



**Kiamumbi Multi-Purpose Co-op Coc. Ltd v Commisioner for Co-operatives & 6 others
(Civil Appeal E516 of 2022) [2023] KEHC 18504 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18504 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E516 OF 2022
AN ONGERI, J
JUNE 14, 2023**

BETWEEN

KIAMUMBI MULTI-PURPOSE CO-OP COC. LTD APPELLANT

AND

COMMISIONER FOR CO-OPERATIVES 1ST RESPONDENT

FRANCIS NGURE NJOROGE 2ND RESPONDENT

DAVID KIHARA MWANGI 3RD RESPONDENT

FRANCIS GITAU NG'ANG'A 4TH RESPONDENT

LEONARD NDUNG'U MBUGUA 5TH RESPONDENT

LUCY NYOKABI MIMANO 6TH RESPONDENT

SUSAN WANJA MWANGI 7TH RESPONDENT

RULING

1. The 2nd and 8th respondents filed a notice of preliminary objection (NOPO) date, d April 112023 in the following terms;
 - i. Order 9 rules 5 of the *Civil Procedure Rules* in that the intended appellants' current advocates are irregularly in this matter, having filed a notice of appointment of advocates instead of a notice of change of advocates.
 - ii. Order 9 rules 6 of the Civil Procedure Rules in that the intended appellants' current advocates have never served the intended appellants' former advocates with a notice of change of advocates.



- iii. Section 74(1) of the *Co-operative Societies Act* in that the intended appellants wish to sanitise the illegality of filing an appeal out of time without leave through the current application.
 - iv. Section 74(2) of the *Co-operative Societies Act* in that there is no room for extension of time once 30 days lapse in an appeal against surcharge orders.
 - v. Section 74(2) of the *Co-operative Societies Act* in that from the exhibit “SN-3”, the draft memorandum of appeal there is no point of law alleged against the Co-operative Tribunal, the only ground that can be pursued in this court from the Co-operative Tribunal in an appeal against a surcharge order.
2. The parties filed written submissions in the notice of preliminary objections as follows;
 3. The Respondent submitted that the Appellant filed this appeal out of time without leave of the court and further that there is no provision for extension of time.
 4. The Respondents also submitted that the intended appeal violates Section 74(2) of the *Co-operative Act* which states as follows;
 - “(2) (2) A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law.”
 5. The Respondent submitted that the Appellants should point out areas of law where the Tribunal erred.
 6. The appellant on their part submitted that a preliminary objection cannot be raised if any facts are required to be ascertained by the court. that the preliminary objection herein is hinged on the respondent’s belief that H.T & Associates are not properly on record and that the appellant has filed an appeal before extending time.
 7. The appellant argued that there is no appeal that has been filed and what was filed was a notice of appeal dated July 12, 2022 and there after a notice of motion November 8, 2022. That the notice of appeal was filed within the timelines required by the law based on the date that the judgement of the tribunal. That judgment was only availed to the appellant on June 15, 2022. That the circumstances rendered it necessary the appellants filed the notice of motion which sought to file the appeal out of time together with a stay of execution.
 8. It was argued that the decision by the tribunal was clearly against the law and against the facts as the inquiry reported by the commissioner for co-operatives found that the 2-8th respondents had stolen funds from the appellant which belongs to members of the appellant and which should be repaid and if the decision of the tribunal is allowed to stand the appellant stands to lose public funds amounting to Kshs. 12,565,912.
 9. It was submitted that the firm of H.T Associates was formally instructed and came of record via notice of appointment of advocates on October 17, 2022. That there were no previous advocates on record prior to H.T & Associates coming on record and the firm of Rumba Kinuthia & Co. Advocates have never been on record and have never filed any documents on behalf of the appellant.
 10. It was contended that the intended appeal is arguable and meritorious with high chance of success and the appellant has taken all the necessary steps and diligently followed up the matter.
 11. The issues for determination in the preliminary objection are as follows
 - i. Whether the appellant’s advocate complied with Order 9 of the Civil Procedure Rules.



- ii. Whether the appellants required leave to file this appeal out of time.
12. On the issue as to whether the appellant's advocate complied with Order 9 of the Civil Procedure Rules, I find the submission by the Appellant is that there was no Advocate acting for the Appellant in the Tribunal. I find that the said issue is one that requires to be canvassed by evidence.
13. Order 9 Order 9 Rule 9 of the Civil Procedure Rules provides as follows: -
- When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
14. In the current case, the proceedings from the Tribunal have not been filed herein and it has not been established which Advocate was acting for the Appellant before judgment.
15. The rationale behind Order 9 Rule 9 was well articulated in the case of S.K. Tarwadi v Veronica Mueblmann [2019] e KLR as follows;
- “...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”
16. I find that the issue as to whether the Appellant has changed Advocates requires evidence before this court can make a determination on the same.
17. On the issue as to whether the appellants required leave to file this appeal, I find that the Application dated November 8, 2022 is not an appeal as the same is seeking leave to appeal out of time.
18. The Respondent submitted that the appeal offends Section 74(2) of the Co-operative Act which states as follows;
- “(2) (2) A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law.”
19. However, I find that there is no appeal filed as yet and the Respondent is attempting to argue an appeal that has not yet been filed through this preliminary objection.
20. I accordingly find that the preliminary objection lacks in merit and I dismiss it with costs to the Appellant.
21. I direct that the Applicant in the Application dated November 8, 2022 files and serves their written submissions within 14 days of this date, thereafter the Respondents to file and serve their written submissions within 14 days.
22. The Ruling will be delivered on July 14, 2023.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 14th day of June, 2023.

.....
A. N. ONGERI



JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents

