



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 165 OF 2019

JANE MUTIO MUSYOKI.....APPLICANT

VERSUS

DAVID MAKAU1ST RESPONDENT

MITA SAVINGS AND CREDIT

COOPERATIVE SOCIETY LIMITED.....2ND RESPONDENT

(Being an appeal from the Ruling and Orders of the Honourable Ms C. Kithinji (Deputy Chairman) and F.F. Odhiambo (Member), P. Swanya (Member) dated the 7th day of January 2019 in the Co-operative Tribunal Case No 425 of 2018)

RULING

INTRODUCTION

1. The Applicant's Notice of Motion application dated 20th February 2019 and filed on 21st February 2019 was brought under Order 51 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules, 2010, Section 81(1) of the Co-operative Societies Acts, Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya. Prayers Nos (1),(3) and (5) were spent. It sought the following remaining prayers:-

1. Spent.

2. That the Appellant be allowed to file the appeal within 60 days from the date of the Ruling in terms of the annexed draft Memorandum of Appeal marked "A6."

3. Spent.

4. THAT there be stay of proceedings in Nairobi Tribunal Case No 425 of 2018 – Jane Mutio Musyoki versus David Makau and Another – pending the hearing and determination of the Appellant's Appeal.

5. Spent.

6. THAT the orders for injunction issued on 7th January 2019 in Nairobi Tribunal Case No 425 of 2018 Jane Mutio Musyoki versus David Makau and Another be set aside and or varied pending the hearing and determination of the Appellant's Appeal.

2. The Applicant's Written Submissions dated 9th April 2019 were filed on 10th April 2019. Despite having been directed to file Written Submissions on 2nd April 2019, the Respondents did not do so. They did not also attend court when the court reserved its Ruling of the aforesaid application. The Ruling herein is therefore based on the said Applicant's Written Submissions only.

THE APPLICANT'S CASE

3. On 20th February 2019, the Applicant swore an Affidavit in support of her present case.

4. She stated that on 7th January 2019, the Co-operative Tribunal dismissed her Notice of Motion application dated 30th August 2018 in which she had sought for orders against the Respondents to be restrained from interfering with the operations of Motor Vehicles Registration Numbers KCN 580V, KCC 803Q and KCK 875C (hereinafter referred to as “subject motor vehicles”) and for the 1st Respondent to return the Transport Licensing Board (TLB) licenses for the aforesaid subject motor vehicles.

5. She pointed out that she did not file her Appeal within thirty (30) days from the date of the Ruling as she was unable to obtain a certified copy of the Ruling and typed proceedings. She attributed this to the fact that the operations of the Tribunal had been halted because it was at the material time, without a Chairman or acting officer.

6. She averred that the grounding of the subject motor vehicles had caused them to continue wasting away. She added that this had made her unable to service the loans for the subject motor vehicles and/or pay tuition fees for her child.

7. She was emphatic that she had complied with all the conditions of the National Transport Safety Authority (NTSA) as could be seen in its letter dated 26th July 2018.

8. She stated that in its Ruling, the Tribunal had found that the 1st Respondent was not the 2nd Respondent’s Chairman and consequently, it ought to have found that his confiscation of letters and communication and his orders were illegal, null and void *ab initio*.

9. She faulted it for not having appreciated the irreparable loss and damage that would be caused to her as a result of its Ruling. It was her contention that she had good grounds of appeal and hence the court ought to allow her application as prayed.

THE RESPONDENT’S CASE

10. In response to the said application, the Respondents filed Grounds of Opposition dated 18th March 2019 on even date. The ground was as follows:-

That the application as brought is fatally defective for being misconceived in that it seeks purely academic orders.

LEGAL ANALYSIS

11. This court noted that the following appeared to have been the issues that had been placed before it for determination:

- 1. Whether or not the application was fatally defective and misconceived;**
- 2. Whether or not the proceedings in the Co-operative Tribunal should be stayed?**
- 3. Whether or not the orders issued by the Co-operative Tribunal should be varied and/or set aside.**
- 4. Whether or not the Applicant should be granted leave to file an appeal out of time.**

12. It therefore found it prudent to determine the same under the distinct and separate heads shown hereunder.

I. COMPETENCE OR OTHERWISE OF THE APPLICATION

13. Although the Respondents questioned the competence of the present application, they did not point out how the same was fatally defective and misconceived for seeking, purely academic orders.

14. The Applicant sought to have their Grounds of Opposition expunged from the court record for having been filed outside the three(3) days as stipulated under Order 51 Rule 14(2) of the Civil Procedure Rules and hence without leave of court and for having been vague and a sham. In this regard, they relied on the cases of **Anna Watetu Theuri vs Eustace Maina Wachira [2016] eKLR** and **Diamond Trust Bank Kenya Ltd vs Richard Mwangi Kamotho & 2 Others [2017] eKLR** respectively.

15. This court was unable to completely decipher the Respondents’ grounds of opposition as they did not elaborate on the same. In this regard, it agreed with the Applicant that the said Ground of Opposition was not merited as it was vague.

16. However, it disagreed with her that the Grounds of Opposition ought to have been dismissed for having been filed late on the following grounds:-

1. Order 50 Rule 6 of the Civil Procedure Rules provides as follows:-

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the

parties making such application, unless the court orders otherwise.

2. Order 51 Rule 14 of the Civil Procedure Rules states that:

(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —

(a) a notice preliminary objection: and/or;

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

(2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.

(4) If a respondent fails to file to comply with subrule (1) and (2), the application may (emphasis court) be heard *ex parte*

3. Article 159(2)(d) of the Constitution of Kenya, 2010 stipulates that:-

Justice shall be administered without undue regard to procedural technicalities.

17. It was therefore clear to this court that filing of the ground of opposition outside the three (3) days as stipulated under Order 51 Rule 14(2) of the Civil Procedure Rules was a procedural technicality that was curable under Order 50 Rule 6 of the Civil Procedure Rules and Article 159(2) (d) of the Constitution of Kenya. The timelines stipulated therein are not cast in stone because it gives the court discretion to proceed *ex parte*, if it deems it just.

II. STAYING OF PROCEEDINGS BEFORE THE CO-OPERATIVE TRIBUNAL

18. The Applicant submitted that if the matter proceeded by virtue of the impugned decision, her case would be dismissed. She therefore argued that it was only just that there be a stay of proceedings pending appeal.

19. As the intended appeal had sought to have the impugned Ruling set aside, it would be prudent that the proceedings in the Co-operative Tribunal be stayed pending the hearing and determination of the intended appeal herein. Indeed, no person should be shut out from seeking resolution of a dispute in court.

III. VARIATION AND/OR SETTING ASIDE OF THE ORDERS

20. The Applicant averred that the Co-operative Tribunal had found that NTSA confirmed that the Trading Licence Board (TLB) stickers were never surrendered to them and that her vehicles were compliant and hence, the 1st Respondent was never the Chairman of the 2nd Respondent.

21. She therefore urged this court to vary and/or set aside the orders so that the 1st Respondent could return the TLB stickers with a view to the subject motor vehicles continue operating pending the hearing and determination of her intended appeal herein. It was her submission that the 1st Respondent would not suffer prejudice and that she would continue enjoying her rights to property protected under Article 40 of the Constitution of Kenya.

22. A perusal of the proceedings before the Co-operative Tribunal showed that it declined to grant the Applicant injunctive orders on the grounds that the subject motor vehicles constantly violated traffic rules and the entire Sacco risked being black listed. It also observed that one of the subject motor vehicles registration No KCC 803Q was yet to be inspected as had been directed by NTSA. It had argued that the interests of the entire membership had to be considered and hence, the Sacco had to ensure compliance with the NTSA regulations.

23. It declined to consider her arguments that the 1st Respondent was not the Chairman of the 2nd Respondent because the issue of leadership had not been placed before it for determination.

24. It was very clear to this court that the issues she had raised for the setting aside and/or variation of the orders in the present application were the very issues which were the subject of the intended appeal herein.

25. The prayer for variation and/or setting aside of the order of the Co-operative was a final order that could not be granted at this stage. If the court were to grant the orders as she had sought, it would effectively render the intended appeal as merely an academic exercise as she would not see the value of prosecuting her appeal. This court therefore saw no merit in respect of that order at this stage, the same being premature and was not persuaded that it should grant the same.

III. LEAVE TO APPEAL OUT OF TIME

26. Appreciably, “**equity aids the vigilant and not the indolent.**” The Applicant’s explanation that she was unable to obtain the certified

copy of the Ruling and proceedings was not a good reason why the Memorandum of Appeal was not filed within thirty (30) days from the date of the Ruling. This is because one does not need the aforesaid documents before filing a memorandum of appeal. They are necessary only at the time of filing a Record of Appeal. This is particularly so because the Applicant's counsel was present at the time the Ruling was delivered and must have heard the contents of the said Ruling.

27. There was no reason why a holding memorandum of appeal could not have been filed because the law allows for the amendment of memorandum of appeal as provided for in Order 42 Rule 3 of the Civil Procedure Rules. The said Order 42 Rule 3 of the Civil Procedure Rules states thus:-

“The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13.”

28. If a court then is to apply the strict interpretation of the law, it would have rejected the Applicant's request to file a memorandum of appeal out of time.

29. However, every person is entitled to have a fair trial as is envisaged under Article 50(1) of the Constitution of Kenya. The said Article 50(1) of Constitution of Kenya provides as follows:-

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

30. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

31. Accordingly, having considered the Applicant's affidavit evidence, the Respondent's Grounds of opposition, their respective Written Submissions and the case law they each relied upon, this court came to the firm conclusion that there would be more injustice in the Applicant being denied an opportunity to ventilate her case on merit.

DISPOSITION

32. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 20th February 2019 and filed on 21st February 2019 was partly merited and is hereby granted in terms of Prayer No 2 and 4 as follows:-

1. THAT the Applicant be and is hereby granted leave to file and serve her Memorandum of Appeal within fourteen (14) days of this Ruling.

2. THAT an order be and is hereby granted for a stay of proceedings in Nairobi Tribunal Case No 425 of 2018 – Jane Mutio Musyoki versus David Makau and Another pending the hearing and determination of the Applicant's intended appeal.

3. THAT costs of the application will be in the case.

33. Orders accordingly.

DATED and DELIVERED at NAIROBI this 15th day of October 2019

J. KAMAU

JUDGE