



Wahiu & 7 others v Magereza Savings and Credit Cooperative Society Limited (Civil Appeal (Application) 98 of 2019) [2024] KECA 430 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KECA 430 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 98 OF 2019
SG KAIRU, F TUIYOTT & JW LESSIT, JJA
APRIL 26, 2024**

BETWEEN

**SAMUEL GACHINI WAHIU 1ST APPELLANT
JOSEPHAT NGAITA THEURI 2ND APPELLANT
JAMES WERU MAINA 3RD APPELLANT
RAHAB W. MWANGI 4TH APPELLANT
GRACE W. WANJAU 5TH APPELLANT
MARY CHEPKURUI 6TH APPELLANT
FRANCIS KIPSAN CHEBOSWONY 7TH APPELLANT
FRANCIS MUNYUA KAARIA 8TH APPELLANT**

AND

**MAGEREZA SAVINGS AND CREDIT COOPERATIVE SOCIETY
LIMITED RESPONDENT**

(An application to strike out the notice of appeal and record of appeal in respect of judgment of the High Court of Kenya at Nairobi (Mbogholi Msagha, Serгон, and Thurairira, JJ.) delivered on 14th June 2018 in High Court Civil Appeal No. 76 of 201)

RULING

1. The respondent in this appeal, Magereza Savings and Credit Cooperative Society Limited, moved the Court by Notice of Motion dated 31st May 2019 seeking an order that the appellants' Notice of Appeal dated 22nd June 2018 and the Memorandum and Record of Appeal dated 15th March 2019 and filed on 18th March 2019 be struck out. The application is made under Rule 84 (now Rule 86) of the [Court of](#)



Appeal Rules and Section 81(3) of the Co-operative Societies Act. The application is based on the ground that the appeal does not lie as it arises from a judgment of the High Court in an appeal from a decision of the Co-operative Tribunal; and that under Section 81(3) of the Co-operative Societies Act, the decision of the High Court is final and therefore, this Court has no jurisdiction to entertain this appeal.

2. In his replying affidavit in opposition to the application, the 1st appellant, Samuel Gachini Wahiu, on behalf of all the appellants deposed that contrary to the applicant's contention, the Court does have jurisdiction to entertain the appeal under Article 164(3) of the Constitution which overrides the earlier statutory provision in Section 81(3) of the Co-operative Societies Act.
3. We heard the application on 29th November 2023 when learned counsel Miss. Anne Kadima appeared for the applicant while Mr. Mutanda, learned counsel, held brief for Gitonga Mureithi for the appellants who are the respondents in the application. Counsel highlighted their respective written submissions dated 23rd June 2020 and 28th November 2023, which we have duly considered.
4. The appellants have taken issue with the competence of the application. It is conceded that the Notice of Appeal and the Record of Appeal sought to be struck out were filed and served on 22nd June 2018 and 18th March 2019 respectively. It is conceded that by the time the present application filed on 31st May 2019 was served, the 30 days period prescribed under Rule 84 (now Rule 86) of the Court of Appeal Rules within which it was open for the applicant to move the Court had lapsed. Rule 86 provides that:

“A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground:

- a. that no appeal lies; or
- b. that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or the record of appeal as the case may be.”

5. In Joyce Bochere Nyamweya vs. Jemima Nyaboke Nyamweya & Another [2016] eKLR, this Court, in dealing with a similar situation where an application to strike out an appeal had been made outside the stipulated thirty days, expressed as follows:

“

“(13) It is not at all in dispute that this application was filed outside the period of 30 days after the notices sought to be struck out were lodged and served. The above proviso is couched in mandatory terms and we have no discretion to second guess what was intended by the framers of the Rules when they gave a time frame. See the case of Gichuki King'ara & Co Advocates v AL Jalal Enterprises Ltd & Others, Civil Appl. No. NAI

211 of 2012(unreported) where this Court stated in reference to Rule 84 as follows;

“The applicant did not file its application within the stipulated period of thirty days. It did so on the 9th August 2012 which was about five months outside the limit set by the Rules. It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time-bound provision. The rule is mandatory and an application brought outside the thirty-day period properly qualifies to be seen as an afterthought.”



(14) The instant application is on all fours with the above case and so many others that were referred to in this matter. In the circumstances we find this application is incompetent for reason that it was filed outside the stipulated time. The same is hereby dismissed with costs to the 1st respondent”

6. The present application must suffer the same fate. It is accordingly struck out with costs to the appellants. That said, and given the challenge to the jurisdiction of the Court to entertain the appeal, in accordance with Rule 107(b) of the *Court of Appeal Rules*, the parties will be at liberty during the hearing of the appeal to address the Court on the competence of the appeal.

7. Orders accordingly.

Dated and delivered at Nairobi this 26th day of April 2024.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

