



**Muiya & 11 others v Kwetu Savings & Credit Co-operative Society Limited
(Formerly Masaku Teachers Savings & Credit Co-Operative Society Ltd) (Civil
Application E416 of 2023) [2024] KECA 332 (KLR) (28 March 2024) (Ruling)**

Neutral citation: [2024] KECA 332 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E416 OF 2023
PO KIAGE, JA
MARCH 28, 2024**

BETWEEN

- JAMES MUIYA 1ST APPLICANT**
- DANIEL MATHUNGWA 2ND APPLICANT**
- ISRAEL NZALLU 3RD APPLICANT**
- RICHARD MASILA KAVEKE 4TH APPLICANT**
- DAVID KIOKO 5TH APPLICANT**
- PATRICK SOVE 6TH APPLICANT**
- COSMAS MWOLOLO 7TH APPLICANT**
- DAVID MWANTHI 8TH APPLICANT**
- WILSON MUTUNGA 9TH APPLICANT**
- LAWRENCE MUTUNGA 10TH APPLICANT**
- JOSEPHAT KALANZO 11TH APPLICANT**
- MASAKU TEACHERS INVESTMENT LIMITED 12TH APPLICANT**

AND

**KWETU SAVINGS & CREDIT CO-OPERATIVE SOCIETY LIMITED
(FORMERLY MASAKU TEACHERS SAVINGS & CREDIT CO-OPERATIVE
SOCIETY LTD) RESPONDENT**

(An application for extension of time to file an Appeal against the Ruling of the High Court of Kenya at Machakos (Kemei, J.) dated 26th February, 2018 in Misc. Civil Appln. No. 35 of 2015)



RULING

1. The applicants have filed a Notice of Motion dated 24th August 2023, seeking, in the main, this order;
 1. Time be extended for filing appeal against ruling delivered by Justice D. K. Kemei on 26th February 2018 in Machakos High Court Miscellaneous Civil Application No. 35 of 2015 and the Court of Appeal Nairobi Civil Appeal No. E653 of 2023 be deemed to have been filed within time and to proceed for hearing and determination on merit.”
2. The application is predicated on grounds on the face of the motion and the affidavit of James Muiya, the 1st applicant herein, and the Chairman of the 12th applicant. He deposes that he swore the affidavit on his own behalf and that of his co- applicants. It is averred that the notice of appeal against the impugned ruling of 26th February 2018, was lodged within time on 5th March 2018. The applicants claim that;
 - “h. By way of honest mistake and oversight on part of the Applicants and given their advanced age as they are all retired teachers aged over 70 years old relying on meagre peasant farming earnings in addition to the unreliable meagre pension which we use to sustain ourselves we had difficulty in raising instructions fees as we were adversely affected by harsh economic conditions brought about by covid court shutdown, covid economic decline, political instability prior to and after elections, maandamano work disruptions and global inflation together with the need to file response to the application by the respondents which sought to vacate the applicant’s stay orders.
 - i. The drought which had hit the country in year 2022 led to failing of applicants crops resulting in famine in Ukambani area where the applicants come from and lack of money to defend the respondent’s application whilst also filing appeal.”
3. The applicants contend that the delay in lodging the appeal was occasioned further by time taken by the court in preparing certified copies of the ruling and proceedings which was from 12th March 2018 to 23rd December 2019. Additionally, there was the Covid-19 pandemic that necessitated the closure of all courts and restriction of movements contributed to the delay.
4. In written submissions dated 23rd January 2024 and lodged by Andrew Makundi & Co. Advocates, for the applicants, it is reiterated that the delay in lodging the appeal is attributable to the Covid-19 pandemic and difficulty in raising legal fees by the applicants. Counsel assert that as per the grounds raised in the memorandum of appeal, the appeal raises “triable issues.” They outline the considerations that should guide the Court in exercising its discretion with respect to extension of time, and cite the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral And Boundaries Commission & 7 others* [2014]eKLR.
5. I have given this application with its supporting affidavit and the applicants’ submissions due consideration. An application for extension of time under *Rule 4* is a plea to a single Judge of this Court to exercise his discretion so as to allow a party who has run afoul the timelines imposed by the *Rules* to be able to file or serve documents out of time. The discretion is a judicial one to be judiciously exercised on the basis of principle, not capriciously.
6. In exercising my discretion, which is free and unfettered, I shall be guided by the considerations set out by the Apex Court in *Nicholas Kiptoo Arap Korir Salat* (Supra) thus;



- “1. Extension of time is not a right of a 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 on 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 respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
7. In the matter before me, the applicants urge that I extend time for filing the appeal against the impugned ruling and deem Civil Appeal No. E653 of 2023 as filed within time. The reasons for the delay in lodging the appeal are proffered as that, the applicants are aged retired teachers who had difficulties in raising legal fees to instruct an advocate due to the harsh economic conditions resulting from the Covid-19 pandemic and other effects of the pandemic. The applicants further attribute their alleged financial hardship to the drought that hit the country in 2022 which ostensibly caused a decline in their crop production. It is also submitted that the period utilised by the court below in preparing certified copies of proceedings, that is from 12th March 2018 to 23rd December 2019, a period of about 6541 days, contributed to the delay.
8. The applicants pleaded that the impugned ruling was rendered on 26th February 2018 and soon thereafter, the notice of appeal was lodged on 5th March 2018. However, subsequently, the record of appeal was not filed as prescribed by the *Rules* of this Court. Rule 84 commands that the record should be filed within 60 days following the date when the notice of appeal was lodged. I note that the motion herein is dated 24th August 2023, approximately 5 years since the notice of appeal was lodged. In my considered view, that period of delay is inordinate. Even if the period utilised by the court to prepare certified proceedings, being 12th March 2018 to 23rd December 2019, is deducted, I still consider the remaining period to be excessively long. Applying the principles in *Nicholas Kiptoo Arap Korir Salat*(*supra*), I do not find the applicants’ explanation for the delay acceptable. If indeed they were in such financial distress for a period of over 5 years that they could not afford to pay legal fees, they should have applied to the Court to appeal as paupers in accordance with **Rule 120** of the *Rules of this Court*. Days are long gone when parties merely raised the Covid flag as the ready scapegoat for all their defaults as it became the new normal. Ultimately, and without a tinge of sympathy, am not persuaded that I should exercise my discretion in favour of the applicants.
9. I decline to grant the prayer to extend time. Accordingly, the application is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

