



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 576 OF 2005

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CLERK TO KANGEMA TOWN COUNCIL.....1ST RESPONDENT

KANGEMA TOWN COUNCIL.....2ND RESPONDENT

EX PARTE :

- 1. KANGEMA JUA KALI ASSOCIATION**
- 2. CYRUS GACHOKA MUNYIRI**
- 3. JAMES MWANGI NJAU**

RULING

The Application

1. The *ex parte* Applicants herein, Kangema Jua Kali Association acting through Cyrus Gachoka Munyiri and James Mwangi Njau, initially filed judicial review proceedings herein by way of a Notice of Motion dated 11th May 2005, in which they sought orders of mandamus and prohibition against the 1st and 2nd Respondents with respect to the development of Plot No. Kangema Township/102. The said Notice of Motion was *heard inter partes*, and a ruling delivered thereon by Emukule J. on 10th May 2006, in which he made various declarations and orders as regards the title to Kangema Township/102 which were largely in favour of the Applicants.

2. The Applicants subsequently filed another application by way of a Notice of Motion dated 3rd September 2016, seeking orders for contempt of court, which was heard and dismissed by Odunga J. in a ruling delivered on 20th September 2018. The Applicant yet again filed another application by way of a Notice of Motion dated 8th December 2016 seeking review of the orders given by Emukule J. on 10th May 2006, which application was also dismissed by Odunga J. in a ruling delivered on 29th September 2017.

3. The 3rd Applicant has now moved this Court by way of a Notice of Motion dated 20th April 2018, seeking leave to appeal the ruling of Emukule J. delivered on 10th May 2006, and that of Odunga J. delivered on 20th September 2017, out of time. The grounds for the instant application is that the Applicants did not file the Notice of Appeal against the said rulings within 14 days, and that Emukule J. and Odunga J. erred in their rulings. The 3rd Applicant gave details of the alleged errors in the said rulings, and stated that he has an arguable appeal which has a high chance of success.

4. The Respondents did not file any responses to the Notice of Motion, whereupon this Court directed the 3rd Applicant to file his submissions on the application.

The Determination

5. The issue before this Court is whether it can grant leave to the 3rd Applicant to appeal the rulings made herein on 10th May 2006 and 29th

September 2017 out of time. The 3rd Applicant in his submissions relied on Article 23 of the Constitution to argue that this Court has jurisdiction to hear an determine applications for redress of infringement of rights, and that the Applicants are aggrieved by the orders of this Court of 10th May 2006 which related to a plot 4(2) which the Applicants had no interest in. Further, that the Respondents herein have never obeyed any of the Courts orders, rendering the 1st Applicant's members destitute.

6. Section 7 of the Appellate Jurisdiction Act provides as follows as regards this Court's discretion to grant leave to file an appeal out of time from its rulings and judgments:-

“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:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

7. This discretion is granted only with respect to an intention to appeal, which is by way of a Notice of Appeal. Further, the principles that guide a court in considering an application for leave to file a Notice of Appeal out of time were laid down by the Court of Appeal in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) as follows:

“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”.

8. In the present application, the rulings sought to be appealed against were delivered on 11th May 2006, and 20th September 2016. One of the rulings sought to be appealed against was therefore delivered over ten years ago, and the other two years ago. No explanation was given by the 3rd Applicant for their failure to file the necessary Notices of Appeal in time, to guide this Court in the exercise of its discretion, and particularly given that he states that there were errors in the said rulings. There is also the likelihood that considerable prejudice may be caused to the Respondents if asked to defend an appeal on a ruling that was delivered over ten years ago.

9. In addition, some of the issues the 3rd Applicant seeks to address in the appeal as regards the clarity of the orders of this Court, and disobedience of this Courts orders can adequately be canvassed in proceedings before this Court. Lastly, on the form of the application, I note that the 3rd Applicant describes himself in the supporting affidavit as the Secretary of the 1st Applicant, which is Kangema Jua Kali Association, and stated that he has authority to bring the application. No authority from the members and/or officials of the said Association was however annexed.

10. I decline to exercise my discretion in the 3rd Applicant's favour for the foregoing reasons, and dismiss the 3rd Applicant's Notice of Motion dated 20th April 2018 with no order as to costs.

11. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE