



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

MISCELLANEOUS CIVIL APPLICATION NO. 67 OF 2019

MOSES OTENGO & ANOTHER.....APPLICANTS

VERSES

MOUNT ELGON ORCHARDS SACCO SOCIETY LTD.....RESPONDENT

RULING

1. The Notice of Motion by the Applicants dated 4th July, 2019 prays for the following orders;

(a) that this court do extend time within which the Applicants can file appeal against the ruling in the Co-operative Tribunal case at Nairobi case No.1 of 2017 which was delivered on the 8th January, 2018.

(b) That there be stay of further proceedings and more particularly the assessment of costs pending the hearing of this application and the intended appeal.

2. The application is supported by the affidavits of the applicants sworn on the same date. They have deponed that the Co-operative Tribunal did not issue its notice of the date when it was to deliver the judgment. That they became aware of the said judgment when their counsel on record was served with the bill of costs for assessment.

3. They argued that because of the said lack of notice they were unable to mount any appeal against the decision and that is why they are seeking the intervention of this court. They contended that they are sure that the tribunal did not consider their submissions in arriving at the impugned decision and this flies on the tenets of the principles of natural justice.

4. The respondent on its part vide the replying affidavit of one **Patrick Mugun** dated 22nd July, 2019 has opposed the application by stating that the judgment was delivered on the 8 January, 2019 and not 12th February, 2019 as claimed by the Applicant. That at any rate all that the Applicants are complaining about is not about the surcharge which was the subject of dispute at the tribunal.

5. He went on to state that the Applicants have not demonstrated in any way how they followed up the matter at the tribunal and especially the registry. He said that the Applicants have all along been indolent and they should not be allowed to benefit from this.

6. This court ordered the application to be disposed by way of written submissions which the parties have complied. This court need not reproduce them here save to state that they are a replica of the respective affidavits. I have equally perused the authorities cited by the parties.

7. Having stated so, the provision of **Section 79 G of the Civil Procedure Act** permits a party to seek an extension of time to file an appeal. The proviso thereof is however conditional, namely, that;

“...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 out of time”

8. It's clear that the tribunal delivered its verdict on the 8th January, 2018 in the absence of the parties although it was indicated that they were duly served. Part of the ruling at paragraph 4 in particular state that;

“On 6th march 2018 directions were taken for parties to file submissions. We note that only the Applicant has complied ...”

9. There seemed to me no clear date when the submissions were to be filed at least from what the parties have availed to the court. There are submissions by the Applicant attached to her affidavit in support which were filed and received on 4th May, 2018. The same were received after the ruling had been delivered. The question in my mind is if the ruling was delivered on 8th January 2018, how come the tribunal was

still discussing the issues of submissions as per the above quotation.

10. Is it possible that there was a typing error on the date of the ruling? Unfortunately this court does not have the benefit of the proceedings at the tribunal. It is therefore not able to appreciate the chronology of events as mentioned and submitted by the Applicant. The Respondent on the other hand did not aid much.

11. In light of the above observation, and in the absence of any evidence of service upon the applicants counsel on the date of the ruling, this court is inclined to grant the Applicant the benefit of doubt. The Respondent has indicated that the intended appeal would not be of much help to the applicant as they have not complied with the relevant provisions of the Cooperative Act. This would in essence invite this court to look at the merits of the intended appeal which is not necessary for now.

12. Suffice to state that owing to lack of clarity on the dates, and lack of evidence of service upon the Applicants, those reasons in my view are sufficient to allow the application. I reckon that not much is lost except time on the part of the Respondent. The decision by the tribunal ordering the surcharge is still intact.

13. In the premises and for the foregoing reasons, the application is hereby allowed as follows:

(a) The Applicants are hereby granted leave to file their appeal within the next 30 days from the date herein.

(b) There be stay of taxation of the Respondent's bill of costs pending the hearing and determination of the said appeal.

(c) Should the applicant fail to file the appeal within the above 30 days, then the respondent shall be at liberty to proceed with the taxation of the bill of costs.

(d) The Respondent shall have the costs of this application.

Dated signed and delivered in open court at Kitale this 5th day of November, 2019.

H K CHEMITEI

JUDGE

5/11/19

In the presence of:-

Khisa for the respondent

Munialo for Applicant

Court Assistant – Kirong

Ruling read in open court.