



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, J.A. - IN CHAMBERS)**

**CIVIL APPLICATION NO. 325 OF 2018**

**BETWEEN**

**JAMES LENGES.....APPLICANT**

**AND**

**THE HON. ATTORNEY GENERAL.....1ST RESPONDENT**

**SIKADA LEPAIYELE LETOWON.....2ND RESPONDENT**

**CHARLES LESAUTYA.....3RD RESPONDENT**

**SANAIYA LESASUTYAN.....4TH RESPONDENT**

**PILALO LIKULOLESIT.....5TH RESPONDENT**

**BABA SIKANDA.....6TH RESPONDENT**

**JAMES LELESIT.....7TH RESPONDENT**

**ABDULLAHI LENGES.....8TH RESPONDENT**

**KUWUWA LETOWON.....9TH RESPONDENT**

**JEREMIAH LENAPATIDA.....10TH RESPONDENT**

**MAMA SIMITIN LELESIT.....11TH RESPONDENT**

**TERESIAN LOROBAT.....12TH RESPONDENT**

*(Being an application for extension of time to file an appeal out of time*

*to the decision of the Environment and Land Court (Okong’o, J.)*

*dated 4th November 2017 in Nairobi ELC No. 2918 of 1997)*

\*\*\*\*\*

**RULING OF THE COURT**

Before me is a Notice of Motion dated 9th November, 2018 under **Rule 4** of the Court of Appeal Rules seeking extension of time to file an appeal against the ruling and orders of **Okong’o, J.** dated 4th November, 2017 in ELC No. 2918 of 1997 out of time, together with an attendant order that costs of the application do abide the outcome of the appeal. It is supported by grounds on its body and a supporting affidavit sworn by **Richard M. Mutiso** together with annexures thereto. It has not been opposed. It has been canvassed through applicant’s sole pleadings and written submissions.

Supporting the application, the applicant relying on averments in the supporting affidavit and written submissions contends that he filed HCCC No. 2918 of 1997 seeking revocation of the second adjudication in land parcel No. Poro "B" 30 (the suit property) comprising 155 acres claiming sole proprietorship of the suit property. The case was dismissed on 4th November 2016 and each party directed to bear own costs. The applicant was aggrieved and timeously filed a notice of appeal simultaneously with a letter bespeaking certified copies of proceedings and ruling both served on the opposite parties on 15th November 2016. It was not until 5th February 2018 when his advocate was supplied with certified copies of proceedings and ruling, while the certificate of delay was issued on 8th March 2018, by which time, time for lodging of an appeal as of right had long lapsed hence the filing of the application under consideration to validate that process.

Further, that the advocate on record for the applicant also faced serious communication challenges between them with their client who could only be reached through emails sent to him through the office of the area chief at Poro Samburu. He is also of advanced age, a person who faced difficulties in raising legal fees for appellate purposes. Lastly, that the respondent stands to suffer no prejudice if the reliefs sought were granted to accord the applicant an opportunity to actualize the intended appellate process.

To buttress the above submissions, applicant's advocates have cited the case of **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others** [2013]eKLR and **Donald O. Raballa vs. Judicial Service Commission & Another** [2020]eKLR; in which the decision in the case of **Fahim Yasin Twaha vs. Timamy Issa Abdalla & 2 Others** [2015] eKLR was approved on the now crystallized principles that guide the Court in the exercise of its discretionary mandate to extend time; **Belinda Murai & 9 Others vs. Amos Wainaina** [1979]eKLR that justice is a living and moving thing and that the role of the judiciary is to keep the law matching in line with the trumpets of progress. Lastly, the case of **Abbas Sherally & Another vs. Abdul Fazaiboy**, Civil Application No. 33 of 2003 on the right to be heard which is not only constitutionally entrenched but also the cornerstone of the rule of law.

My invitation to intervene on behalf of the applicant has been invoked under **Rule 4** of the **Court of Appeal Rules**. The uncontroverted position in the application is as set out above. I say uncontroverted because the opposite party despite being served with the application and hearing notice for the hearing of the application served electronically by the deputy registrar of the Court on Feb. 23, 2021 at 10.12am there has been no reaction from the respondents. Lack of response on the part of the respondent notwithstanding, I am obligated in law to render a merit decision on the matter.

The principles that guide the Court in the exercise of its mandate under rule 4 of the Court of Appeal Rules have now been crystallized by both this Court and the Supreme Court. I take it from (**M.K. Ibrahim & S.C. Wanjala SCJJ**) in

**Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others** [2013]eKLR as follows:- *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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.*

Applying the above threshold to the uncontroverted position herein, the factors I am obligated in law to take into consideration when determining an application of this nature are the length of delay, reasons for the delay, possibility of the arguability of the appeal and lastly the degree of prejudice to be suffered by the opposite party if the reliefs sought were granted.

On the length of the delay, the uncontroverted position is that the intended impugned decision was rendered on 4th November 2016. The applicant timeously complied with **Rule 75(2)** of the Court's **Rules** by timeously filing the notice of appeal annexed to the application on 9th November, 2016. **Rule 82(1)** of the Court's **Rules** obligated the applicant to file the record of appeal within sixty (60) days of the date of the lodging of the notice of appeal namely, 9th November, 2016. The applicant was unable to comply with that timeline for reason advanced above. The proviso to **Rule 82(1)** accords him reprieve firstly if he complied with the prerequisite to apply for a certified copy of the proceedings and cause a copy of the letter bespeaking proceedings to be served on the opposite party on the one hand and to get a certificate of delay on the other hand, both of which the applicant complied with.

To fortify that position, the applicant has annexed numerous correspondences addressed to the deputy registrar of the Court appealed from inquiring about the progress on the typing of the proceedings resulting in the certificate of delay dated 8th March, 2018. It therefore merits that the period between the date of the lodging of the notice of appeal and the issuance of the certificate of delay have to be discounted. When so discounted the period started running afresh from 8th March, 2018. The application is dated 9th November 2018 which is a period of eight (8) months from the date of capacitation to the date of taking action. The uncontroverted explanation are communication challenges between advocate and client.

In In **George Mwendu Muthoni vs. Mama Day Nursery and Primary School, Nyeri C.A No. 4 of 2014 (UR)**, extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months, while in **Aviation Cargo Support Limited vs. St. Marks Freight Services Limited** [2014]eKLR, the relief for extension of time was declined for the applicant's failure to explain why the appeal was not filed within sixty (60) days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six (6) months to seek extension of time within which to comply.

Applying the above threshold to the uncontroverted position herein, I am satisfied the period involved in the presentation of the application upon capacitation with certified copies of proceedings is not one that can be termed inordinate. The explanation given is also plausible, reasonable and therefore excusable.

On the possible arguability of the intended appeal no draft memorandum of appeal is exhibited. This default is however not fatal. First, it is due to the fault of counsel on record for the applicant who failed to exhibit a draft memorandum of appeal. It should not therefore be visited against the innocent litigant. Second, the law enjoins me to discern these from the supporting facts. Paragraph 3 of the supporting affidavit is explicit that applicant intends to challenge the second adjudication as according to him the entire suit property belongs to him. In law no

number of grounds is required to be raised to satisfy this threshold. Even one single bona fide ground will suffice. By bona fide means one that will invite a response from the opposite party and warrant interrogation by the Court. I have no doubt what is raised in paragraph 3 of the supporting affidavit is such bona fide issue as it will definitely invite a response from the respondent and therefore warrants interrogation by the Court.

As for prejudice to be suffered by the opposite party, if the relief sought were granted, none has been raised by the respondents for their failure to respond both to the application and deputy registrar's letter of invitation for the respective parties to file written submissions.

In the result, I find merit in the application. It is accordingly allowed as prayed.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**