



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civ Appli 86 of 2005

NANYUKI EQUATOR SACCO CO-OPERATIVE SOCIETY LIMITED APPLICANT

AND

1. NYERI SACCO SOCIETY 1ST RESPONDENT
2. THE CHAIRMAN THE CO-OPERATIVE TRIBUNAL.....2ND RESPONDENT

(An application for extension of time to file and serve notice of appeal and record of appeal from ruling and order of the High Court of Kenya at Nairobi (Ibrahim J) dated 22nd February, 2005

in

H.C.MISC. APPL. NO. 886 OF 2003)

RULING OF THE COURT

This is a reference to the full Court under **Rule 54 (1) (b)** of the Court of Appeal Rules (Rules) from the ruling of a single Judge (Deverell, J.A.) dated 17th June, 2005 allowing an application under **Rule 4** of the Rules for the extension of time for filing and serving a notice of appeal. The applicant, **Nanyuki Equator Sacco Co-operative Society Limited** (Nanyuki Sacco) had also sought extension of time for filing and serving the record of appeal. However by the time the application was filed the time limited by **Rule 81** of the Rules had not expired and Deverell JA merely ordered, correctly, in our view, that the appeal should be instituted within the time limit set in **Rule 81** of the Rules.

The Nanyuki Sacco intends to appeal against the judgment of the superior court (Mohamed Ibrahim J) dated 22nd February, 2005 in which the superior court allowed the application for judicial review brought by Nyeri Sacco Society (Nyeri Sacco) to quash the decision of the Co-operative Tribunal dated 7th August, 2003 in the *Co-operative Tribunal Case No. 16 of 2003* granting an order of injunction to Nanyuki Sacco against the Nyeri Sacco.

It is the Nanyuki Sacco which instituted *The Co-operative Tribunal Case No. 16 of 2003*, against the Nyeri Sacco. We do not have the details of the suit but it appears that the basis of the claim is that the Nyeri Sacco has encroached on the Nanyuki Sacco's area of operation, by opening an office in Naro Moru Town and recruiting members who were already members of Nanyuki Sacco in contravention of the by-laws of Nyeri Sacco. In the suit, the Nanyuki Sacco sought and obtained an interlocutory

injunction to restrain the Nyeri Sacco from operating banking services in the Naro Moru office and from recruiting members within Laikipia District pending the determination of the claim. The Chairman of the Tribunal granted the orders of injunction on 7th August, 2003. The decision of the Chairman of the Co-operative Tribunal was quashed by the superior court at the instance of Nanyuki Sacco on 22nd February, 2005 on the ground that the Chairman lacked jurisdiction to grant the orders because other members of the Tribunal had participated in the hearing and determination of the application.

The superior court construed **Section 80 (4)** of The Co-operative Societies Act as not permitting other members of the Tribunal to participate with the Chairman (as had happened in the case) when hearing and determining interlocutory applications.

The Nanyuki Sacco intends to appeal to this Court against the decision of the superior court.

The application for the extension was supported by the affidavit of **Moffat Muya Mwihuri**, Chairman of Nanyuki Sacco who deposes in paragraphs 4, 5 and 6, thus:

“4. THAT after the delivery of the judgment I talked to my Advocates on record after 5 days to get a typed copy of the ruling which I was to study and give details to my members of the Management Committee who in turn had to make decision in view of the said judgment.

5. THAT the members of the management committee being the central decision making organ debated the entire judgment and finally came to the conclusion of filing an appeal against the entire judgment.

6. THAT the Society gave instructions to its Advocates M/s. Gitonga Muriuki & Co. Advocates on 16th March, 2005 to appeal against the High Court decision”.

The learned single Judge was satisfied that the issue of jurisdiction of the Chairman of the Tribunal which was to be raised in the intended appeal was not frivolous; that there was a special and valid reason for the delay of 28 days and that there was no special prejudice either way which could affect the discretion. Regarding the explanation for delay, the learned Judge said in part:

“Mr. Muriuki did not suggest that he needed instructions as to factual matters in order to file the Notice but he argued that he could not properly act without instructions as there could be costs implications arising from the filing of the notice if not followed up with the institution of the appeal.

In a case such as this where the intended appellant is not a commercial organization or an individual but a co-operative society and where according to Mr. Muriuki, the consent, to the appeal, of the Chairman of the society after consultations with Management Committee was required, it may be that waiting for such instructions was a special valid reason for the delay to be taken into account in the exercise of my discretion”.

It is apparent from the submissions of Mr. Mwangi Kariuki, learned counsel for the Nyeri Sacco that this reference is based on two grounds, namely, that the learned Judge erred in law in taking into account that the counsel had to take instructions to file a notice of appeal and secondly, that the learned Judge erred in law in taking into account the issue of prejudice.

He contended that the notice of appeal is a simple document for which the advocate does not need instructions to file it. Regarding the issue of prejudice, Mr. Mwangi Kariuki contended that the decision of the learned Judge could not solely be based on the ground of prejudice when the other grounds to support the application were unmaintainable.

Needless to say, Deverell JA in allowing the application was exercising the unfettered discretion to extend time under **Rule 4** of the Rules. In exercising his discretion under **Rule 4**, the single Judge takes into account relevant factors including but not limited to the merits of the intended appeal, length of the delay, explanation for the delay and whether the granting of the order may cause undue prejudice to the

respondent (see *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi*, Civil Application No. Nai. 255 of 1997 (unreported), *Wasike vs. Swala* [1984] KLR 591).

The reference not being an appeal, the relevant consideration is not whether the learned single Judge reached the correct decision on the merits but whether the single Judge exercised his discretion judicially. The principles upon which the Court can interfere with the exercise of discretion by a judge are well settled (see *Mbogo vs. Shah* [1968] EA 93, *The Francois Vieljeux* [1984] KLR 1; *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125.

Mr. Mwangi Kariuki cited *Koki Katua vs. Michael Mutisya Kithome*, Civil Application No. Nai. 342 of 2000 (unreported) in which this Court said:

“An advocate does not need his client’s instructions to file a Notice of Appeal, it being a simple document whose filing does not constitute an irrevocable commitment by a party to file an appeal”.

The learned single Judge, as is clear from the passage from the ruling quoted above, distinguished a Co-operative Society from a commercial organization or an individual and was satisfied that waiting for instructions to file a notice of appeal was a special valid reason for the delay in the circumstances of the case.

In *Evans vs. Bartlam* [1937] A.C. 473, Lord Wright said at page 489:

“A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows ex debito justitiae once the facts are ascertained”.

And in *Jenking vs. Bushby* [1891] 1 CH 484 Kay L.J. said at page 495:

“Of course in a question of discretion, authorities are not of much value.

No two cases are exactly alike and even if they were, the court cannot be bound by a previous decision to exercise its discretion in a particular way because that would be in effect putting an end to the discretion”.

Thus in matters of discretion no one case can be an authority for another. In this case, we are satisfied that it was a legitimate consideration in the exercise of the discretion that a decision to appeal had to be made by Nanyuki Sacco before the Notice of Appeal could be filed.

As the case of *Wasike vs. Swala* (supra) shows, the question of prejudice that a respondent may suffer arising from the extension of time is a relevant consideration when dealing with an application for extension of time. In this case, the decision of the single Judge was not solely based on the ground that neither party would suffer prejudice if time was extended. The learned Judge was in addition satisfied that the intended appeal was not frivolous and that there was a valid reason for the delay.

It seems that Mr. Mwangi Kariuki is in effect asking us to substitute the discretion of the learned Judge with our own discretion. That is not permissible.

In the result, we are satisfied that the learned Judge did not err in principle in exercising his discretion to extend time and that he indeed exercised his discretion judicially.

For those reasons, this reference is dismissed with costs to the applicant (i.e. Nanyuki Sacco).

Dated and delivered at Nairobi this 17th day of November, 2006.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR