REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 24 OF 2015

THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF PLANNING,

MINISTRY OF DEVOLUTION AND PLANNING.....1ST APPLICANT/RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF FINANCE & NATIONAL TREASURY...2ND APPLICANT/RESPONDENT

VERSUS

PETER O. NYAKUNDI & 68 OTHERS.....RESPONDENT/PETITIONERS

RULING

1. On 08/05/2016, the 69 Respondents filed a Petition against the Principal Secretary, State Department of Planning in the Ministry of Devolution and Planning and the Honourable Attorney General claiming the infringement of their rights under certain Articles of the Constitution and seeking certain declarations and orders. The thrust of the Respondents claim was that they stated that they were Internally Displaced Persons (IDPs) having been forced out of their homes by the Post-Election Violence (PEV) of 2007/08 but that while other similarly situated IDPs were compensated and resettled by the Government, the Respondents had been discriminatorily denied such compensation and resettlement. Their Petition, therefore, mainly sounded in the violation of the right to be free from discrimination.

2. The Petition was defended by the Honourable Attorney General. In a Judgment dated 30/09/2016, the Learned Justice M. Odero entered judgment in favour of the Respondents and made three orders against the Applicants:

> *1. The Petitioners herein are victims of the 2007/2008 post-election violence who were entitled to compensation but have not yet been compensated.*
>
> *2. The 1st Respondent shall compensate the Petitioners in the same manner as it did for other internally displaced persons within 90 days for (sic) the date of this judgment.*
>
> *3. The Petitioners are awarded the costs of this Petition*.

3. Thereafter, the Respondents' Counsel extracted the decree, taxed the costs of the Petition, obtained a Certificate of Costs Against the Government, and severally wrote to the Honourable Attorney General to settle the decree and the costs. The Honourable Attorney General did not respond to any of the demands.

4. Eventually, on 21/01/2019, the Respondents, through their Counsel, brought a Judicial Review Application to wit Nakuru Judicial Review Application No. 2 of 2019 seeking orders of mandamus to compel the Principal Secretary, State Department of Planning in the Ministry of Devolution and Planning to pay to the Respondents the judgment debt "in the sum of Kshs. 2,425,000, allocate [them] 2 ¼ acres of land each and pay [to them] costs which have been taxed and certified by the Registrar at Kshs. 1,599,549/- together with all accrued interests."

5. The Honourable Attorney General filed Grounds of Opposition to that Judicial Review Application and then, eventually, brought the Application coming for determination herein as a way to thwart the Judicial Review Application. The Application is dated 09/06/2020. It seeks the following prayers:

> *1. Spent.*

2. Spent.

3. THAT there be an order of stay of further proceedings in Judicial Review No. 2 of 2019 wherein the Applicant is seeking for an order of mandamus to compel the Applicants herein to satisfy the decree in this matter.

4. THAT the Applicants be granted leave to lodge Notice of Appeal out of time.

5. THAT there be an order of stay of execution of decree in this matter in any manner whatsoever pending hearing and determination of the appeal of the Court of Appeal.

6. THAT the costs of this application be in the cause.

6. The Application is supported by the Affidavit of Ms. Winnie Cheruiyot, a Senior State Counsel in the Office of the Attorney General who describes herself as having "personal conduct of this matter and well versed with all the proceedings herein and hence competent to swear this affidavit."

7. The Respondents filed a Replying Affidavit sworn by the 1st Respondent, Peter O. Nyakundi.

8. The Application was argued by way of Written Submissions. I have read the submissions filed by the parties' counsel.

9. The Respondents' Counsel has raised two preliminary issues which I propose to quickly dispose before getting to the substantive question presented. First, Counsel finds fault in the fact that the Honourable Attorney General has sought to litigate the Application in the name of

> "The Principal Secretary, Ministry of Finance & National Treasury" who the Attorney General introduces as the 2nd Applicant in the post-judgment Application. The problem, as the Respondents' Counsel points out is that this Applicant was never a party in the suit pre-judgment. Counsel finds this addition un-procedural and amenable to summary dismissal. I would readily agree that this addition is un-procedural especially coming as it did without the leave of the Court. Ultimately, however, the addition has little functional significance since the Honourable Attorney General defends all line ministries in litigation. In the era of constitutionally-sanctioned principle of favouring substantive determination of disputes on merits as opposed to on technicalities, this point attracts no more attention from the Court.

10. Second, Counsel complains that the Application is supported by an affidavit of Counsel who has sworn to contentious issues. Respondents' Counsel argues that advocates should not enter into the arena of the dispute between parties by swearing affidavits on contentious issues. Counsel also argues that an advocate does not become authorized to swear an affidavit on behalf of her client merely because they act for the client; the advocate must state in the affidavit that she was authorized by the client to swear the affidavit.

11. The Respondents' counsel here says that the Senior Litigation Counsel from the Honourable Attorney General's Office has deposed on contentious matters of fact which can only be deposed to by the Respondents. He urges the Court to strike out the affidavit thereby leaving the Application legally barren and therefore incompetent.

12. It is true that it is improper for an advocate to swear an affidavit on factual matters on the case. However, an advocate is perfectly entitled to swear an affidavit regarding specific matters related to the status of the file which are typically not contentious. In this case, none of the matters deposed to by the State Counsel are truly contentious: they mainly give a history of the case which is a matter of record. I, therefore, find no reason to strike out the affidavit though I must point out that it is an unwise trend for advocates to be deposing to affidavits in support of such applications.

13. I will now return to the main substantive issue presented: are the Applicants entitled to an extension of time to file a Notice of Appeal to the Court of Appeal?

14. There is no dispute that section 7 of the Appellate Jurisdiction Act clothes this Court with power to grant an extension of time to file a Notice of Appeal after the statutory period of 14 days. Our case law has now developed the factors which a Court considers in granting a party an extension of time. The leading case is the Supreme Court's decision in ***Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others, SC Appl. 16/2014 [2014] eKLR.*** There the Supreme Court stated:

> *This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion*:
>
> *1. 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;*
>
> *2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*
>
> *3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
>
> *4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
>
> *5. Whether there will be any prejudice suffered by the respondents if the extension is granted;*

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

15.

16. These factors listed by the Supreme Court provide guidelines on what will be considered "good cause" for purposes of permitting a party who is aggrieved by a judgment or ruling of this Court to file an appeal out of time in the Court of Appeal. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour. The specific factors to be considered include:

1. The period of delay;

2. The reason for the delay;

3. The arguability of the appeal;

4. The degree of prejudice which could be suffered by the Respondent is the extension is granted;

5. The importance of compliance with time limits to the particular litigation or issue; and

6. The effect if any on the administration of justice or public interest if any is involved.

17. In the present case, the Honourable Attorney General quite remarkably says that the delay in lodging the appeal out of time was not "of their own making." Let the Honourable Attorney General's Counsel speak for herself:

> *Foremost, the Respondent/Petitioner (sic) had lodged a notice of appeal due to the fact that the judgment did not disclose any award. The respondent/petitioner (sic) also filed a bill of costs which we responded (sic) and had it taxed. At that point, we had only been served with a decree which did not give the respondent petitioner (sic) any award. We were later served with a certificate of order against the government, which made pronouncement on an award…..*
>
> *It is evident from our correspondence with our clients, we received instructions from the Ministry of Interior and Coordination of National Government to appeal the judgment on 8th June, 2020 and we did proceed to apply for leave immediately….*

18. Most charitably understood, the Honourable Attorney General says that he did not think it necessary to appeal because the judgment did not disclose any award! If so, then nothing has changed in the intervening three years and he has no need to apply now. If the Judgment delivered did not disclose any award against the Government on 30/06/2016, then it most certainly did not disclose any on 09/06/2020 when the Application herein was filed! It is not as if the judgment marinated between 09/06/2020 and 09/06/2020 and developed aged flavour with new orders against the Government! What is more is that a decree was extracted and served on the

Honourable Attorney General on 02/12/2016. Thereafter, a Certificate of Costs against the Government was served and received by the Honourable Attorney General on 29/01/2018. Both of these, and especially the latter document contain very clear orders against the Government which are purportedly extracted from the Judgment dated 09/06/2016. If any antennae needed to be activated to pursue an appeal, it should have gone up then.

19. Secondly, the Honourable Attorney General offers what appears to be internal government failures or processes as a self-executing reason to be permitted to file an appeal four years out of time. The implication seems to be that since the Honourable Attorney General received instructions from the line ministry to appeal on 08/06/2020 – that is four years after the judgment – then that provides a definitionally good reason to permit the extension of time. There is no attempt whatsoever to explain what by any reasonable standards is an inordinate delay.

20. This Court is fully aware that blunders happen in Government offices. Sometimes these blunders are caused by inattention by overwhelmed officers; sometimes by a slow bureaucratic machine across various Government departments. Even then, there can be no reasonable explanation for the delay in filing an appeal for a period of four years. To allow extension of time in such circumstances is to rule that the timelines that govern other litigants simply do not apply to the Honourable Attorney General. Yet they do. Parties who have won judgments against the Government have a right to enjoy the fruits of their judgment or litigate the appeals to those judgments timeously like all other litigants.

21. I find no reasonable explanation has been given for the extraordinarily long delay of four years in seeking extension of time in this case. I further find that requiring litigants back to Court on an appeal four years after judgment is definitionally prejudicial to such litigants.

22. In the circumstances, I decline to extend time to lodge an appeal out of time. It follows that the other two consequential prayers must be declined as well. The result is that the Application dated 09/06/2020 is dismissed in its entirety with costs.

23. Orders accordingly.

Dated and delivered at Nakuru this 26th day of November, 2020.

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.