



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 107 OF 2007**

**GODFREY KINUU MAINGI**

**JUSTUS MURUNGI**

**HARUN MBURUGU**

**JOSEPH NTURIBI MWITHIMBU**

**ANDREW GIKUNDA.....APPLICANTS**

**AND**

**NTHIMBIRI FARMERS CO-OP. SOCIETY LTD**

**THE REGISTRAR OF CO-OP. SOCIETIES.....RESPONDENTS**

*(Application for extension of time to serve notice of appeal out of time from the ruling of the High court of Kenya at Nairobi (Mohammed Ibrahim, J) dated 8<sup>th</sup> July, 2005*

**In**

**H.C.C.APPLN. NO. 633 OF 2004)**

**\*\*\*\*\***

**RULING**

**The applicants move the court under *rule 4* of the Rule this Court for an order of extension of time to serve a notice of appeal out of time.**

**It is apparent from the record laid before me and the submission made by *Mr. Nyakundi*, counsel for the applicants, that the decision intended to be appealed against was made on 8<sup>th</sup> July, 2005. The applicants being aggrieved by the said decision timeously filed a notice of appeal. This was on 19<sup>th</sup> July, 2005. It is averred by the applicants that the same was forwarded by the superior court to the Court of Appeal on 28<sup>th</sup> July, 2005 and a sealed copy of the notice of appeal was collected from the superior court on 12<sup>th</sup> August, 2005 and served upon the respondents' counsel on 18<sup>th</sup> August, 2005. The applicants, in the circumstances, admit that service was effected outside the time prescribed by the Rules, but, hasten to contend that the delay in serving the respondents'**

counsel was occasioned by circumstances beyond the applicants' control, and therefore they are not to blame.

It is common ground that on 16<sup>th</sup> September, 2005, the respondents moved this Court to strike out the notice of appeal on the grounds that the said notice had been served on them outside the time limited by the Rules. However, on 3<sup>rd</sup> November, 2006 their counsel withdrew the application on account of some material irregularities and the Court acceded to the application under *rule 55(6)* of the Rules. Since then none of the parties has taken any action on the said notice of appeal until this Motion was lodged on 16<sup>th</sup> May, 2007. Probably, the main reason for not doing so is that the parties are engaged in myriads of other disputes both in the superior court and in the Tribunal.

In dealing with this application I have to bear in mind that I am called upon to exercise my discretion whether or not to grant the relief sought. In doing so, I am guided by the principles set out by this Court over a long period of time and that is that the discretion exercisable under *Rule 4* of this Court's Rules, is unfettered and that the main concern of the Court is to do justice between the parties. Nevertheless, the discretion has to be exercised judicially, that is on sound factual and legal basis. The principles applicable were restated by *O'Kubasu, J.A.* from this Court's ruling in *LEO SILA MUTISO V ROSE HELL EN WANGARI MWANGI C. APP NAI 255/97 (UR)*, thus:

*"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 first 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 is indisputable that the delay in serving the notice of appeal is one month. On consideration of the submissions made before me and upon reading the annexures, I am satisfied that there is sufficient explanation for not having served the notice of appeal as is required by the Rules.

However, the most difficult aspect of this application is the delay between 3<sup>rd</sup> November, 2006 when the respondents' counsel withdrew the application for striking out the notice of appeal and 16<sup>th</sup> May, 2007 being the time of making this present application. Was the delay inordinate and inexcusable as contended by *Mr. Arithi*? Could it, also, be asked of him why he never took any action to re-activate his application to strike out the notice of appeal? Was he sending signals to the applicants that he had no more quarrel over lateness in service? The delay, in my view, may appear inordinate but has been satisfactorily explained by *Mr. Nyakundi* that it was because of so many applications and suits between the parties which matters have been pending in various courts, some of which were in superior court during the last month of March, 2007. I accept the explanation. Further, I think the lack of activity on the part of *Mr. Arithi* could have made *Mr. Nyakundi* believe that the former did not place much seriousness on the validity of the notice of appeal.

I gather from submissions of counsel that the issues of law to be raised in the intended appeal are of great public importance and vexing enough to grant examination and legal interpretation by this Court. Moreover, it has not been shown to me how the respondents would be prejudiced if the application were to be granted.

I will in the circumstances exercise my discretion in favour of the applicants and make the following orders:-

- a) That the time for serving the notice of appeal be extended.
- b) That the notice of appeal be served within 7 days from the date of this ruling.
- c) That the costs of this application shall be in the intended appeal.

**DATED and DELIVERED at NAIROBI this 3<sup>rd</sup> day of April, 2008.**

**P.K. TUNOI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**