissed with costs.
9. The 1st Respondent did not participate in the instant proceedings by either filing a response or submissions to the motion.
10. The Court has considered the rival affidavit material and submissions in respect of the motion. The Applicant's motion essentially seeks leave to file appeal, out of time, regarding the decision of the Co-operative Tribunal in Nairobi CTC No. 514 of 2016 delivered on 19.10.2022. The power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the CPA. Section 79G of the CPA provides that:

“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.”
11. The foregoing provision is mirrored by Section 81(1) of the Co-operatives Societies Act, which provides that:-

“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.”
12. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Thuita Mwangi* (supra), the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the CPA, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”
13. While the discretion of the Court is unfettered, a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court's discretion in his favor. The Supreme Court in the case of Nicholas Kiptoo Korir Arap



Salat (supra) enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

See also County *Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

14. There is no dispute that the decision of the Tribunal was delivered on 19.10.2022. See annexure marked “EOA2”. The Applicant’s explanation for the delay in filing the appeal is premised on the sole fact that although counsel had immediately upon delivery of the impugned judgment, applied for certified copies of the judgment and typed Proceedings to enable him lodge an appeal, it was not until 06.02.2023 and 08.06.2023 that the Tribunal forwarded the requested documents. By which time the prescribed time within which to lodge an appeal had lapsed. The 2nd to 10th Respondent have challenged this position by arguing that the delay is inordinate whereas no sufficient reasons for delay have been tendered. Further, they would be prejudiced if the motion were to be allowed.
15. In the Applicant’s affidavit material supporting the explanation for delay, is the annexure marked “EOA3” , being copies of a series of correspondence between his firm and the Tribunal, also copied to counsel for the 2nd to 10th Respondents. The earliest of the said correspondences is dated 19.10.2022 resting with the letter dated 08.06.2023 when the Applicant’s advocates received a copy of the typed proceedings from the Tribunal. Date of receipt of the proceedings as captured in the communications in “Annexure EOA3” corresponds with the Applicant’s counsel deposition as being 08.06.2023. However, with respect to the Judgment of the Tribunal, counsel deposes that the same was received on 06.02.2023 nevertheless a cursory review of “Annexure EOA3” it appears that the same was forwarded by the Tribunal on 27.03.2023.
16. Meanwhile, from the annexure marked” EOA2” the judgment appears to have been certified as a true copy of the original as at 18.01.2023. Thus, as of 18.01.2023, a certified copy of the impugned decision of the Tribunal was available. Could it be that counsel for the Applicant failed to collect judgment copy from the Tribunal, as asserted by counsel for the 2nd to 10th Respondent? This appears likely from the further fact that counsel for the Applicant despite receiving the judgment copy by 27.03.2023 only filed the present motion close to four (4) months later, on 21.07.2023. It is settled that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party



seeking extension of time must not be seen to presume on the Court's discretion. Here the explanation given by counsel is not altogether persuasive.

17. The delay in collection of the judgment after certification and between 18.01.2023 until 27.03.2023 has not been satisfactorily explained. Further, no concrete explanation has been offered for the delay of four months between the latter date and filing of the instant motion.

18. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] EKLK addressed the question of delay as follows;-

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....”

19. In the Court's view, while the explanation given by the Applicant is not entirely convincing or sufficiently cover the entire period of delay, the delay does not appear inordinate. It would be a travesty of justice for the Court to drive the Applicant from the seat of justice in the circumstances. Further, as rightly argued by the Applicant, any prejudice likely to be visited upon the 2nd to 10th Respondent can be adequately compensated through costs and the Court has the discretion to attach conditions for the expedited disposal of the appeal, once filed, to curb unnecessary delay.

20. Concerning the merits of the intended appeal, the Court having perused the grounds in the draft memorandum of appeal is satisfied that they raise issues worthy of consideration on appeal; that is to say the intended appeal appears arguable. Based on the language employed in Mutiso (supra), the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. The Court of Appeal in Vishva (supra) stated that “an arguable appeal need not (be one that will) succeed so long as it raises a bona fide issue for determination by the Court. The same Court further emphasized the right of appeal in the following terms:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of *Richard Ncharpi Leiyagu v IEBC & 2 Others* (supra); *Mbaki & Others v Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sberally & Another v Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding inter alia that:

- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- (ii) the right to be heard is a valued right; and
- (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice...”

21. In the circumstances of this case, the Court is persuaded that to facilitate the Applicant's undisputed right of appeal, leave ought to be granted. The motion dated 21.07.2023 is therefore allowed, but the costs thereof awarded to the 2nd to 10th Respondents in any event.



DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2ND DAY OF MAY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Kamwani

For the Respondent: Mr. Maina

C/A: Erick

