



IN THE COURT OF APPEAL

AT NYERI

[CORAM: KANTAL, JA IN CHAMBERS]

CIVIL APPLICATION NO. 140 OF 2018 /UR 89 OF 2018

BETWEEN

NEW MAGUMONI FARMERS

CO-OPERATIVE SOCIETY LTD.....APPLICANT

AND

JUSTUS MUTUA MUSYOKA.....RESPONDENT

(Being an application for extension of time to file and serve Notice and Record of

Appeal out of time from the Judgment of the High Court of Kenya

at Chuka (P.M. Njoroge, J) dated 19th December, 2017

In

CHUKA (E&L Civil Appeal No. 4 of 2017)

RULING

The applicant **New Magumoni Farmers Co-operative Society Limited** by a Notice of Motion brought under Rule 4 and other rules of this Court and provisions of the Constitution of Kenya, 2010 prays in the main that I grant it leave to file and serve Notice and Record of Appeal out of time.

The respondent in the motion is **Justus Mutua Musyoka**. In grounds set out in support of the motion and in an affidavit of **Anderson Murithi** who is the Chief Executive Officer of the applicant it is stated amongst other things that the applicant was not informed by previous advocates that judgment had been delivered by the High Court on **19th December, 2017**; that the applicant came to know of delivery of that judgment on **1st August, 2018** when time for filing and serving Notice and Record of Appeal had lapsed; that their then lawyer had since ceased practicing and had joined the County Assembly of Tharaka Nithi; that an application for leave to file an appeal out of time filed at the High Court had been dismissed; and that the applicant had made all efforts to procure proceedings and judgment of the High Court and that there was no inordinate delay in bringing the application.

Mr. Anderson Murithi further depones in the said affidavit that proceedings and judgment had been applied for in the High Court on **1st August, 2018** and were supplied the same day; that the said application was then lodged in the High Court on **20th September, 2018** but was dismissed in a ruling delivered on **1st October, 2018**; and that the applicant believes that it has an arguable appeal.

The respondent did not file an affidavit in reply.

I heard the application on **25th March, 2019** when **Mr. A.G. Riungu** appeared for the applicant while **Mr. B.G. Kariuki** appeared for the

respondent. **Mr Riungu** relied on the grounds in support of the motion and the affidavit in support and submitted that the applicant had problems with their former lawyer and that the lawyer was not informing the applicant of the progress of the case. According to counsel, the appeal to the High Court at Chuka should have been on points of law only and the Judge was wrong to entertain other issues.

In opposing the application **Mr Kariuki** submitted that there was no arguable appeal as the Judge at the High Court had found that he had no jurisdiction in the matter. Counsel submitted further that the application was filed ten months after judgment which according to counsel was inordinate delay.

I have considered the application and the submissions made.

I am being asked to exercise discretion under Rule 4 of the rules of this Court. Grant of such leave is discretionary and I have original jurisdiction to grant or refuse to grant leave.

There are various factors that are now agreed as the relevant factors to consider in an application for extension of time. Those factors have been considered in various pronouncements of this Court such as in the case of **Mutiso versus Mwangi Civil Case No. 255 of 1997** which was a reference to the full court from the decision of a single Judge. The factors to consider were recognized as:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: firstly, the length of the delay; secondly, the reason for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted".

It was held in the case of **Mwangi versus Kenya Airways Ltd [2003] eKLR 48** that:

"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap 9) gives the single Judge unfettered discretion and so long as the discretion is exercised judiciously a Judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered".

It would therefore be noted that the list of factors to consider in an application like this one is not exhaustive. The length of delay is relevant as the reason for that delay and the chances of the intended appeal succeeding are all relevant in an application for leave to extend time. I should also consider whether allowing the application would prejudice the respondent amongst other factors.

On the issue of delay I note that judgment was delivered by the High Court at Chuka on **19th December, 2017** and it is the applicant's case that they did not get to know about delivery of that judgment until **1st August, 2018**. It is alleged that there was a breakdown in communication between the applicant and its then advocates. I note from the record that an application for extension of time was filed at the High Court on **20th September, 2018** which application was dismissed on **2nd October, 2018** and the motion before me was filed in this Court on **14th November, 2018**. It would therefore appear on the issue of delay that the same is not inordinate and it is reasonably explained.

What about the chances of the intended appeal succeeding? It is not very clear from the record what was the origin of the dispute between the parties. From what I can see in the judgment delivered on **19th December, 2017** there was a dispute between the applicant and the respondent which was heard by a Land Disputes Tribunal. The applicant was unhappy with the decision of that tribunal and appealed to the Eastern Provincial Disputes Appeals Committee which appeal was unsuccessful. The applicant then filed proceedings before the High Court at Chuka where various grounds were raised. The High Court considered the appeal and found that it had no jurisdiction to entertain the same. The judgment reveals a situation where the applicant was granted various opportunities to file submissions or serve the same but there was blatant disregard of those court orders by the applicant. The court also found that the appeal required leave before filing which leave had neither been sought nor obtained. The court also found that the appeal before it had been pending before the High Court for nearly twelve years on account of various acts of omission or commission by the applicant who was the appellant.

Looking at the judgment as a whole I am not persuaded that the intended appeal has any chances of success.

I am also not persuaded that the respondent would not be prejudiced by grant of leave in a situation like this one where litigation has been ongoing for many many years. I find therefore that this is not a suitable case for exercise of my discretion in favour of the applicant and the Motion dated **6th November, 2018** is hereby dismissed with costs to the respondent.

DATED & Delivered at Nairobi this 5th day of April, 2019

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR