REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 12 OF 2017

REPUBLIC.....….....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....RESPONDENT

AND

EPHRAHIM MURIUKI WILSON AND 4 OTHERS .....*EX PARTE* APPLICANTS

AND

THE COUNTY GOVERNMENT OF NYERI & 8 OTHERS.....INTERESTED PARTIES

RULING

1. A brief history of this file is necessary in order to put the application the subject of this ruling into proper perspective. The starting point is that by a Notice of Notion dated **1st** February 2017, the applicants sought the following orders:-

> *a) An order of Certiorari directed to the Respondent, by itself, its servants and or agents or any other officer acting under its authority to bring to the Court for the purpose of being quashed the decision made on **18th** November 2016 to continue with the hearing in the matter of the Plot No. S E.1 to E.18 (Now Block 1/422-450, Sofia Area, Karatina, Nyeri County;*
>
> *b) An order of prohibition directed to the Respondent, by itself, its servants and or agents or any other officer acting under its authority to bring to the Court for the purpose of prohibiting it from hearing the complaint in the matter of the Plot No. S E. 1 to E. 18 (Now Block 1/422-450, Sofia Area, Karatina, Nyeri County;*
>
> *c) Costs of the application.*

2. In a judgement delivered on 27th June 2018, this court extensively addressed its mind on the question of jurisdiction and held that by dint of Articles 165 (5) (b) of the Constitution as read with Article 162 (2) (b) of the Constitution and section 13 of the Environment and Land Court Act,[1] this court is divested of the jurisdiction to hear and determine the dispute in this case. The court also noted that there existed a pending case in the ELC court at Nyeri and wondered why the application was not filed in the said court.

3. Notwithstanding the finding on jurisdiction, the court proceeded to address the merits of the application, which were the *Jurisdiction of the National Land Commission* and found that under Section **14** of the National Land Commission Act, the Commission has jurisdiction to enforce Article **68(c) (v)** of the Constitution and review all grants or dispositions of *public land to establish their propriety or legality.*

4. In addition, the court addressed the issue *whether there were grounds for to review the decision of the National Land Commission* and concluded that the applicants did not demonstrate ***illegality, irrationality*** *and* ***procedural impropriety*** and dismissed the Judicial Review application on 27th June 2018.

The instant application

5. By a Notice of Motion dated 14th May 2019, the applicants seek the following orders:-

> *a. Spent.*
>
> *b. Spent.*
>
> *c. That this honorable court be pleased to stay execution of the orders of 27th June 2018 pending the hearing and determination of the intended appeal.*
>
> *d. That this honorable court be pleased to enlarge time for the applicant to file Notice of Appeal and Memorandum of Appeal out of time.*
>
> *e. That this honorable court do issue such other direction and/or orders as the court may deem just and expedient to grant.*
>
> *f. That the costs of this application be in the cause.*

6. The grounds in support of the application are that the applicants counsel was engaged as a legal adviser to the governor of Vihiga County and owing to the nature of his work he was unable to attend to this matter, and, that, there was a communication breakdown between the advocate and his clients, hence, the delay.

7. The applicants also state that they filed an application for review which they withdrew on 26th Mach 2019, and, that, they are desirous of pursuing the appeal, hence, they prayer for extension to time to file. They also state that their appeal is arguable, has a high likelihood of success and they stand to suffer prejudice if the application is not allowed.

Interested Party's Replying Affidavit

8. Fredrick Murage, the second Interested Party, the Chairperson of Nyeri County Residents Association and Sofia Area Temporary Occupation License Committee swore the Replying Affidavit dated 11th June 2019 on behalf of himself and the second to the ninth Interested Parties. He averred that the application has been brought in bad faith, and, that, the court is being used to determine a land dispute disguised as a judicial review application.

9. He averred that after they filed their Bill of Costs, the applicants applied for review but withdrew the application, and, that, the matter was referred to the Deputy Registrar for Taxation, but the applicants asked for 14 days to reply, but, instead filed the instant application.

10. He averred that the applicants are abusing court processes, and, that, the applicants are bound by the actions of their advocates. In response to the alleged breakdown of communication with the applicant's advocates, he deposed that there are numerous means of communication including physically visiting their advocate's officers.

The arguments

11. The applicants' counsel stated that he was only pursuing prayers 3, 4, 5 and 6 of the application only. He relied on the grounds cited in the application and the supporting affidavit. He placed reliance on Articles 159(2) (d) of the Constitution and sections 1A, 1B, 3A, 63 (c), 66 and 95 of the Civil Procedure Act[2] and Order 42 Rule 6, 50 Rule (5), 51 (1) of the Civil Procedure Rules. He argued that this court has powers to enlarge time to file the intended appeal and urged the court to exercise its powers under the foregoing.

12. The applicant's counsel also argued that the court is required to consider the period of the delay, the explanation for the delay, and argued that the application was filed after one year. He also argued that the court is required to consider possible prejudice to the other party and whether a party can be compensated by way of damages.

13. He submitted that the applicant has explained the reason for the delay and placed reliance on *Jennifer Njuguna & Another v Robert Kamiti Gichuhi*.[3] Counsel further argued that there was no inaction on the part of the applicant. He submitted that the delay has been explained and that the intended appeal raises good grounds. He argued that the question was whether the applicants proved illegality, irrationality and procedural impropriety which deserves to be argued on appeal. He argued that the Respondents will not suffer prejudice and the only issue will be costs. He relied on *George Kainda & Katumbi v Judith Katumbi Kathenge & Another*.[4] On the costs, he argued that the same is part of the intended appeal and urged the court not to permit the appeal to be rendered nugatory. He placed reliance on *Rhodha Mukuma v John ASbuoga*.

14. The Respondents counsel adopted his written submissions filed on 24th July 2019. He argued that the considerations to be born in mind are the length of the delay, reasons for the delay, possible prejudice (if any) on each party, and how the court exercises discretion. In addition, he argued that the court also considers the conduct of the parties and the need to balance the interests of the successful party.

15. It was his submission that the applicants admitted the delay and argued that the reason offered is not sufficient. He cited *Annah Mwihaki Wairuru v Hannah Wanja Wairuru*[5]for the holding that the decision to extent time for filing a Notice of Appeal is discretionary. He also cited *Masisi Mwita v Damaris Wanjiku Njeri*[6]for the requirements of stay under order 42 of the Civil Procedure Rules, which include the need to demonstrate substantial loss and for an applicant to provide security and argued that a successful party is entitled to enjoy the fruits of his judgment.[7] He described the application as an abuse of court process.

16. Lastly, counsel submitted that Article 159(2) (d) of the Constitution cannot come to the applicants aid in the circumstances of this case. For this proposition he cited *Zacharia Okoth Obado v Edward Akongo Oyugi & 2 Others*.[8]

Determination

17. The first issue to consider is whether the High Court has jurisdiction to grant extension of time to file an appeal to the Court of Appel. This question was not raised before me, but I find it useful to address it. The same question has arisen in several cases in the High Court, with a section of the High Court holding that the High Court lacks such jurisdiction to extent time for filing of Notice of Appeal in the Court of Appeal, and others holding that the High Court has jurisdiction.

18. In *Simon Towett Martim v Jotham Muiruri Kibaru*,[9] the High Court held that Rule 4 of the Court of Appeal Rules grants the Court of Appeal exclusive jurisdiction to grant extension of time to file an Appeal to the Court of Appeal. The judge (Kimaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for extension of time to lodge Notice of Appeal out of time.

19. In *Edward Njane Nganga & another v Damaris Wanjiku Kamau & another*, the High Court (Waithaka J)[10] after reviewing High Court and Court of Appeal decisions disagreed with the argument

that the High Court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time.

20. The Court of Appeal had the opportunity to pronounce itself on the same subject in *Kenya Airport Authority & another v Timothy Nduvi Mutungi*.[11] The relevant excerpt reads as follows:-

> *"It is evident that on 10th December 2012, the 1st applicant filed High Court Misc. Application No. 709/2012 seeking three orders namely; leave to lodge a notice of appeal out of time; extension of time within which to file suit and stay of execution of the judgment of the High Court…. at the hearing of the application the learned Judge made it clear that he was not willing to grant the orders sought. On his part, the respondent contends that that application should have been filed in this Court and not in the High Court which had no jurisdiction.*
>
> *The proceedings of the High Court show that on 17th June, 2013 the respective counsel agreed, amongst other things, and the learned Judge so ordered, that the 1st applicant herein should seek leave, extension of time and stay of execution in this Court within 30 days of the date of the order.*
>
> *The application of 10th December, 2012 was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of Court of Appeal Rules which provides:-*
>
> > ***"The High Court may extend time for giving notice of intention to appeal from a Judgment of the High Court or making an application for leave to appeal or for a certificate that the case is fit appeal notwithstanding that time for giving such notice or making such appeal may have already expired."***
>
> *Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined and since the present application was made within the 30 days stipulated by order of the High Court made by consent on 17th June 2013, the delay which is material is from the date following the delivery of the impugned Judgment (that is 9th October, 2012) to 10th of December, 2012 when the application for extension of time was made in the High Court. That is a delay of about 2 months which is not relatively inordinate considering the nature of the proceedings and which delay has been reasonably explained as largely systemic."*

21. The above being the position, I find and hold that this court has the jurisdiction to determine an application for extension of time to file a Notice of Appeal out of time. Having so concluded, the next step is to consider the guiding principles. The Court of Appeal in ***Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited[12]*** **had this to say:-**

> ***"The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour."***

22. It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.[13] **The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. It is not possible to draw a closed list.**

23. The court has to balance the competing interests of the applicant with those of the respondent.

This is consistent with the holding in *M/S Portreitz Maternity v James Karanga Kabia**[14]** that:-*

> *"**That right of appeal must be balanced against an equally weighty right, which 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."***

24. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others**[15]** succinctly laid down the principles to guide courts in applications for extension of time as follows:-

> *"… we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:*
>
> *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."*

25. A common definition of judicial discretion is the act of making a choice in the absence of a fixed rule, i.e. statute, case, regulation, for decision making; the choice between two or more legally valid solutions; a choice not made arbitrarily or capriciously; and, a choice made with regard to what is fair and equitable under the circumstances and the law. Whenever the court is invested with the discretion to do certain act as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary manner and capricious manner. The classic definition of "discretion" by Lord Mansfield in *R. vs. Wilkes**[16]** is that "discretion" when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, "but legal and regular."

26. Discretion must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in *Rookey's Case*[17] stated as follows:-

> *"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."*

27. The discretionary powers of the court are constrained by the objectives of the Constitution to grant access to justice. 'Discretion' signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard— what is 'just and

equitable' — which calls for an overall assessment in the light of the factors mentioned in the Constitution or a statutory provision, each of which in turn calls for an assessment of circumstances.[18] Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends.[19] There is nothing arbitrary or capricious about exercising a discretion in order to give effect to a constitutional right.

28. Broadly speaking, the exercise of the court's discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it. In this regard what an applicant is required to show, in essence, is a reasonable explanation for his default (it has also sometimes been described as an "acceptable" explanation. **A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercised. (See** *Monica Malel & Anor v R, Eldoret*[20]**).**

29. **The reason given is that the applicants advocate was engaged elsewhere and that there was a breakdown of communication. I find it unconvincing that for a whole year the applicants could not contact their advocate in this era of modern communication. It is on record that the same applicant had applied to review the judgment and the court cautioned the advocate that they were citing grounds for appeal as opposed to grounds for Review prompting the counsel to withdraw the application. It also on record that the matter subsequently came up for taxation of the Respondents' Bill of Costs and the applicants asked for time to reply only to come up with the present application. Viewed in the context of the history of this file and the one year delay, I find and hold that the reason cited for the delay cannot unlock this courts discretion.**

30. The next question is whether the delay was inordinate. The judgment was delivered on was rendered on **27th** June 2018. The applicants moved this court on **14th** May 2018, after a delay of **0** months and **10** days. I am persuaded that the said period amounts to an inordinate delay. The said delay has not been sufficiently accounted for.

31. The next hurdle is whether the applicants have satisfied the requirements of Order **42** of the Civil Procedure Rules, 2010 which provides as follows:-

> *(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*
>
> *(2) No order of stay shall be made under sub rule (1) unless-*
>
> > *(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and*
> >
> > *(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant*

32. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. The Court of Appeal in the case of *Butt v Rent Restriction Tribunal*[21] while considering an application of this nature had this to say:-

a. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

b. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

d. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

33. It is clear from the wording of Oder **42** Rule **6 (1)**, for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; **(a)** *Substantial loss may result to the applicant unless the order is made;* ***(b)*** *The application has been made without undue delay;* ***(c)*** *such security as to costs has been given by the applicant.*

34. The corner stone of the jurisdiction of the court under Order **42** of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.[22]What constitutes substantial loss was broadly discussed in *James Wangalwa & Another vs Agnes Naliaka Cheseto***[23]** where it was held *inter alia* that:-

> *"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself , does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.*
>
> *The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of* ***Silverstein vs. Chesoni****,**[24]**...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"*

35. In *Equity Bank Ltd vs Taiga Adams Company Ltd*,[25] the court stated that the only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. The applicants never addressed the question whether they would suffer substantial loss.

36. Apart from proof of substantial loss the applicant is enjoined to provide security.[26] The applicants' counsel never addressed this requirement at all. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay.[27] The offer for security must come from the applicant as a price for stay. **In *Equity Bank Ltd vs Taiga Adams Company Ltd***[28]**it was held that:-**

> *"...of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought…let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay…"*

37. In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory.[29] These twin principles go hand in hand and failure to prove one dislodges the other. It should also be noted that the judgment in question

never granted any positive order. This is because the application for judicial review orders was dismissed. Essentially, there is nothing to stay. There is no order from this court to be stayed. The only order is recovery of costs. The bill is yet to be taxed and even it had been taxed I find no reason to grant stay.

38. I find that the applicants have not satisfied the tests for granting the orders sought. The only order that commends itself in this case is dismissal. Accordingly, I dismiss the applicants' application dated 14th May 2019 with costs to the Interested Parties.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 21st day of November 2019

John M. Mativo

Judge.

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[1] Act No. 19 of 2011.

[2] Cap 21, Laws of Kenya.

[3] {2017} e KLR.

[4] {2018} e KLR.

[5] {2017} e KLR.

[6] {2016} e KLR.

[7] Citing *Masisi Mwita v Damaris Wanjiku Njeri*, {2016} e KLR.

[8] {2014} e KLR.

[9] Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004, {2004} e KLR.

[10] {2016} e KLR.

[11] {2014} e KLR.

[12] **{2015} eKLR.**

[13] See *Leo Sila Mutiso vs. Rose Hellen Wangare Mwangi* Civil Application No. NAI 255 of 1997 (UR).

[14] *Civil Appeal No. 63 OF 1997.*

[15] {2014} eKLR.

[16] 1770 (98) ER 327.

[17] [77 ER 209; (1597) 5 Co.Rep.99].

[18] *Norbis v Norbis* [1986] HCA 17; 161 CLR 513; 60 ALJR 335; 65 ALR 12.

[19] Ibid.

[20] *Civil APP No. NAI 246 of 2008.*

[21]Civil App No. NAI 6 of 1979.

[22] See Gikonyo J in HCC NO. 28 of 2014, *Trans world & Accessories (K) Ltd vs Commissioner of Investigations & Enforcement*.

[23] HC Misc No. 42 of 2012, {2012} eKLR.

[24] {2002} 1 KLR 867.

[25] {2006} e KLR.

[26] See judgement in Republic vs Commissioner for Investigations & Enforcement,Misc App no 51 of 2015 (NBI).

[27] Ibid.

[28] Supra.

[29] As was held in *Hassan Guyo Wakalo vs Straman EA Ltd* {2013}eKLR.