



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E1678 OF 2021

KINATWA SACCO

COOPERATIVE LTD.....1ST APPELLANT/APPLICANT

JOSEPH KITHEKA.....2ND APPELLANT/APPLICANT

VERSUS

JAVIES NGUI JOEL.....1ST RESPONDENT

FLORENCE NDINDA SILLA.....2ND RESPONDENT

GIDEON MUMO MWALUKU.....3RD RESPONDENT

ESTHER NGURU.....4TH RESPONDENT

ISAIAH IKINDU.....5TH RESPONDENT

JOHN BOSCO MUUTU.....6TH RESPONDENT

PETER MUSYOKA.....7TH RESPONDENT

GEORGE MUNYOKI MUTISYA.....8TH RESPONDENT

PATRICK DANIEL MUTUA.....9TH RESPONDENT

PETER MUTHUI.....10TH RESPONDENT

COLLINS MUSYOKA.....11TH RESPONDENT

FRANCIS MUGANE MWANGI.....12TH RESPONDENT

FRANCIS KASINA.....13TH RESPONDENT

KINATWA PRESTIGE LTD.....14TH RESPONDENT

CLINTON WAMBUA.....15TH RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 19th October 2021 in which the appellants/applicants sought for the following orders;

i. THAT pending the hearing and determination of this application and/or further orders, this honourable court be pleased to

order a stay of the proceedings and/or any further proceeding in Milimani CMCOMMSU E915 OF 2021 (JAVIES NGUI JOES & OTHER VS KINATWA SACCCO CORPORATIVE LIMITED)

ii. THAT pending the hearing and determination of this application and/or further orders this honourable court be leased to discharge and/or set aside the orders issued on 2/7/2021 and 13/7/2021 in Milimani CMCOMMSU E915 O 2021 (JAVES NGUI JOEL & OTHERS VS KINATWA SACCO CORPORATIVE LIMITED).

iii. THAT this honourable court be pleased to grant an extension of time to applicants to lodge an appeal out of time from the ruling/orders of honourable E. M. Kagoni PM made on 13/7/2021 in Milimani CMCOMMSU E915 OF 2021 (JAVIES NGUI JOEL & OTHERS VS KINATWA SACCO CORPORATIVE LIMITED).

iv. THAT costs of this application be provided for.

2) The applicants filed the affidavit sworn by Joseph Kitheka, the 2nd appellant herein in support of the motion. The 1st to 13th respondents filed the replying affidavit sworn by Javies Ngui Joel, the 1st respondent to oppose the motion. The 14th respondent filed the replying affidavit of Dennis Mwengi Kaloki to also oppose the motion while the 15th respondent filed a replying affidavit he swore to also oppose the application.

3) I have considered the grounds stated on the face of the motion plus the facts deponed in the rival affidavits and the rival oral submissions of learned counsels appearing in this matter.

4) It is the submission of the appellants that they were unable to file an appeal against the orders of the trial magistrate issued on 1st September 2021 because the lower court file could not be traced until the time required to appeal lapsed.

5) The appellants aver that they wrote the letter dated 7th September 2021 seeking for the trial court's file to be made available to them. The respondents on their party are of the submission that the appellants have not presented any plausible grounds to support the prayer for leave to appeal out of time. They further averred that no good reasons to explain the delay.

6) Under Section 79G of the Civil Procedure Act, the court has the power to extend and or grant leave to a party to file an appeal out of time if such a party provides good and sufficient cause for its failure to lodge an appeal within 30 days from the date of delivery of the decision sought to be challenged on appeal.

7) In this case, the appellants expressly stated that they were unable to file the appeal on time because they failed to access the trial court's file to establish the basis of the decision of the trial magistrate to dismiss the appellant's preliminary objection. the appellants expressly stated that they were unable to trace the court file until after the time allowed to appeal lapsed.

8) The respondents did not controvert the appellants' assertion that the trial court's file could not be traced. I am persuaded by the reason advanced by the appellants to explain the cause of the delay. I am satisfied that the appellants are entitled to leave to appeal out of time.

9) The appellants also sought for an order for stay of proceedings before the trial court pending the hearing and determination of the intended appeal. The appellants argued that unless proceedings are stayed, the appeal will be rendered nugatory in that the suit before the trial court will proceed to full hearing yet the appellants are challenging the trial court's jurisdiction to entertain the matter.

10) The appellants aver that the dispute in these proceedings can only be determined by the Cooperative tribunal and not by the magistrate's court. The respondents urged this court to dismiss the appellant's application arguing that their appeal prima facie is not arguable.

11) It is also argued by the respondent that if proceedings are stayed their right to access justice will be infringed. It is not in dispute that the respondents filed a suit against the appellants and two others vide the plaint dated 1st July 2021 in which they sought for inter alia an order for permanent injunction to restrain the respondents from convening, holding or chairing any meeting to their exclusion or otherwise interfering with the daily affairs of Kinatwa Sacco Cooperative Ltd.

12) It is on record that the appellants raised a preliminary objection arguing that the trial court had no jurisdiction to entertain the suit since it is a dispute which should have been filed in the Cooperative tribunal. The trial magistrate heard and dismissed the appellant's preliminary objection stating that the same is not based on pure points of law.

13) The appellants are now before this court seeking to challenge the dismissal order. The question as to whether or not the preliminary objection raised pure points of law is an issue which will obviously be determined on appeal.

14) It is clear in my mind therefore that the appellants' appeal raised arguable grounds. If in the end the appeal turns successful and the court finds that the trial court did not have jurisdiction to entertain the sit, then, judicial time and resources will have been wasted if the case before the trial court is allowed to go on. I am therefore convinced that it is in the interest of justice to issue the order staying further proceedings before the trial court pending the hearing and determination of this appeal.

15) In the end, I find the motion dated 19th October 2021 to be meritorious. The same is allowed thus giving rise to issuance of the following orders;

i. The appellants/applicants are granted leave to file an appeal out of time. Consequently, this appeal is deemed as properly filed with leave of court.

ii. There be an order for stay of further proceedings in Milimani C. M. COMMSU E915 of 2021, Javies Ngui Joel & 14 others = vs = Kinatwa Sacco Corporative Ltd.

iii. Costs of the motion to abide the outcome of the appeal.

iv. The hearing of appeal to be expedited.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF DECEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st Appellant

..... for the 2nd Appellant

..... for the Respondent