



NSSF Cooperative Sacco Limited v Omukuba & 5 others (Commercial Miscellaneous Application E199 of 2024) [2024] KEHC 9343 (KLR) (Commercial and Tax) (19 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E199 OF 2024**

MN MWANGI, J

JULY 19, 2024

BETWEEN

NSSF COOPERATIVE SACCO LIMITED APPLICANT

AND

ABEDNEGO OMUKUBA 1ST RESPONDENT

MOSES GATERE 2ND RESPONDENT

JUMA MWACHOYO 3RD RESPONDENT

MUSA RONO 4TH RESPONDENT

PAUL MACHARIA 5TH RESPONDENT

BORU ALAKE 6TH RESPONDENT

RULING

1. The applicant filed a Notice of Motion application dated 7th March, 2024 pursuant to the provisions of Article 50 of *the Constitution* of Kenya 2010, Sections 1A, 1B, 3, 3A, 63(e) & 79G of the *Civil Procedure Act*, and Order 50 Rule 6 & Order 51 Rules 4, 5, 6 & 9 of the *Civil Procedure Rules*, 2010, seeking inter alia stay the execution of the judgment dated 16th December, 2022 delivered in CTC No. 185 of 2020, and the decree issued by this Court on 26th February, 2024 pending the hearing and determination of the substantive appeal, and for leave to appeal against the said judgment.
2. The applicant's case is that judgment was entered on 16th December, 2022 by the Cooperative Tribunal in favour of the respondents without its knowledge. It averred that initially, the said judgment was set to be delivered on 30th November, 2022, but the Tribunal issued directions to the effect that it would be delivered on notice, however, neither the applicant nor its Advocates on record were notified when the



- said judgment was delivered, as they only learnt of its existence a year later, through an email from the Cooperative Tribunal Registry sent on 26th February, 2024, which included a draft decree for approval.
3. It was stated by the applicant that when its Advocates carried out their due diligence, they found that the judgment was scheduled for delivery on 15th December, 2022, but it was delivered on 16th December, 2022. The applicant argued that the Tribunal acted improperly, used incorrect legal principles, failed to evaluate evidence correctly, and ignored critical evidence, thus necessitating an appeal against the judgment delivered on 16th December, 2022.
 4. The application was opposed through a replying affidavit by Abednego Omukuba, the 1st respondent herein sworn on 18th March, 2024. He averred that the Judiciary Case Tracking System provides regular updates to litigants and notifies them about judgments, and so the applicant must have known about the judgment that was delivered on 16th December, 2022. He asserted that the applicant's Advocates on record were responsible for keeping the applicant informed about the case progress, hence the applicant can seek recourse against them for negligence at the Advocates' Disciplinary Tribunal.
 5. The respondents contended that there was inordinate delay in filing the instant application, since it was filed more than a year after the judgment in issue was delivered. Further, that the applicant has neither sufficiently explained the said delay nor demonstrated that they have an arguable appeal to warrant this Court to exercise its discretion in their favour.
 6. In a rejoinder, the applicant contended that it was unaware of the case progress before the Tribunal since it was not updated on the Judiciary e-filing portal. It averred that its intended appeal is merited as it raises issues on loan advances and guarantees. The applicant asserted that it is willing to provide security through a bank guarantee or by depositing the decretal sum in a joint interest-earning account for the due performance of the decree in question.
 7. The instant application was canvassed by way of written submissions. The applicant's submissions were filed on 27th March, 2024 by the law firm of Gitonga Muriuki & Company Advocates, whereas the respondents' submissions were filed on 15th April, 2024 by the law firm of Nyongesa Nafula & Company Advocates. I shall however not reproduce the contents of the said submissions but will refer to them in my determination.

Analysis And Determination.

8. I have considered the application herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit by the respondents and the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether the application for leave to file an appeal out of time is merited; and
 - ii. Whether applicant has made out a case to warrant being granted an order for stay of execution pending appeal.

Whether the application for leave to file an appeal out of time is merited.

9. Mr. Muriuki, learned Counsel for the applicant relied on the Supreme Court case of *John Ochanda v Telkom Kenya Limited* [2014] eKLR and the Court of Appeal case of *Kenya Shell Company Ltd v Charles* [2003] eKLR and submitted that the respondents have not demonstrated that judgement notice(s) were ever served on the parties herein, which means that the prejudice that followed the delivery of their judgment in their absence is real, and on that basis, this Court has to intervene. He stated that in as much as they regularly receive updates from the e-filing portal on matters filed, they have never received any updates in respect of the proceedings before the Cooperative Tribunal.



10. He stated that the instant application was filed immediately after the applicant was notified of the judgment delivered on 16th December, 2022, and the applicant's intended appeal is not only arguable but also has very high chances of success.
11. The respondents' Counsel on the other hand relied on the case of the *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR and submitted that the applicant has not met the threshold to warrant this Court exercising its discretion in its favour
12. Section 74 (2) of the Co-operatives Societies Act provides that an appeal against the decision of a Cooperative Tribunal ought to be filed within thirty (30) days. Under the provisions of Section 95 of the *Civil Procedure Act*, this Court has the power to enlarge time within which the applicant can file an appeal against the decision of the Cooperative Tribunal. The Supreme Court in the case of *Naomi Wangechi Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others* [2018] eKLR set out the guiding principles when it comes to extension of time. They are the same principles expressed in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC* [2014] eKLR as follows -

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

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...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. [where] there is a reasonable [cause] 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.”
13. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No Nai 255 of 1997 (unreported), cited with authority by the Court of Appeal in the case of *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR, the Court stated the following -

“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 in general matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of the delay; secondly, the reasons for delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

14. It is not disputed that judgment in the Cooperative Tribunal was delivered on 16th December, 2022. This means that the applicant should have lodged an appeal to the High Court on or before 8th February, 2023 pursuant to the provisions of Order 50 Rule 4 of the Civil Procedure Rules, 2010. The



applicant however averred that it was not aware until the 26th February, 2024 that the Co-operative Tribunal had delivered its judgment, when the latter vide an email sent on 26th February 2024 to the applicant's Advocates on record, forwarded a draft decree for its approval. On perusal of the CTS extract attached to the applicant's affidavit in support of the instant application, and the respondent's further affidavit, it is evident that on 14th September, 2022 the Tribunal scheduled the matter before it for judgment on 30th November, 2022. However, on the said date, judgment was not delivered.

15. The CTS then indicates that the said matter came up for mention before the Tribunal on 15th December, 2022 when a judgment date was fixed. Thereafter, judgment was delivered on 16th December, 2022. From the CTS extracts produced by the parties herein, it is impossible to ascertain whether the judgment delivered on 16th December, 2022 was delivered in the presence of the respondents or their Counsel. This Court notes that in as much as the respondents fault the applicant and its Advocates on record for not checking the judiciary e-filing platform for any activity on the matter, they do not confirm whether or not they were served with a notice for when the said judgment was to be delivered, and/or disclose how they came to know that the Tribunal had delivered its judgment. There is also no evidence presented to this Court confirming that indeed there was a notice uploaded in the Judiciary e-filing portal notifying the parties of the new judgment date.
16. In view of the foregoing, this Court is persuaded that in as much as there has been delay in appealing against the decision of the Co-operative Tribunal, the delay was not deliberate. To the contrary, it was occasioned by factors that were beyond the applicant's control. This Court is of the considered view that the instant application was filed timeously having been filed on 7th March, 2024 which is approximately 9 days after the applicant learnt of the existence of the Co-operative Tribunal's judgment.
17. I have perused the applicant's Memorandum of Appeal annexed to its affidavit in support of the instant application and I note that it raises issues of law as provided for under Section 74(2) of the Co-operatives Societies Act. Further, I am persuaded that the issues therein are arguable and should be determined on merits. On whether the respondents shall suffer prejudice in the event that this Court extends time for the applicant to lodge an appeal against the decision of the Co-operative Tribunal, I am not persuaded that this is the case since the applicant has averred that it is ready and willing to provide security through a bank guarantee or by depositing the decretal sum in a joint interest-earning account for the due performance of the decree in issue.
18. In the premise, this Court finds that the applicant's application for leave to file an appeal out of time is merited.

Whether applicant has made out a case to warrant being granted an order for stay of execution pending appeal.
19. Mr. Muriuki relied on the case of *Scania East Africa Ltd & 2 others v Patrick Mutisya Kioko* [2022] eKLR and submitted that the instant application has been filed without undue delay, and that the applicant will suffer substantial loss if the orders sought are not granted, thus rendering the intended appeal nugatory.
20. Ms. Nyongesa, learned Counsel for the respondents relied on the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR and argued that the applicant is a large deposit-taking Sacco Society with over 8,000 contributing members, thus it cannot suffer substantial loss from a judgment of Kshs.347,490.27, plus costs of Kshs. 86,120.00. She stated that since the respondents are still members of the Sacco, the decretal sum could be recovered from their deposits and shares if the applicant is successful in its intended appeal. She cited the case of *Gusii Mwalimu Sacco Limited v Alfred Geke*



[2013] eKLR and further submitted that the applicant ought to have demonstrated the nature of substantial loss to be suffered, but that was not done.

21. Stay of execution pending appeal is provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which states as follows -

“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.”

22. It is now well settled that in determining an application for stay of execution pending appeal, Courts are under a duty to balance the competing interests of the parties taking into account the fact that an appellant has an undoubted right of appeal whereas the respondent has a decree which he should not be obstructed from executing unless there is a good reason. In the case of Visbaram Rajji Halai v Thornton & Turpin [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 Rule 6 of the Civil Procedure Rules, 2010 is fettered by three conditions namely -

- i. establishment of a sufficient cause;
- ii. satisfaction of substantial loss; and
- iii. the furnishing of security.

23. This Court has already found that the applicant’s intended appeal raises arguable issues that should be determined on merits. The respondents are holders of a decree issued by the Co-operative Tribunal on 26th February, 2024, for judgment of Kshs.347,490.27 and costs of Kshs.86,120.00 against the applicant. When a decree is a money decree such as the decree in this case, Courts will not readily grant an order for stay of execution pending appeal unless it is demonstrated that the decree-holder is not financially sound, thus incapable of refunding the decretal sum to the judgment debtor in the event the appeal is successful. In the case of Kenya Hotel Properties Limited v Willesden Investments Limited [2007] eKLR, the Court of Appeal held that -

“Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.”

24. I am cognizant of the fact that the applicant neither averred nor alluded to the respondents’ inability to refund the decretal sum in the event it is successful in its intended appeal. Further, in as much as the applicant stated that it stands to suffer substantial loss, it did not put forth its current financial position and how the same will be affected in the event that stay is not granted. The respondents on the other hand submitted that since they are still members of the applicant Sacco, the decretal sum if paid out to them could be recovered from their deposits and shares if the applicant is successful in its intended appeal.

25. In the premise, I am not persuaded that the applicant stands to suffer any substantial loss in the event that the orders sought are not granted. As to whether the instant application has been filed inordinately late, as explained earlier in this ruling, the application herein was filed on 7th March, 2024



which is approximately 9 days after the applicant learnt of the existence of the Co-operative Tribunal's judgment, was filed timeously.

26. On the issue of deposit of security for the due performance of the decree, the applicant indicated that it is willing to provide security through a bank guarantee or by depositing the decretal sum in a joint interest earning account. In the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, it was stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.”

27. It is now well settled that in the absence of proof of substantial loss, Court's will rarely grant an order for stay of execution pending appeal. See the case of *Kenya Shell Limited v Kibiru* [1986] KLR 410. However, in view of the fact that the applicant has demonstrated that it has an arguable appeal and it is ready and willing to offer security for the due performance of the decree, this Court finds that it is in the interest of justice to grant the orders sought by the applicant.

28. The upshot is that the application dated 7th March, 2024 is merited. I issue the following orders -

- i. Leave is hereby granted to the applicant to appeal out of time against the judgment by Hon. Janet. Mwatsama Deputy Chairperson delivered in CTC No. 185 of 2020 entered on 16th December, 2022;
- ii. The applicant's Memorandum of Appeal shall be deemed as being properly filed upon payment of the requisite Court fees, which must be paid within 14 days from today;
- iii. An order for stay of execution of the judgment delivered on 16th December, 2022 and the decree dated 26th February, 2024 and any consequential orders therefrom is hereby issued pending the hearing and determination of the appeal;
- iv. The applicant shall deposit the entire decretal sum in a joint interest earning account in the names of the Advocates for the parties within thirty (30) days from the date of this ruling;
- v. In default of orders No. (ii) and (iv) above, the application herein shall be deemed to have been dismissed and the respondents shall be at liberty to execute; and
- vi. Costs of the application shall abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JULY 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Muriuki for the applicant

Mr. Kimaiti h/b for Mrs Nyongesa for the respondents

Ms B. Wokabi – Court Assistant.

