



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, JA – IN CHAMBERS)

CIVIL APPLICATION NO. 67 OF 2020

BETWEEN

THE REGISTERED TRUSTEES CHURCH OF GOD

IN EAST AFRICA (K).....APPLICANT

AND

FREDRICK MAEGWE MATARA.....1ST RESPONDENT

EMMANUEL OTIANGALA.....2ND RESPONDENT

BOAZ OTANGA.....3RD RESPONDENT

NEWTON ANUNDA..... 4TH RESPONDENT

DEBORA OMUKOKO.....5TH RESPONDENT

ROSE NABUTO.....6TH RESPONDENT

JARED OTENYI.....7TH RESPONDENT

JOSEPHINE OYARO.....8TH RESPONDENT

JANE AMUKOA.....9TH RESPONDENT

(Being an application for extension of time within which to file an appeal out of time from the Environment and Land Court (Hon. A. K. Kaniaru, J.) dated 25th July 2019

in

Busia ELC No. 198 of 2014

RULING OF THE COURT

Before me is a notice of motion dated 25th June, 2020 under sections 3(2), 3A and 3B of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya and Rule 4 of the Court of Appeal Rules, substantively seeking extension of time within which to file an appeal out of time against the ruling of A. K. Kaniaru, J. delivered on 25th July, 2019 in Busia High Court Case No. ELC No. 198 of 2014.

The application is supported by grounds on its body and a supporting affidavit of RT. Rev. James Obunde sworn on 25th June, 2020 together with annexures thereto. It has been opposed by a replying affidavit of Jane Amukoa sworn on 29th January, 2021 together with annexures. The application was canvassed through the respective parties rival pleadings and written submissions without oral highlighting.

Supporting the application, the applicant submits, that the intended impugned ruling was delivered on 25th July in their absence. Their

advocates only came to learn of the delivery of the ruling on 26th August, 2019 when they were served with a bill of costs arising from the same ruling dated 1st August, 2019. Their advocates immediately brought this to their attention on 28th August 2019. Being a church community, a resolution needed to be given by the governing committee for the institution of an appeal. It was not until the 12th September, 2019 that the resolution was made following which the applicant gave instructions to their advocate on 14th September, 2019 to initiate the appellate process by which time, time for appealing as of right had long lapsed. They moved to the ELC and filed an application on 20th September, 2019 seeking leave to appeal which was struck out by the ELC in March, 2020. Soon thereafter, Covid-19 pandemic set in, posing challenges on the administration of justice. It was not until 25th June, 2020 when they managed to file the application under consideration.

They rely on the case of **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014]eKLR**; **Nyaigwa Farmers' Co-operative Society Limited vs. Ibrahim Nyambare & 3 Others [2016] eKLR**; **Moroo Polymers Limited v Wilfred Kasyoki Willis [2019] eKLR**; **Vishva Stone Suppliers Company Limited vs. RSR Stone [2006] Limited [2020] eKLR**; **Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR**; all on principles that guide the exercise of the Court's mandate under Rule 4 of the Court's Rules.

It is on the basis of the above threshold that applicant contends that they have brought themselves within the ambit of the prerequisites for granting relief to a deserving party under the above cited **Rule**. They submit they are such a deserving party because they only came to learn of the delivery of the ruling on 26th August, 2019 thirty (30) days after its delivery and by which time, time for initiating the appellate process as of right had long lapsed. They also moved with speed to capacitate their advocate to initiate the appellate process as soon as they were capacitated by a relevant resolution from the governing body of the applicant. They moved with speed to file the application before the ELC and moved to this Court as soon as their application to the ELC was struck out for being incompetent for want of jurisdiction in the Court to grant the relief sought.

Lastly, that the intended appeal is arguable with high chances of success as it seeks to challenge the ELC's discretionary refusal to restore the suit dismissed for want of prosecution. Second, that no prejudice will be suffered by the respondent if the relief sought were granted to them as prayed.

In rebuttal, the respondent concedes that applicant's suit was indeed dismissed for want of prosecution. They (applicants) subsequently filed two applications, one for reinstatement and another for stay of execution both of which were also dismissed for want of prosecution. Applicant also filed an application seeking leave to appeal which was struck out for want of jurisdiction. The application under consideration filed eleven (11) months after the delivery of the intended impugned ruling in the respondents' opinion is not only unreasonable but also inordinate. They stand to suffer great prejudice as they have to use their own money to defend themselves in the numerous litigations applicant has been initiating against them unlike the applicant which has the advantage of using funds collected from the public. They also contend that no public interest issue is involved in the litigation as all that applicant sought to do was to bar her from accessing her own church. The other reason for opposing the application is that the litigation has been pending from 21st February 2012 close to nine (9) years and yet it has not been heard on its merit. Ends of justice would therefore demand that it be brought to an end.

My invitation to intervene on behalf of the applicant has been invoked substantively under provisions of law cited in the heading of the application. It is sufficient for me to state that the substantive rule for accessing the relief sought is **Rule 4** of the Court's **Rules** which falls for interrogation. **Sections 3(2), 3A and 3B** of the **Appellate Jurisdiction Act** enshrines the general mandate of the Court and the overriding objective principle of the Court which I find no need to expound. It is sufficient for me to say that the overriding objective principle enjoins me to bear in mind the principle of expeditious resolution of disputes and exercise greater latitude in the dispensation of justice.

Principles that guide the Court in the exercise of its mandate under **Rule 4** of the Court's **Rules** are as crystallized by the Supreme Court, **(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.

I have applied the above parameters to the rival position herein. The factors I am enjoined to consider when deciding either way are the length of the delay, reasons for the delay, arguability of the appeal (possibly), and, lastly, prejudice to be suffered by the opposite party if the application were to succeed.

On delay, it is common ground that the period involved is eleven months.

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 days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply.

Applying the threshold in the above two cases, I am satisfied a period of eleven (11) months delay is not so inordinate as to disentitle a party an opportunity to exercise an appellate right.

On the reason for the delay, the major one fronted by applicant is that the intended impugned ruling was delivered in their absence and that by the time they came to learn of its existence time for initiating the intended appellate processes as of right had run out, which has not been controverted. It is, therefore, not only plausible but also reasonable. The second is that they unsuccessfully and erroneously sought the

Court's intervention in the ELC for leave to appeal. A position confirmed by the respondent, which I also find excusable as it was the applicant's advocates mistake that he sought relief from a wrong forum.

On arguability of the intended appeal, they intend to challenge the ELC's exercise of discretion in declining their request to set aside the order for dismissal of the suit for want of prosecution and restore it for merit disposal which I find arguable. In law an arguable appeal is not one that must succeed but one that warrants a response from the opposite party and interrogation by the Court.

Issue as to whether the Court exercised its mandate judiciously or otherwise is arguable notwithstanding that it may not ultimately succeed.

As for prejudice, the major complaint raised by the respondent is issue of incurring costs in defence of numerous off shoot litigation at the instance of the applicant which in my view can be compensated for by an order for costs.

In the result, I am satisfied applicant has satisfied the threshold for exercise of discretion in its favour under the **Rule 4** of the Court's **Rules** procedures. The application is therefore allowed on the following terms:

- 1. Applicant has fourteen (14) days of the date of this ruling to file and serve a notice of appeal.**
- 2. Thereafter to proceed according to the law.**
- 3. The respondent will have costs of the application.**

DATED and DELIVERED at NAIROBI this 5th day of March, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR