



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**CONSTITUTIONAL PETITION NO 1 OF 2019**

**LUCY MSIGO WAITA.....PETITIONER**

**VERSUS**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL**

**HIGHWAYS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application for determination is the petitioner's Notice of Motion dated 28<sup>th</sup> July 2020 brought under Section 7 of the Appellate Jurisdiction Act and Section 75 (1) of the Civil Procedure Act and seeks the following orders:-

**i. Spent**

**ii. Court is pleased to extend time for making this application, as necessary, and grant leave to appeal to the Court of Appeal on the ground that an appeal from the ruling of Environmental and Land Court upholding the 2<sup>nd</sup> respondent's preliminary objection does not lie as of right and the ruling having been delivered on email, the intended appellant did not have an opportunity to make an oral application.**

**iii. The costs of this application are decreed to abide the results of the intended appeal.**

2. The application is grounded on the fact that the ruling of this court was delivered via email on 7<sup>th</sup> July 2020, and that the petitioner did not have a chance to make an oral application to seek leave to appeal. That the petitioner has filed and served a notice of appeal, against the decision of court to strike out the claim and upholding the preliminary objection. That the petitioner pleaded to court to extend time for making this application for leave, and grant leave to appeal to the Court of Appeal. That this application is a proper case where court should extend time, as the delay to bring this application was occasioned by the covid-19 lockdown.

3. The application is supported by the affidavits of Lucy Msigo, the petitioner herein, and Stephen Macharia Kimani, the counsel on record for the petitioner both dated 28<sup>th</sup> July 2020. Ms. Lucy Msigo stated that she has instructed her advocate to appeal the ruling of this court to the Court of Appeal, and that due to the Covid-19 restrictions, her advocate on record could not file the application for leave within time. She further pleaded with court to extend time to enable her bring this application, and grant her leave to appeal and to have her Notice of Appeal deemed as filed.

4. Mr. Kimani stated that he received the ruling from court via email dated 8<sup>th</sup> July 2020 and being dissatisfied with the ruling of court he seeks to appeal against it. He annexed a Notice of Appeal dated 14<sup>th</sup> July 2020 and marked 'B'. He further states that his office was operating in a limited manner, due to the complete closure of Mombasa Law Courts as a result of the covid-19 regulations that ensured lockdown. He further stated that the intended appeal has good chances of success as the 1<sup>st</sup> respondent has refused to answer the claim and that there is an admission that compensation money was remitted to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> respondent to pay the rightful parties. That the refusal to pay the petitioner despite no objection being recorded by the 1<sup>st</sup> respondent is a violation of her constitutional rights that should be heard on merit.

5. The application is opposed by the 1<sup>st</sup> respondent through a replying affidavit and notice of preliminary objection both dated 21<sup>st</sup> September 2020 on grounds that the application lacks merit and the intended appeal has not disclosed issues of law to be canvassed in the

appeal. The 1<sup>st</sup> respondent further stated that the petitioner had no locus standi to bring the matter, as she has no letters of administration ad litem and the application offends Section 45 of the Law of Succession Act. The 1<sup>st</sup> respondent stated that the explanation that the delay in filing the application was caused by covid-19 restrictions is not justifiable.

6. The application was canvassed by way of written submissions which were duly filed by the parties to the suit. I have considered the application herein as well as the rival submissions. The issue for determination is whether the court should extend time and grant leave to the petitioner to appeal to the court of appeal.

7. On 7<sup>th</sup> July 2020, the court made a ruling on the 2<sup>nd</sup> respondent's Notice of Preliminary Objection dated 14<sup>th</sup> October 2019 to the effect that the petition has no merit and dismissed it with costs to the respondents. The petitioner herein being dissatisfied with the ruling seeks to appeal against the ruling and the order issued thereunder, and has already filed a Notice of Appeal dated 14<sup>th</sup> July 2020. The right to appeal against an order of dismissal does not lie as of right as stated in Section 75 (1) of the Civil Procedure Act. Instead a party intending to appeal shall seek leave from the court that made the order. In this case, the petitioner has to seek leave of court to appeal, as provided by Order 43 Rule 3 of the Civil Procedure Rules which directs a party on how to proceed where leave of court has to be sought before making an appeal. The Rule states:-

**“An applications for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made or within fourteen days from the date of such order.”**

8. From the reading of the above order, the petitioner ought to have sought leave orally at the time the ruling was being delivered, or within 14 days from the date of ruling, which would be on or before 27<sup>th</sup> July 2020, However this application was filed on 8<sup>th</sup> September 2020 a period of about a month and 12 days later.

9. The petitioner relies on **Section 7 of the Appellate Jurisdiction Act** to approach court to extend time to seek leave to file an appeal at the court of appeal. The Section, gives court the power to extend time to appeal, and states that:-

**“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”**

10. With regard to extension of time to file appeal, the Supreme Court, in **Fahim Yasin Twaha vs. Timamy Issa Abdalla & 2 Others [2015] eKLR**, laid down some general principles in matters relating to extension of time. The court said:

**“As regards extension of time, this Court has already laid down certain guiding principles.....we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;**

**5. whether there will be any prejudice suffered by the respondents, if 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.”**

11. I have perused the affidavits in support of the application, and the reason is that the delay in filing this application was occasioned by the restricted movements and the scaling down of court activities as a result of covid19 restrictions. From a further scrutiny, it's evident that the petitioner's Notice of Appeal is dated 14<sup>th</sup> July 2020 and lodged in court on 20<sup>th</sup> July 2020. The question that arises is why would the petitioner file Notices of Appeal on 17<sup>th</sup> July, 2020 and make this application in September and claim that covid-19 restrictions hindered her? I find that this application is an afterthought after the petitioner realized the mistake done of lodging a Notice of Appeal instead of filing this application. The petitioner cannot turnaround and blame covid-19 restrictions as the reason why this application was not made in time. Further to that, the petitioner chose to disregard Section 75 (1) of the Civil Procedure Act, which directs an intending appellant to an order of dismissal, to seek leave from the court that issued that order, prior to filing an appeal to the Court of Appeal.

12. The requirement by Section 75 (1), to a party intending to appeal against an order to dismissal, to seek leave to the court that issued that order, ensures that the intending appellant satisfies court that the appeal is merited. It is the duty of court as provided by Section 1B (1) (c) of the Civil Procedure Act, to ensure the efficient use of the available judicial and administrative resources, and time is a scarce resource that should be used meticulously.

13. Extension of time as stated by the Supreme Court in *Fahim Yasin Twaha vs. Timamy Issa Abdalla & 2 Others (supra)*, is an equitable

right that is granted at the discretion of court on a case to case basis. An order of dismissal is a significant one, and the court takes into consideration the strength of the intended appeal when considering whether to grant leave to appeal or not. The intended appellant has to satisfy court that there is a strong case that has chances of success and not a mere frivolity, which can only be done by attaching a draft memorandum of appeal for consideration by court. The petitioner herein has not attached a draft memorandum of appeal for court to consider its chances of success, in order to determine whether to grant leave to appeal to the Court of Appeal.

14. From the reading of the Notice of Motion dated 28<sup>th</sup> July 2020, no good reason has been given to extend time to file appeal, and I am not satisfied that the petitioner has a strong appeal case with a high chance of success. Having proceeded to file an Notice of Appeal on 17<sup>th</sup> July 2020 and now file the present application on 8<sup>th</sup> September, 2020, it is my finding that the application is an afterthought and therefore I find it devoid of merit and dismiss it with costs to the 1<sup>st</sup> respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24<sup>TH</sup> DAY OF MAY, 2021**

.....

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**