



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GATEMBU, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 11 OF 2018

BETWEEN

HON. ATTORNEY GENERAL.....APPLICANT

AND

EMFIL LIMITED.....1ST RESPONDENT

NZURI MAHALI LIMITED.....2ND RESPONDENT

RAMADHANI ABDALLAH MWANJAMA.....3RD RESPONDENT

SABA MWANGA LIMITED.....4TH RESPONDENT

MAISHA MEMA LIMITED.....5TH RESPONDENT

MAFANIKO LIMITED.....6TH RESPONDENT

TAMU NDOTO LIMITED.....7TH RESPONDENT

GAZI BAY LIMITED.....8TH RESPONDENT

JUMA SHEE MWAMWINDI.....9TH RESPONDENT

SHEE HAMISI MWAMWINDI.....10TH RESPONDENT

NSHEE HUSSEIN KENYA.....11TH RESPONDENT

NASSORO ABDALLA MWACHIBULO.....12TH RESPONDENT

CLIEF VIEW COMPANY LIMITED.....13TH RESPONDENT

MWABUNGU BAY LIMITED.....14TH RESPONDENT

DAANI BAY PARCELS LIMITED.....15TH RESPONDENT

KINONDO BAY LIMITED.....16TH RESPONDENT

UKUNDA BAY LIMITED.....17TH RESPONDENT

JUA MAISHA LIMITED.....18TH RESPONDENT

(Being an application for extension of time to file an appeal out of time from the Ruling of the Environment & Land Court at Mombasa

in

ELCC No. 113 of 2015)

RULING

1. By an application dated 8th June 2018 presented to this Court on 12th June 2018 under Sections 3 and 3A of the Appellate Jurisdiction Act and Rules 1, 4, 42 and 43 of the Court of Appeal Rules, the applicant, the Hon. Attorney General, seeks extension of time to file an appeal against a ruling of the Environment and Land Court (**A. Omollo, J.**) delivered on 20th July 2017.

2. In that ruling, the Environment and Land Court (the ELC) allowed two applications by Emfil Limited, the 1st respondent, dated 28th January 2016 and 1st February 2017 respectively. In the application dated 28th January 2016, the 1st respondent sought, and was granted “leave to enter judgment for the plaintiff in default of defence against the 1st to 6th defendants and 8th defendant” and that the “defences of the 154th, 157th, 158th, 161th, 166th, 167th, 239th, 241st, 293rd, 306th, 308th defendants be struck out and judgment be entered for the plaintiff as prayed in the plaint.” In the application of 1st February 2017, the 1st respondent sought, and was granted, an order that “the defences of the 1st to 7th defendants be struck out and judgment be entered for the plaintiff as prayed in the plaint.”

3. The applicant is aggrieved by that ruling and intends to challenge it on appeal to this Court. The applicant had initially, presented an omnibus application dated 22nd January 2018 combining a prayer for stay of further proceedings before the Environment & Land Court with the prayer for extension of time to file its appeal out of time. However, by an Order of the Court made on 6th June 2018, the applicant was directed to first apply for leave to file the appeal out of time before a single Judge, hence the present application presented on 12th June 2018.

4. **Mr. Nguyo Wachira**, learned State Counsel, appeared for the applicant during the hearing of the application before me and relied on his written submissions which he highlighted. He submitted that the application is merited; the intended appeal is arguable as the Judge allowed the 1st respondents applications without having regard to the defence which raises triable issues of fact and law; that there is also public interest involved as over 416 persons risk eviction from the suit property. Counsel made reference to Supreme Court of Kenya decision in **County Executive of Kisumu vs. County Government of Kisumu, Civil Application No. 3 of 2016** on the principles that should guide the court in exercising its discretion when considering an application for extension of time and emphasized that public interest is a pertinent consideration.

5. In his supporting and supplementary affidavits sworn on 8th June 2018 and 17th July 2018 respectively Dick Safari, County Land Registrar, Kwale County deposed that in allowing the 1st respondents applications to strike out the defences, the Judge ignored the applicant’s defence; that the applicant desires to appeal that decision and manifested that intention by filing notice of address for service after other respondents had filed notices of appeal and by applying for typed proceedings from the lower court; that the applicant thereafter filed notice of appeal as a matter of caution; that considering that other respondents had already filed notices of appeal and applied for proceedings, there will be no prejudice to the 1st respondent if leave to extend time for appealing is granted; and that there are numerous other matters and the issues raised in the 1st respondent’s suit in ELC Case No. 113 of 2015 are best resolved through a full trial.

6. In a further supporting affidavit sworn on 3rd July 2019, the said Dick Safari deposed that prior to January 2017, the matter was being handled at the Attorney General’s office by a Mr. Richard Ngare who was transferred to Nairobi and thereafter left service; that Mr. Nguyo who currently has the conduct of the matter reported in Mombasa in January 2017 and took time to acquaint himself with prior litigation on the matter and to fully appreciate the public interest involved.

7. Counsel concluded by stating that the applicant has not wasted time; that the applicant had intended to participate in the appeals by the other respondents and the delay involved is not inordinate pointing out that the substantive appeal, being Civil Appeal No. 14 of 2019 has already been filed.

8. Supporting the application, learned counsel for the 9th to 12th respondents **Mr. J.S. Asige** and also holding brief for the 2nd, 4th to 8th, 14th 15th 17th and 18th respondents referred to a supporting affidavit sworn by Nassor Abdalla Mwachibulo, the 167th defendant in the lower court in which it is deposed that the said respondents, who are registered proprietors of parcels of land within the suit property, were deprived an opportunity to be heard at a trial by reason of the impugned ruling and their constitutional right under Article 40 of the Constitution violated; that the intended appeal is arguable as the learned Judge ignored and brushed aside the triable issues raised in the defences, and that the delay in filing the appeal is explained satisfactorily.

9. **Ms. Kisilu** learned counsel holding brief for **Mr. Mogaka** for the 155th, 227th, 231st, 233rd, 234th, 395th, defendants in the lower court also supported the application pointing out that 421 persons who have titles to the property are affected by the impugned decision and that justice requires that they should be heard substantively.

10. The application is strenuously opposed by the 1st respondent. The background to the matter; the history of acquisition of the suit properties in 1987 by the 1st respondent; the dealings in the properties; and the litigation history culminating with the impugned ruling of 20th July 2017 is set out fully in a lengthy replying affidavit with over 800 pages of exhibits sworn on 9th July 2018 by a director of the 1st

respondent, Vinaychandra Damodar Popat.

11. **Miss. Dave** learned counsel for the 1st respondent urged in her written and oral submissions that the application for extension of time is made in bad faith; that the question of proprietorship of the suit properties has been the subject of previous litigation culminating with a pronouncement by this Court in a judgment delivered on 18th July 2014 in Civil Appeal No. 312 of 2012 between the 1st respondent and the Registrar of Titles, among other parties, that the 1st respondents title to the suit properties is valid and unimpeachable; that in ELC No. 113 of 2015, in which the impugned ruling striking out the respondents' defences was made, the 1st respondent sought orders to restrain the respondents from trespassing on the properties as well as eviction orders; that the issue of ownership of the properties having been conclusively determined in HCCC No. 181 of 2007 and in ELC No. 113 of 2015, there would be no defence to the 1st respondent's suit in ELC No. 113 of 2015 and the ruling of the court given on 20th July 2017 is therefore unassailable; that in any event the defence that was filed by the applicant was a mere denial.

12. It was submitted that the applicant is misguided in purporting to pursue public interest and to represent the purported squatters in this matter; that given the statutory mandate of the applicant, he cannot purport to act for parties who, in their private capacities, are trespassers on the properties; that given the litigation history in multiple courts the intended appeal is an abuse of the process of court; that allowing the applicant's application would be contrary to the rules of res judicata as the issues intended to be raised on appeal have conclusively been determined.

13. Citing the Supreme Court of Kenya decision in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, SC Application No. 16 of 2014 [2014] eKLR*, counsel submitted that the conditions for the court to exercise its discretion in favour of the applicant have not been met; that the applicant has not shown good and sufficient cause for not filing the appeal in time; that the applicant has been indolent and careless in the conduct of the matter in the lower court in that it filed a defence in the lower court only after an application for leave to enter judgment had been made; that it did not file a replying affidavit or written submissions to the 1st respondents application dated 28th September 2016 despite having been granted an opportunity to do so; that no reasons are given for filing the notice of appeal on 7th March 2018, out of time even though it "*timely filed notices of address when served with notices of appeal by the other defendants*"; that as no cogent reasons are given, the application, which was filed in order to derail the formal proof proceedings in the lower court, should be declined. Counsel urged that allowing the application will be prejudicial to the 1st respondent and prayed for its dismissal.

14. I have considered the application, the affidavits, submissions and the authorities cited. Rule 4 of the Court of Appeal Rules, 2010 provides that:

"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."

15. The factors to be considered in deciding whether to exercise the discretionary power under that rule include the length for delay, the reasons for the delay, whether the applicant has an arguable appeal, the degree of prejudice to the other party if time is extended, the public importance or public interest of the matter, and generally the requirements of the interest of justice. In *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others* (above) to which I was referred, the Supreme Court pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

16. Earlier, in *Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR*, *Waki, JA* stated that:

"The exercise of this Court's discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38."

17. Having regard to those principles, the ruling the applicant intends to challenge on appeal was delivered on 20th July 2017. Notices of appeal dated 1st August 2017 were duly lodged on 3rd August 2017 by the firm of Asige Keverenge & Anyanzwa and Company advocates on behalf of at least 5 of the defendants in the lower court. There is also a notice of appeal filed dated 31st July 2017 and lodged on 3rd August 2017 filed through the firm of Birir & Company Advocates on behalf of two other defendants in the suit in the lower court. Also attached to the applicant's initial application dated 22nd January 2018 are copies of letters dated 21st and 28th July 2017 by the said law firms bespeaking typed proceedings from the ELC. As conceded by the applicant, it did not itself file a notice of appeal in a timely fashion.

18. The impugned ruling having been delivered on 20th July 2017, any person desiring to appeal against it should, in accordance with Rule 75 of the Court of Appeal Rules, have filed a notice of appeal on or before 3rd August 2017. Mr. Wachira explained that the applicant was intending to ride on the appeals by the other defendants and filed a notice of address for service under Rules 79 and 80 of the Court of Appeal Rules. That notice was dated 29th November 2017, filed before the ELC on 1st December 2017 and lodged before this Court on 20th December 2017. Under Rule 79 of the Court of Appeal Rules, the notice of address for service should have been lodged within 14 days of service of the notice of appeal and it would appear therefore that that notice was itself out of time.

19. The applicant's initial omnibus application which contained a prayer for extension of time to file notice of appeal out of time is dated 22nd January 2018 and was filed in Court on 23rd January 2018. Considering that the 14 days within which the applicant should have filed a notice of appeal under rule 75 of the Court of Appeal Rules expired on 3rd August 2017 the initial application for extension of time, filed on 23rd January 2018, was over 5 months late.

20. The applicant's notice of appeal dated 7th March 2018 was finally lodged before this Court on the same day, i.e. 7th March 2018 which is a delay of about 7 months from when it should have been filed. The explanation that the delay is on account of the officer who was handling the matter in the applicant's office having been transferred and that Mr. Wachira who now has the conduct of the matter on behalf of the applicant reported to the office in January 2017 and did not appreciate the gravity of the matter is not satisfactory.

21. As to chances of success of the intended appeal, the less I say the better. Suffice to observe that the applicant intends to challenge the decision of the lower court striking out its defence, which the learned Judge indicated in the impugned ruling he had not seen.

22. The remedy of striking out a defence has been described as drastic and draconian and should only be granted in the clearest of cases. [See judgment of *Madan, JA* in *D. T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & another [1980] eKLR*]. In *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others* (above) the Supreme Court quoted with approval from *United Arab Emirates vs. Abdelghafar & others 1995 IRLR 243* that in considering an application for extension of time, the court in exercise of its discretion should bear in mind the principle that a party should not be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to the opponent for which an award of costs cannot compensate.

23. In the latter case *United Arab Emirates vs. Abdelghafar & others*, the Employment Appeal Tribunal expressed that:

“The approach indicated by these two principles is modified according to the stage which relevant proceedings have reached. If, for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to say have a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice to the other party, justice will usually favour the action proceeding to a full trial on the merits.”

24. I am unable to say, at this stage, that the intended appeal does not have any chance of success. It is, I think, arguable. It is also clear from the material presented before me that a large number of people who claim interests in the suit properties, referred to in some instances as squatters, are affected by the impugned decision which in my view is a relevant consideration.

25. All in all, although the applicant has fallen short of demonstrating that it has been diligent in its pursuit of the intended appeal, weighing and balancing all relevant factors, and considering also that the substantive appeal has since been filed, I am inclined to exercise my discretion in its favour of the applicant. I accordingly allow prayer 2 of the applicant's notice of motion dated 8th June 2018. The applicant shall bear the 1st respondent's costs of the application.

Orders accordingly.

Dated and delivered at Nairobi this 22nd day of May, 2020.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR