



REPUBLIC OF KENYA



**Co-operative Bank of Kenya Ltd v Ndunda (Civil Appeal (Application)  
E346 of 2022) [2022] KECA 1301 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1301 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E346 OF 2022  
GWN MACHARIA, JA  
DECEMBER 2, 2022**

**BETWEEN**

**CO-OPERATIVE BANK OF KENYA LTD ..... APPLICANT**

**AND**

**SAMUEL MUSAU NDUNDA ..... RESPONDENT**

*(An application for leave to appeal against the Decision/Order of the High Court of Kenya at Nairobi (A. Mabeya, J) delivered on 10th June, 2021 in HCC No. 483 of 2003)*

**RULING**

**Brief background**

1. On June 10, 2021 the High Court of Kenya at Nairobi, Commercial and Tax Division (A Mabeya, J) in HCC No 483 of 2003 made an order in favor of the respondent for discovery and production of the documents applied for by the respondent. The applicant was ordered to produce for discovery, among others, some documents in respect to some bank accounts held by the applicant in the name of the respondent and also bank statements for the period from 1998 to 2003.
2. The applicant filed a notice of appeal on June 15, 2021 and sought leave to file an appeal to this court which leave was denied by the High Court *vide* a ruling dated September 9, 2022.

**Application**

3. The appellant filed a notice of motion dated September 22, 2022, brought under sections 3A and 3B of the *Appellate Jurisdiction Act*, rules 39 (B), 42(1) 43 and 47 of the *Court of Appeal Rules, 2010*, article 159 (2) (d) of the *Constitution* of Kenya, seeking that the applicant be granted an order for leave to appeal to this court against the ruling/order of the A Mabeya, J made on June 10, 2021 in HCC No 483 of 2003 and that costs be provided for.



4. The application is supported by the grounds on the face of it and the affidavit of Jackson Oire, the applicant's legal officer, who averred that the respondent filed an application dated March 11, 2020 in the High Court, seeking the discovery and production of numerous documents by the applicant. That by a ruling delivered on June 10, 2021, the respondent's said application was allowed. The applicant being aggrieved by the said ruling filed its notice of appeal on June 15, 2021 and sought leave to appeal *vide* an application dated June 16, 2021, which application was dismissed with costs on September 9, 2022. That the intended appeal raises serious points of law to be canvassed before this court as the High Court inevitably closed its door to justice, thereby exposing the applicant to serious consequences as a result of its inability to procure and produce the said documents for discovery owing to no fault on its part but the advancement in technology and lapse of time. The matter has been fixed for mention on November 1, 2022 and the applicant is apprehensive that its intended appeal will be rendered an academic exercise to which it will suffer great injustice, and thus prays that the application be allowed.
5. The application is opposed by the respondent who filed a replying affidavit and grounds of opposition both dated October 31, 2022. He opposes the application on the grounds that; the applicant has not yet complied with the orders of the High Court and is coming to this court with unclean hands and so cannot be heard until he purges the contempt, the application is meant to delay the determination of the suit, the applicant is undeserving of this court's discretion and it has not disclosed on what grounds leave is sought or any reasonable cause of action for the grant of the prayers. It is prayed that that application be dismissed.

### Submissions

6. The applicant through its submissions dated November 3, 2022 states that the granting of leave to appeal is within the discretion of the court. That the intended appeal raises serious issues of law for determination, being whether an order for discovery can be made 17 years after the filing of the suit. It is submitted that the issue of the delay to request for discovery, which is inordinate was not considered by the High Court. It is the case for the applicant that the appeal has high chances of success and the failure to grant the prayers will expose it to great prejudice as it will be exposed to being cited for contempt of court orders. Reliance is placed on the case of [\*Machira t/a Machira & Company Advocates vs Mwangi & Another \[2002\] KLR\*](#) to buttress the submission.
7. The respondent on the other hand submitted that the matter has been set for hearing for the 13<sup>th</sup> and February 15, 2023, that the application has no basis as the documents being sought will help the court know the truth and make an informed decision and hence the application should be dismissed with costs. He relied on the case of [\*ABN Amro Bank N V v Kenya Pipeline Company Limited \[2014\]\*](#).

### Analysis and determination

8. I have considered the application, submissions, authorities relied upon and the law.
9. The decision whether or not to grant leave to appeal is discretionary as was stated by the court in [\*Kenya Shell Limited v Kobil Petroleum Limited \[2006\] eKLR\*](#) where it was held that:

“Whether or not the court would grant leave to appeal is a matter for the discretion of the court. As in all discretions exercisable by courts, however, it has to be judicially considered.”
10. The High Court held that inability to comply with a court order was not a ground of appeal. The applicant avers that it cannot comply with the order on the ground that it has been 17 years since the suit was filed and the bank does not have the documents requested for. I do not find this to be an arguable point of law or fact. It is a minor procedural matter which does not go to the root of



the litigation. Furthermore, the applicant could have sought a review of the impugned order. As to averment that there is risk of being cited for contempt, I find it not factual as no application for contempt has been made yet. Moreover, the burden of proving the ingredients for contempt of court is higher than on a balance of probabilities but lower than beyond a reasonable doubt as in criminal cases. The elements required to be proved are that; the order must be lawful and the person accused of disobedience must have had knowledge of the order and failed to comply with the order in spite of having the ability to comply. As at now, clearly, what has been set down for hearing is the suit and nothing else.

11. A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objectives of the *Civil Procedure Act* and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court in order to expedite justice. Certainly, as conceded, the matter before the High Court is old and cooperating with the court fastens the wheels of justice. In my view, I find that the intended appeal has no realistic prospects of success and I find no ground of appeal which merits serious judicial consideration.
12. Accordingly, the application herein is dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER, 2022.**

**G W NGENYE-MACHARIA**

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**JUDGE OF APPEAL.**

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

*Signed*

**DEPUTY REGISTRAR**

