



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, J.A - IN CHAMBERS)

CIVIL APPLICATION NO. 349 OF 2019

BETWEEN

GEORGE KANG'ETHE WARUHIU..... APPLICANT

AND

ESTHER NYAMWERU MUNENE.....1ST RESPONDENT

SOLOMON NGA'NGA WARUHIU.....2ND RESPONDENT

(An application for extension of time to file Notice of Appeal out of time and certification to appeal to the Supreme Court of Kenya against the Judgment of the Court of Appeal at Nairobi (Waki, Nambuye & Gatembu, JJA) dated 8th March, 2019

in

(Civil Appeal No. 168 of 2013)

RULING

The applicant, **George Kang'ethe Waruhiu** filed a Notice of Motion dated **5th November 2019**, pursuant to **Article 163(4)** of the Constitution, **Rules 4, 5(2)(b)** and **47** of the Court of Appeal Rules, 2010 and **Rule 24** of the Supreme Court Rules 2012, seeking the following orders:

“1. Spent.

2. That this Honourable Court be pleased to extend the time for filing a Notice of appeal against the Judgment of P.N Waki, R.N Nambuye and S. Gatembu Kairu, JJA delivered on 8th March 2019 in Nairobi Civil Appeal No. 168 of 2013.

3. That the Applicant's Notice of appeal against the whole Judgment of P.N Waki, R.N Nambuye and S. Gatembu Kairu, JJA delivered on 8th March 2019 in Nairobi Civil Appeal No. 168 of 2013 filed on 14th October 2019 be deemed duly filed and properly on record.

4. That this Honourable Court be pleased to grant the Applicant leave to file this Application out of time.

5. That this Honourable Court be pleased to certify that this matter herein is of general public importance for which an appeal can lie from the Court of Appeal to the Supreme Court.

6. That once the orders 1,2,3,4 and 5 above are granted, this Honourable Court be pleased to issue an order of stay of execution of the Judgment and orders of N. Waki, R.N Nambuye and S. Gatembu Kairu, JJA delivered on 8th March 2019 in Nairobi Civil Appeal No. 168 of 2013 pending the hearing and determination of the Applicants intended Appeal to the Supreme Court.”

Briefly, the background of the application stems from a dispute between the children of the late Senior Chief **Waruhiu**. The late chief had five wives and when he died intestate, a fifty five acre farm was subdivided into 5 parcels and each registered in the name of the 1st born son of each household. It was contended that the late **David Wainaina Waruhiu (David)** was registered as the proprietor of

Githunguri/Gaitheko/336 (the suit land) as a trustee for himself and his mother's household. However, on **17th October, 1980** he transferred the suit land to the applicant following which, **Samuel Njoroge Waruhiu** (deceased), **Esther Nyamweru Munene** and **Solomon Ng'ang'a Waruhiu** (the 1st and 2nd respondents herein) filed a suit in the High Court seeking orders that they are beneficiaries of the suit property; that as a trustee, their late brother (**David**) had no mandate to transfer the suit property to the applicant without their consent and the transfer should be declared null and void and an order be issued restraining the applicant from selling the property or receiving proceeds from such sale.

In a ruling delivered on **20th April, 2011**, the trial court (**Gacheche, J.**) dismissed the respondents' claim and held that the alleged trustee relationship between the late **David** and the respondents had not been proved by credible evidence; that the allegations of fraud as pleaded had not been established to the required threshold and that the claim was time barred in terms of the provisions of **Section 7** of the Limitation of actions Act, Cap 22 of the Laws of Kenya.

Dissatisfied with this decision, the respondents appealed to this Court and on **8th March 2019**, the Court of Appeal (**Waki, Nambuye & Gatembu, JJA**) allowed the appeal, set aside the decision of the trial Judge and allowed the respondents' claim as prayed before the High Court. The Court found that the late **Samuel's** testimony on lack of consent and knowledge of the transaction between the late **David** the applicant with regard to the transfer of the suit property was uncontroverted.

It is this decision that precipitated to the Notice of Motion now before me.

The motion was supported by the affidavit of the applicant sworn on **5th November, 2019** in which he deponed that the judgment delivered by the Court of Appeal on **8th March 2019** in favour of the respondents, **Esther Nyamweru Munene** and **Solomon Nga'nga Waruhiu**, declared them the rightful owners of **Title Number Githunguri/Giathieko/336** (the suit property) through customary trust; that aggrieved by the judgment he instructed his former advocates- Mesr's Waruhiu & Company Advocates to file an appeal but they filed Notice of Motion Application No. 93 of 2019 dated **22nd March 2019** seeking leave to appeal to the Supreme Court as a matter of general public importance and inadvertently omitted to file a Notice of Appeal; that subsequently the Motion was withdrawn and a Notice of Appeal dated **14th October, 2019** was filed by his current advocates; that the applicant would have filed a Notice of Appeal on time save for the omissions by his former advocates and the fact that he had been critically unwell since the delivery of this Court's judgment and hence unable to attend to the matter.

On the matter of general public importance arising from the intended appeal, the applicant claimed that this Court's judgment in Civil Appeal No. 168 of 2013, raised cardinal issues of jurisprudence including the legal basis that can be used to defeat the statute of limitation in the absence of fraud and what other grounds can be invoked to defeat the indefeasible right to title. He also faulted the court's judgment for failing to consider any compensation to the bona fide purchaser for value.

