

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(Coram: Pall, J.A. (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 87 OF 1998
BETWEEN

JOHN GITHINJI WANGONDU KARIUKI
KIBOI.....APPLICANT

AND

**OTHAYA FARMERS CO-OPERATIVE SOCIETY LIMITED THE COMMISSIONER FOR CO-
OPERATIVE DEVELOPMENT.....RESPONDENT**

**(Appeal from a Ruling of the High Court of Kenya at
Nyeri (Osiero, J.) dated 17th April, 1997**

in

H.C.C.C. NO. 51 OF 1997)

RULING

By this notice of motion dated 7th April, 1998 brought under rule 4 of the Court of Appeal Rules, the applicant John Githinji Wangondu has applied that time for filing the intended appeal be extended. Although the notice of motion shows that the applicant is the said John Githinji wangondu, in the supporting affidavit he has very clearly said that the application is made on his own behalf and on behalf of Kariuki Kiboi. They are together called the applicants. As the application is made by the applicants in person I will not say that the application is incompetent for the aforesaid reason alone.

On 17th April, 1997 Osiero, J. dismissed the applicants application seeking inter alia to restrain Othaya Farmers Co-operative Society Ltd (the Society) from convening election for Rukira and Kagere Coffee Factories scheduled for 5th March, 1997 and they also prayed for a mandatory injunction directing the respondents to accept and recognise the applicants as duly elected representatives of the said two factories and their management committees. The application was dismissed on a preliminary point that no statutory notice under the Government Proceedings Act had been served upon the 2nd respondent namely the Commissioner for Co-operatives. Both Mr. Sichangi for the 1st respondent and Mr. Gichuru for the 2nd respondent opposed the application, among other things, on the ground that the notice of appeal although dated 18th April, 1997 was served upon both of them on 28th April, 1997. However, it is not the date of the notice but the date of lodgment of the notice which the material for the purposes of service under rule 76 of the Rules of this Court. The notice although dated 18th April, 1997 was lodged on 21st April, 1998 and served upon the respondents on 28th April, 1997. It was served within 7 days of the lodgment so as to comply with rule 76 of the said Rules. I therefore dont find any merit in this objection on the part of the respondents.

The applicants have said in the supporting affidavit that copies of the proceedings were obtained buy their counsel in August, 1997. They have said that they could not obtain them earlier as the court file having been forwarded to the Nairobi registry of the High Court went missing for quite some time. However Sichangi's objection is, and Mr. Gichuru associates himself with it, that the applicants having obtained the proceedings in August, 1997 do not sufficiently explain why this application could not be brought by them earlier and why it took the applicants eight months to file this application. The applicants have explained that their counsel Mr. Gitobu Manyara was a candidate for the Parliamentary election held on 29th December, 1997. He was busy campaigning for his election and consequently failed to file this application for extension of time. Although Mr. Manyara has not filed this affidavit to confirm the reason for the delay. I think I can take judicial notice that he was busy with his campaigning. The applicants have further said that after the election result was out, and no application for extension of time

had been filed, they decided to withdraw the matter from Mr. Imanyara and brought the present application themselves. There was a delay of about three months in filing this application after the election result was out and the applicants decided to withdraw the matter from their advocate. The delay prior to the election is attributable either to the superior court registry or to their counsel and this court has held in several matters that normal rule is that an innocent party should not be penalised for the sins of his legal advisors for a lapse on the part of the court registry. I therefore don't think that the applicants have been guilty of inordinate delay in coming to the court with their present application.

The applicant intends to appeal exercising their right to do so. Respondents counsel have argued that the intended appeal has no substance in it. On behalf of the applicant it was argued in the superior court that the Government Proceedings Act had no application in the instant case and also that the fundamental rights of the applicants under the Constitution had been compromised. I would not say that these matters are such as could be rejected out of hand.

Under rule 4 of the Rules of this Court I do have an unfettered discretion to extend time on such condition as may be just. The respondents have not shown if they are going to be prejudiced at all if the application is granted by me. In the circumstances of this case I would exercise my discretion in favour of the applicants and order that they shall file their intended appeal within 30 days of the date of this order. Costs of the application shall be in the intended appeal. If however no appeal is filed within the aforesaid period, then the application shall be deemed to have been dismissed with costs to the respondents assessed at Shs. 2000/- in each case.

Dated and delivered at Nyeri this 28th day of October, 1998.

G.S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR