



REPUBLIC OF KENYA



KENYA LAW
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Nkorui v Meru South Farmers Co-operative Society Limited (Miscellaneous Application E007 of 2023) [2024] KEELRC 781 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 781 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
MISCELLANEOUS APPLICATION E007 OF 2023**

ON MAKAU, J

APRIL 12, 2024

BETWEEN

ROSALID CIAMBAKA NKORUI APPLICANT

AND

**MERU SOUTH FARMERS CO-OPERATIVE SOCIETY
LIMITED RESPONDENT**

RULING

Introduction

1. This ruling relates to the respondents Notice of Motion dated 12th July 2023 brought under sections 3A, 79G & 95 of the *Civil Procedure Act* Order 51 Rule 1 and 3, Article 50 of *the Constitution*. The application seeks the following: -
 - a. This Court be pleased to grant the Applicant leave to appeal out of time against the Ruling dated 9th November 2022 delivered by Honourable J.M.Gandani in Chuka CMCC No. 72 of 2004.
 - b. The Memorandum of Appeal annexed to the Application be admitted.
 - c. The costs of the Application abide the outcome of the appeal.
2. The Application is supported by the affidavit sworn by the Applicant's Advocate Mr. Mugambi Nyaga on 12th July 2023. It is the applicant's case that he filed an appeal against the impugned ruling in the High court at Chuka on 9th December 2022; being appeal Number E033 of 2022; that the appeal was filed within the within the required time; that on 25th May 2023, he was notified that the appeal had been struck out by the High Court for lack of jurisdiction; that he is interested in challenging the impugned ruling which in his view raises triable issues; and that the application is brought in good faith and without inordinate delay.



3. The Respondent opposed application by the Replying Affidavit sworn on 23rd September 2023 by its General Manager Mr. Eric Marangu Mugendi. The gist of the respondent's case is that the applicant filed appeal in the High Court at Chuka together with other related matters; on 12th July 2023, the Court directed that the appeals be consolidated to avoid duplicity and fixed the same for hearing on 4th October, 2023; that the appeals are still pending hearing before the same Court; that this court should allow the appeals to proceed to the logical conclusion before the High Court; that the applicant ought to apply to the High Court for withdrawal of the pending appeals before approaching this Court; that the application is grossly incompetent and is being used to extend proceedings which started in 2004; and the application should be dismissed with costs.

Submissions

4. The applicant submitted that he deserves the leave sought because he filed his appeal within the time prescribed by the law but the same was struck out on ground of jurisdiction. He maintained that the delay in filing the appeal before this Court was caused by an inadvertent mistake by filing the appeal before the wrong Court. He maintained that the application is made in uttermost good faith and prayed for the orders sought in the application. He contended that the respondent will not be prejudiced by the orders.
5. For emphasis he relied the case of Leo Sila Mutiso v Rose Hellen Wangari Mwangi (UR) and Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR where the court discussed the principles of granting leave to appeal out of time.

Issues for determination analysis

6. Having considered the application, affidavits and the submissions by both sides, the issue for determination is whether the applicant has laid any basis upon which time to lodge an appeal can be extended.
7. The threshold for the award of leave to appeal out of time was set out in the case of Nicholas Kiptoo Salat v Independent Electoral and Boundaries Commission and 7 others (2014) eKLR where the Supreme Court held that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”
8. The Supreme Court went on to establish 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.”
9. Again, the Court Appeal in the case of *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR stated as follows about extension of time:-

“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.”

10. 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.”

11. The Appellant attributed the delay to the honest mistake of filing his appeal before the High Court instead of this Court. The respondent acknowledges that the applicant filed the appeal in the High court and alleged that the appeal is still pending. It asked this Court to allow the appeal to proceed before the High Court to the logical conclusion. The applicant exhibited an email from the Deputy Registrar Chuka High Court notifying him that his appeal number E033 of 2022 had been struck out since the court lacked jurisdiction over the matter. The respondent has not tendered any evidence to prove that the applicant’s appeal is still pending before the High Court.
12. The email has not been challenged and therefore I am satisfied that the applicant has given sufficient reason for the delay in filing the appeal before this court. I will treat the mistake by the applicant’s counsel as one which cannot be visited upon an innocent client.
13. As regards prejudice, I believe that the applicant will be more prejudiced if the leave sought is withheld than the respondent who can be compensated by costs. In the end, I allow the application in the following terms:
- a. Leave is granted to the applicant to file appeal within 15 days of this Ruling.
 - b. The applicant to pay the respondent Kshs. 10,000 as throw-away costs within 30 days of this ruling.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF APRIL, 2024.

ONESMUS N 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.