Lastly, it was stated that after the delivery of this Court's judgment, the suit property was acquired compulsorily and a sum of Kshs. 23,025,000.00 awarded in **Petition No. 399 of 2014** and that the respondents had issued a demand seeking release of the sum awarded, and therefore that there was imminent threat of execution.

On **21st January 2020**, when the motion came before me for hearing **Mr. Kilonzo**, learned Counsel for the applicant informed the court that they would only be seeking orders with regards to extension of time for the filing of the Notice of Appeal as the other prayers would be determined by a 3 judge bench.

Whilst urging the application, **Mr. Kilonzo** reiterated the contents of the affidavit in support of the motion as well as the grounds on the face of the motion. He contended that despite the delay of seven months caused by the applicant's former advocates in inadvertently omitting to file the Notice of Appeal, the intended appeal raised weighty issues of law.

Miss. Shaw, learned counsel for the respondents opposed the motion on the basis that the Court lacked jurisdiction to sustain the application which was pegged on **Rule 4** of the Court of Appeal Rules. She contended that the extension of time as provided by the Supreme Court Rules could not be addressed by this

Court. Counsel further contended that there was an order in the superior court relating to compensation in respect of the suit land and that there were proceedings for committal in place due to the applicant's noncompliance and refusal to release the 23 Million held by his advocate. Lastly, she stated that the delay was unreasonable and emphasized that the matter has been in court since 2008.

In a brief rebuttal, **Mr. Kilonzo** contended that the issue of contempt was not in issue before this Court and that the issue of delay had been sufficiently explained by the applicant.

I have considered the application, the rival affidavits, and the submissions made by counsel and the law. **Mr. Kilonzo** for the applicant informed the court that he was not pursuing the orders in the motion seeking stay of execution and certification to the Supreme Court. **Article 163 (4)** of the Constitution upon which the motion was anchored provides for instances of appeals from the Court of Appeal to the Supreme Court. The remaining provisions of the law, therefore upon which the applicant's motion is anchored are Rules 4, 5 (2) (b) and 47 of this Court's Rules. Suffice to state that these provisions relate to appeals before this Court and not in the Supreme Court. The question at the core of the motion before me is whether this Court possesses jurisdiction to grant extension of time in respect of a Notice of Appeal intent on challenging the decision of this Court in the Supreme Court.

As has often been stated, the issue of jurisdiction takes precedence over any other issue pending before the court. A Court enters into the threshold of jurisdictional error when it enters into an inquiry which it is not entitled to undertake. As stated in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

For a start, Rule 24 of the Supreme Court Rules 2012 deal with certification of matters by the Court of Appeal in respect of matters deemed to be of general public importance. This rule is not now applicable as **Mr. Kilonzo** did rightly point out that such an application is outside the purview of a single judge. The law governing intended appeals to the Supreme Court is outlined in the Supreme Court Rules, 2012. **Rule 31 (1)** provides that:

“ 31 (1) A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of judgment or ruling. In Form B set out in the first Schedule, with the Registrar of the court or with the tribunal, it is desired to appeal from.

(2)Where an appeal lies only on a certificate that a matter of general public importance is involved, it shall not be necessary to obtain such certification before lodging the notice of appeal.

(3) Upon receipt of the notice of appeal of the court or tribunal against whose decision it is intended to appeal, the court or tribunal shall transmit a copy of the notice to the Registrar”.

The remedy for failing to meet this requirement is found in **Rule 53** of the

Supreme Court Rules, 2012 provide that:

“The Court may extend the time limited by these Rules, or by any decision of the Court”.

It is evident from the provisions quoted above that this court lacks the authority to grant the order of extension of time as sought in the instant motion and it is my considered view that the applicant has erroneously canvassed his application in the wrong forum. Jurisdiction is a creation of statute and this court cannot assume jurisdiction. In my view, the correct forum to seek extension of time to lodge a notice of appeal challenging the decision of this court is the Supreme Court. Rule 53 of the Supreme Court Rules 2012 provides for enlargement of time. This can only be in that Court, (the Supreme Court) and not the Court of Appeal. The applicants counsel did not cite any authorities before me in support of his contrary view. My position is further fortified in the Supreme Court of Kenya decision of **Rosemary Wanja Mwangiru & 2 others vrs.**

The Attorney General & 3 others; Civil Application No. 2007 of 2019 wherein that court considered an application for extension of time to file an appeal and a record of appeal out of time against the judgment of the Court of Appeal. It is instructive to note that although the motion was rejected by the Supreme Court, the basis for rejection was not for want of jurisdiction but on the reasoning that there was “.... ***no basis upon which the application for extension of time can be sustained***”. It is therefore my considered view, and not without sympathy to the applicant, that I do not have jurisdiction to grant the order sought.

Having come to the above conclusion, I do not consider it necessary to delve into the issue of whether the applicant has a right of audience before me given the alleged contempt of court.

The upshot of the above is that, the motion of **5th November, 2019** is improperly before me. It is hereby dismissed with costs to the respondents.

It is so ordered.

Dated and delivered at Nairobi this 6th Day of March, 2020.

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR