



**Endarasha Farmers Cooperative Society Limited v Gichuki (Miscellaneous Application E020 of 2023) [2024] KEELRC 782 (KLR) (15 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 782 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
MISCELLANEOUS APPLICATION E020 OF 2023**

**ON MAKAU, J  
APRIL 15, 2024**

**BETWEEN  
ENDARASHA FARMERS COOPERATIVE SOCIETY LIMITED ..... APPLICANT  
AND  
CHARLES KINGORI GICHUKI ..... RESPONDENT**

**RULING**

1. This Ruling relates to the application dated 29<sup>th</sup> September 2023 which is brought under sections 1A, 1B, 3, 3A, 63, 65, and 95 of the Civil Procedure Act, Order 9 Rule 9, Order 42, Rule 6 (1) and (2), and Order 50 Rule 1 of the Civil Procedure Rules. The Application seeks the following orders:
  - a. That the Honourable Court be pleased to grant leave to the Firm of Karanja Maina & Co. Advocates to come on record for the Appellant/Applicant post judgement.
  - b. That the Honourable Court be pleased to stay execution pending the hearing and determination of the application.
  - c. That the Honourable Court be pleased to stay execution pending the hearing and determination of the Appeal.
  - d. That Leave be granted to the Applicant to file an appeal out of time with respect to Nyeri CMELRC 31 of 2019 Charles Kingori Gichuki v Endarasha Framers Cooperative Society Limited.
  - e. That the annexed memorandum of appeal be deemed duly filed and served upon payment of requisite fees.
  - f. The costs and incidentals to this application abide the outcome of the said appeal.
2. The Application stands on the grounds that:



- i. Judgement in Nyeri CMELRC 31 of 2019 Charles Kingori Gichuki v Endarasha Framers Cooperative Society Limited was delivered by Hon. Nelly Wangeci Kariuki on 3<sup>rd</sup> June 2021.
  - ii. Pursuant to the said judgement, the Respondent obtained Notice to show cause dated 29<sup>th</sup> June 2023, and warrants of arrest was issued against the Chairman and Secretary Manager of the applicant, who now face imminent arrest.
  - iii. The said matter has a mention date of 18<sup>th</sup> October 2023 to confirm the whereabouts of the said officials in execution of the warrants of arrest issued.
  - iv. The respondent's advocate did not serve the impugned order on the Applicants before the time for filing appeal had lapsed.
  - v. The challenges and risks caused by the Covid-19 pandemic including scaling down of judiciary operations made it difficult to file appeal on time.
  - vi. The applicant was never given any chance to defend the suit and only became aware of the orders when they took operations of the society after the former secretary manager by a resolution of the members was dismissed for misappropriation.
  - vii. The Respondent has sought warrants of arrest against the applicant which move will greatly prejudice its operations.
  - viii. It is only fair and just that leave is granted.
3. The Application was opposed by the Respondent through its grounds of opposition dated 12<sup>th</sup> October 2023 as follows:
    - a. The application is misconceived and incompetent.
    - b. The application is bad in law, a gross abuse of the process of the Court and untenable.
    - c. The Application is fatally and incurably defective.
    - d. The application is frivolous and vexatious.
    - e. The application is otherwise without merit and should be dismissed with costs.
  4. The Respondent further filed his affidavit sworn on 8<sup>th</sup> December 2023, wherein he averred that the application was not properly before the Court as it was brought under the Civil Procedure Act and Rules which aren't applicable to this Court. It was averred that the Court derives its jurisdiction from the Employment and Labour Relations Court Act and the Rules and hence the application was incompetent.
  5. It was deposed that the judgement was delivered on 3<sup>rd</sup> June 2021 and on 7<sup>th</sup> June 2021, the Applicant filed an application for setting aside the judgement, which was dismissed on 2<sup>nd</sup> December 2021. Subsequently, the Applicant never appealed against the judgement or the ruling delivered on 2<sup>nd</sup> December 2021. Further, the application was made after a delay of two and half years which is inordinate, inexcusable and unexplained. Besides the Applicant have frustrated the execution of the decree by failing to comply with the same and instead, fraudulently sold all the proclaimed vehicles and failed to deposit the proceeds as security before this court.
  6. It was deposed that the Applicant has not been honest to this Court and the trial court and has not placed sufficient material before the Court to enable it exercise its discretion. He stated that the Applicant's chairman and secretary failed to appear before court despite service of the Notice to show



cause and have since been evading arrest. It was therefore deposed that the Applicant has deliberately obstructed the orders of the court and thus do not deserve any discretion from the Court.

### Submissions

7. The Applicant filed submissions dated 4<sup>th</sup> January 2024. It cited Order 42 rule 6 (2) of the Civil Procedure Rules which outlines the principles applicable in granting stay of execution pending appeal. The Applicant submitted that it had a probability of success if allowed to pursue the case on appeal. It contended that its advocate failed to turn up at the hearing and thus the mistakes of an advocate should not be visited upon the applicant. It maintained that the applicant only became aware of the orders when it took over its operations from former secretary manager.
8. It submitted that the Applicant would suffer substantial loss if the order for stay is not granted. It relied on the definition of substantial loss in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR and *RWW V EKW* [2019] eKLR. It argued that the Applicant worked to sustain its livelihood and that of the farmers from whom it collected dairy products. It was submitted that the life of the chairman and the secretary were at stake as there were warrants of arrest against them. It contended that the Respondent was one of its employees who participated in misappropriation of its funds. It admitted that its failure to file appeal on time, but attributed the same to covid-19 pandemic which affected court operations.
9. It further submitted that it had complied with the order to deposit the security for costs in court and cited the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR. Therefore, it submitted that it had satisfied the requirements for the grant of the orders sought and urged that it would be more prejudiced than the Respondent if the orders are not granted.
10. The Respondent, on the other hand, filed written submissions dated 6<sup>th</sup> February 2024 in which he urged that the application lacked merits. For emphasis he relied on the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR. He reiterated that the delay in making the application was inordinate, inexcusable and the same has not been explained. He argued that the Applicant's knowledge of the judgment is depicted by the filing of the 7<sup>th</sup> June 2021 application and the current advocates application of 6<sup>th</sup> December 2021 to come on record for the Applicant.
11. He further submitted that the Appeal had no chance of success as the Applicant terminated the Respondent without affording him a chance to be heard and without a valid reason. He contended that he would be greatly prejudiced if leave is granted as he has been locked out of the fruits of his judgement for over three years. Further he is now living in misery without employment after the unfair termination of his employment.
12. For emphasis, reliance was placed on the case of *Tonui v National Bank of Kenya (Miscellaneous Civil Appeal E002 of 2022)* [2022] KEHC 2977 (KLR) to urge that the Applicant did not place sufficient reason before the Court, more so as it withheld important information from the Court. Further reliance was placed on the case of *Redland Enterprises Limited v Premier Savings & Finance Limited* [2002] eKLR.
13. As regards the order for stay of execution, he submitted that no stay can be granted if there is no appeal on record. He argued that the right of appeal must be weighed against depriving him the fruits of the judgement, and the deprivation must be for just cause. He further submitted that the Advocates prayer to come on record was superfluous and therefore should not be allowed. Finally, he argued that the application is brought under wrong provisions and it should be dismissed with costs.



## Analysis and determination

14. Having considered the Application, affidavits and submissions the issues falling for determination are:
- a. Whether the applicant has invoked this Court’s jurisdiction properly.
  - b. Whether leave to appeal out of time should be granted.
  - c. Whether stay of execution should be granted.

### Whether the Court’s jurisdiction was properly invoked

15. The Respondent argued that the Application was premised on wrong provisions as the Court’s jurisdiction is donated by section 12 of the Employment and Labour Relations Court’s Act and rule 17 of the Court’s Rules. The Act and procedure Rules do not expressly provide for extension of time or change of advocate after judgment. As such the court has to resort to the Civil Procedure Act and the Rules to fill the lacuna in order to serve substantive justice as contemplated under Article 159 of the Constitution. Therefore, I am satisfied that the applicant has properly invoked jurisdiction of the court.

### Whether leave to appeal out of time should be granted

16. The Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR established the following principles to guide the Courts when entertaining applications for extension of time:
- i. “Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
17. Similarly, Justice Odek in Edith Gichugu Koine v Stephen Njagi Thoithi [2014] eKLR established the criteria to be followed when deciding a matter on extension of time as follows:
- “Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – See FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS, Civil Application Nai. 332 of 2004 (unreported). There is also a duty now imposed on the Court under sections 3A and 3B of the Appellate Jurisdiction Act to ensure that the factors considered are consonant with the overriding



objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.”

18. In a nutshell, where a party wishes for the Court to exercise its discretion in such matters, it ought to prove to the satisfaction of the Court that; a reasonable reason exists for the delay, that there was no undue delay in the filing of the Application, that the intended Appeal is not frivolous and that the Respondent shall not suffer prejudice.

### **Reasonable reason**

19. The Court in *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) defined excusable delay as follows:

“Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party’s control.”

20. The Appellant attributed the delay to lack of knowledge of the judgement of the Court. Its argument was that it only found out about the court order after taking over operation from its former secretary. The Respondent disparaged the argument on grounds that the Applicant was well aware of the orders of the Court as it filed an application dated 7<sup>th</sup> June 2021 for setting aside the judgment and its current advocates filed their application of 6<sup>th</sup> December 2021 to come on record.
21. From the foregoing, I am convinced that the Applicant is withholding truth from the Court with the sole aim of tilting the scale of justice. Having verified that the Applicant was well aware of the impugned judgment and the ruling on his subsequent application for setting aside the judgment, I hold that the failure to lodge an appeal within the statutory period was deliberate. In the alternative, I am of the opinion that the intended appeal is an afterthought.

### **Undue delay**

22. Rule 8 (1) and (2) of the ELRC Procedure Rules provide that:

- “(1) Where any written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law.
- (2) Where no period is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.”

23. In this case the applicant had thirty days to file an appeal but as observed above, the Applicant was well aware of the judgement of the Court from 2021, but chose to sit pretty and let time pass without taking any action. Two years without cogent reasons for delay surely amounts to unreasonable delay and I so, hold.

### **Prejudice**

24. The Applicant argued that the Respondent stand to suffer no injustice if the Application is granted. The Respondent on the other hand contended that allowing the application would lock him out of the fruits of his judgement which he has not been able to enjoy for over three years due to the Applicant’s



frustration. The Court in *Portreitz Maternity v James Karanga Kabia Civil Appeal No 63 of 1997* emphasized the need for a court to balance the interests of parties as follows:

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

25. The mere fact that the Respondents must defend the Appeal is prejudicial as it shall not only disturb his peace, but will further prevent him from enjoying the fruits of his judgement. He has waited for years and his attempt to execute the decree has borne no fruit after the applicant sold its assets and failed to pay him or deposit in court. As such the court finds that the applicant is on a mission to frustrate the respondent from enjoying the fruit of his judgment and therefore granting the leave sought would prejudice the respondent.

**Whether the Applicant is entitled to the orders sought**

26. Having considered the law and the materials presented to the court, I do not find merit in the Application for leave to file appeal out of time and I decline to grant it., Having declined to grant leave to appeal, an order for stay pending appeal is unmerited. Consequently, the Application dated 23<sup>rd</sup> September 2023 is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 15<sup>TH</sup> DAY OF APRIL, 2024.**

**ONESMUS MAKAU**

**JUDGE**

**Order**

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

