IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, JA – IN CHAMBERS)

CIVIL APPLICATION NO. 11 OF 2020

(Being an application for extension of time to file the memorandum of appeal against the

judgment of the Environment and Land Court (Hon. J.G. Kemei, J.)

dated 5th December, 2019

in

Murang'a ELC No. 50 of 2017

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ZACHARIA KAMAU MWANGI........................APPLICANT/APPELLANT

VERSUS

ESTHER WANJIRU MWANGI...1ST RESPONDENT

NGURE GITAU..2ND RESPONDENT

RAHAB WANJIRU NJUGUNA.......................................3RD RESPONDENT

RULING OF THE COURT

Before me is a Notice of Motion dated 2nd January, 2020 under sections **1A**, **1B**, **3A** and **79G** of the **Civil Procedure Act, Cap 21, Laws of Kenya**, substantively seeking leave of the Court to allow the applicant file his intended memorandum of appeal out of time and that the costs of the application be in the cause.

The application is supported by grounds on its body and a supporting affidavit sworn by **Zacharia Kamau Mwangi**, together with annexures thereto. It has been opposed by a replying affidavit of **Diana Odero** sworn on 19th March, 2021. It was canvassed through rival pleadings in the absence of learned counsel for the respective parties and without oral highlighting.

Supporting the application, the applicant avers that he was aggrieved by the whole of the trial's court judgment delivered on 5th December, 2019 and timeously filed a notice of appeal on 19th December, 2019, simultaneously with the letter bespeaking certified copies of proceedings and judgment for appellate purposes supplied on 7th January, 2020 by which time the requisite timeline for filing an appeal had long lapsed. It is on the basis of the above that the applicant asserts that the delay in bringing the application under consideration is not so inordinate or so great so as not to be inexcusable to warrant disentitling him to the relief especially in the circumstances herein where there is demonstration that the respondents will not suffer any prejudice if the relief sought were granted to him.

The respondents, are not opposed to the application on condition that the applicant does deposit in court the total decretal amount of Kshs. 3,701,122/= (awarded to them) as security for costs as they are apprehensive of his ability to pay both costs of the appeal as well as the decretal amount involved.

My invitation to intervene on behalf of the applicant has been invoked under the provisions of law cited under **sections 1A**, **1B**, **3A** and **79G** of the **Civil Procedure Act, Cap 21, Laws of Kenya**, all of which do not fall for consideration in an application of this nature. They are accordingly struck out. The striking out of the provisions of law cited as access provisions for the relief sought will not vitiate the

application. I will invoke the inherent power of the Court enshrined in **Rule 1(2)** of the Court's **Rules** and **Article 159(2)(d)** of the Constitution of Kenya enshrining the non-technicalities principle and sustain the application for merit disposal.

The appropriate provision of law falling for interrogation in an application of this nature and which the applicant ought to have cited as the access provision for the relief sought is **Rule 4** of the **Court of Appeal Rules**. It provides as follows:

> **"The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."**

The principles that guide the court in the exercise of its mandate under the said Rule have been crystalized by case law both by the Court and the Supreme Court of Kenya.

I take it from the Supreme Court of Kenya decision **(M.K. Ibrahim & S.C. Wanjala SCJJ)** in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others** **[2013]eKLR** in which the principles that guide the applicable threshold and which I fully adopt were restated 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.*

From the above exposition, the factors I am enjoined to bear in mind when determining an application of this nature are but not limited to the length of the delay, reasons for the delay possibly arguability of the intended appeal and lastly prejudice to be suffered by the respondent should the relief sought be granted. On the length of the delay judgment was delivered on 5th December, 2019 while the application under consideration is dated 2nd January, 2020, a period of twenty-eight (28) days. From the date of capacitation of 7th January, 2020 to the date of the application is thirteen (13) days.

In **George Mwende 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 rival position herein, I am satisfied that the delay involved is not so inordinate so as to disentitle the applicant to the relief sought.

As for reasons for the delay, what has been proferred and not controverted is the delay in supplying certified copies of the proceedings and judgment for appellate purposes which I find plausible, reasonable and excusable as the same has been sufficiently demonstrated on record to be the position.

On arguability of the intended appeal, the applicant relies on four (4) proposed grounds of appeal which the respondent claims are not arguable. These may be paraphrased albeit in summary form as follows: the learned Judge erred both in law and fact by: ruling that the respondents were entitled to a refund of Kshs. 3,470,000/= whereas the initial sale agreement was for a sum of Kshs. 764,000/=, failing to consider that the valuer's report was grossly exaggerated and was single sourced by the respondent's valuer - a fact that is potentially detrimental to the applicant, stating that the applicant did not inform the respondent about the pending court case at Kigumo Law Courts whereas there was no pending case in any court by the time the sale agreement was written and holding that the applicant was at fault and proceeded to penalize him despite the fact that the applicant did not author any of the alleged mistakes, hence, he arrived at the wrong finding since he failed to consider the orders dated 22nd September, 2009 and decree dated 3rd August, 2009 while the sale agreement was dated 9th November, 2011.

The position in law as crystallized by the principles of case law restated by the Supreme Court of Kenya highlighted above, is that an arguable appeal need not be one that must necessarily succeed, but one that warrants not only an invitation of the opposite party to respond thereto, but one that also warrants the Court's interrogation. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd.** & **2 Others, Civil Application No. 124 of 2008**. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**.

Applying the above threshold to the proposed grounds of appeal highlighted above, I have no doubt they would all warrant the respondent's response thereto as well as the Court's interrogation. They are therefore arguable.

On prejudice likely to be suffered by the respondents should the relief sought be granted, the respondents argue that there is risk of being highly prejudiced should the appeal proceed without prior provision as to security for costs and the decree.

I have considered this argument in light of the principles that guide the exercise of the Court's mandate under **Rule 4**. None of them deals with provision for security either for the decree or costs. These are considerations falling for consideration in an application under **Rule 5(2)(b)** of the Court's **Rules.** They are therefore discounted.

In the result, I am satisfied that the applicant has satisfied the threshold for exercise of the Court's discretionary mandate under **Rule 4** of the

Court of Appeal Rules in his favour.

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 the memorandum of appeal.**
2. **Thereafter to proceed according to the law.**
3. **Costs of the application to abide the outcome of the intended appeal.**

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 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