



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**MISC. APPLICATION NO. 218 OF 2019**

**NANASI HOUSING CO-OPERATIVE CO. LTD.....1<sup>ST</sup> APPLICANT**

**MARGARET WAIRIMU MBIRUA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**JOHN MUOHO NJORE.....RESPONDENT**

**RULING**

1. For determination is an application by way of Notice of Motion filed on 24<sup>th</sup> January, 2019 and brought under Order 50 Rule 6 of the Civil Procedure Rules seeking an order that the time within which the Applicant may file appeal against the Judgment delivered on 10<sup>th</sup> August, 2018 in Co-operative Tribunal Case (CTC) NO. 369 of 2008 Thika be enlarged.

2. The application is based on the key ground that copies of the proceedings and of judgment were supplied after the expiry of the time allowed to file an appeal. The application is supported by the affidavit of **Simon Mbirua Karangu**, the Chairman of the 1<sup>st</sup> Applicant that. He deposes that the said Applicant was dissatisfied with the judgment delivered in favour of the Respondent by the Tribunal. He contended that the society applied for a copy of the proceedings and Judgment on 11<sup>th</sup> August, 2018 and that the said copies were furnished on 1<sup>st</sup> October, 2018 after the expiry of the time allowed to lodge the appeal. That upon receiving the said copies, the society had to convene a meeting to deliberate on the judgment and further raise funds for purposes of instructing their advocate. He deposed that the failure in the timely furnishing of proceedings and judgment occasioned the delay in filing the appeal on time.

3. **John Muoho Njore**, the Respondent (and erstwhile Defendant in the lower court) opposed the motion by swearing a replying affidavit. He contended that the application has been brought after inordinate delay; that this matter relates to a land parcel hence the Court has no jurisdiction; and the application is an afterthought. At the hearing of the application the parties agreed to rely on their respective affidavits.

4. The court has considered the application and respective affidavits. Section 79G of the Civil Procedure Act 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.”**

5. The successful applicant must demonstrate **“good and sufficient cause for not filing the appeal in time.”** In **Thuita Mwangi v Kenya Airways [2003]e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari material* with Section 79G of the Civil Procedure Act, 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.”**

6. 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.

7. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state 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] e KLR.**

8. The Applicant has attempted to explain the delay between 10<sup>th</sup> August 2018 and 8<sup>th</sup> November 2018 when the application was filed. Even the Respondent admits that the copies of judgment and proceedings were only certified in the third week of September, 2018. The remainder of the time according to the Applicant was taken up by relevant deliberations in the Society and preparations to instruct their advocates. This explanation sounds reasonable in view of the fact that the Applicant is a co-operative society.

9. On the question of jurisdiction, from the material before the court, and more particularly the draft memorandum of appeal annexed to the application, the dispute in the tribunal related to the purchase of shares in respect of and or allotment of a plot by the Respondent from the co-operative society, the key issue at the trial being whether the Respondent duly paid the purchase price as required or whether the Society was entitled to repossess the plot. Suffice to say that, appeals from decisions emanating from the Co-operative Disputes Tribunal fall within the jurisdiction of the High Court pursuant to the provisions of section 81 of the Co-operative Societies Act. The proviso to section 81(1) of the Act empowers the High Court for “sufficient reason” to extend the period of 30days stipulated for the filing of appeals from the Co-operative Tribunal to the High Court. Thus, there being no dispute that the Tribunal had jurisdiction to entertain the dispute herein, this Court is the proper Court to hear an appeal therefrom.

10. In the circumstances of this case, the Respondent will not be prejudiced unduly by the delay of about 3 months. Consequently, I would grant the motion filed on 8<sup>th</sup> November 2018 and order that the memorandum of appeal be filed within 21 days. Cost are awarded to the Respondent in any event.

**DELIVERED AND SIGNED AT KIAMBU THIS 6<sup>TH</sup> DAY OF FEBRUARY 2020**

.....

**C. MEOLI**

**JUDGE**

**In the presence of :**

Mr. Njehu holding brief for Muthomi for the Applicant

No appearance for the Repondent

Court Assistant – Ndege/Nancy