IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 37 OF 2020

BETWEEN

DAVID KAMAU KARIUK

(Suing as the legal representativeof the Late Esther W. Kirii).....APPLICANT

VERSUS

STANLEY THEURI

(Suing as the legal representative of the Late Francis K. Mwai).....1ST RESPONDENT

DISTRICT LAND REGISTRAR NYANDARUA.....2ND RESPONDENT

HON. THE ATTORNEY GENERAL.....3RD RESPONDENT

(Being an application for extension of time to serve the notice of appeal arising from

an intended appeal against the ruling and consequential orders of Environment

and Land Court at Nyahururu (M. C. Oundo, J.) dated 3rd December 2019

in

Nyahururu ELCC No. 440 of 2017)

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RULING

Before me is a notice of motion dated 7th February 2020, brought under rules 4, 75 and 77 of the Court of Appeal Rules, 2020, substantively seeking orders that:

> **"2. This court be pleased to extend the time within which the applicant should have served the Notice of Appeal consequently the notice of appeal dated 5th December 2019 be deemed as properly served.**
>
> **3. That costs of this application be provided for."**

It is supported by grounds on its body, a supporting affidavit of **David Kamau Kariuki** together with annextures thereto. It has been opposed by a replying affidavit of **Stanley Theuri Kihungi**, the 1st respondent dated 26th June 2020 together with annextures thereto. The application was canvassed by written submissions. Those for the applicants are dated 26th June 2020, while those for the 1st respondent tare dated 25th June 2020.

It is the applicant's averments and submissions *inter alia* that: they were sued by the first respondent in Environment and Land Court (ELC) ELCC No. 440 of 2017 at Nyahururu; they had an advocate on record representing them in the said matter but who severally failed to attend court to present their case resulting in an ex parte judgment being issued against them for that default; they filed an application dated 15th

August 2019 seeking a review and setting aside of the ex parte judgment delivered on 7th May 2019, issued against them and for leave to defend the matter. This application was consolidated with several other applications and heard jointly by the court resulting in the ruling delivered on 3rd December 2019. That in both the judgment of 7th May 2019 and the ruling of 3rd December 2019 the Hon. Judge failed to take into consideration the applicants pleadings namely the defence and counterclaim which explicitly demonstrated that applicants and his family had lived on the suit property for about fifty seven (57) years and therefore in excess of the statutory period of twelve (12) years for qualification for one to own land by way of adverse possession, a position erroneously overlooked by the trial court.

Further, that he was aggrieved by the said decision of 3rd December 2019 and timeously filed a notice of appeal on 5th December 2019 but were unable to serve the same on the 1st respondent because by the time their advocate went to serve the said notice on to the 1st respondent's advocates, they had already closed office for December holidays. His own advocates also closed office for the same December holidays. It was not until the 20th January 2020 that his advocates opened offices and caused the notice of appeal to be served on the 1st respondent's advocates on 24th January 2020 albeit belated by which time, time for serving the same had lapsed hence the application under consideration for its validation. They have an arguable appeal borne out by the draft memorandum of appeal annexed to the supporting affidavit. It is only just and fair in the circumstances of this application that the application be allowed to validate the notice of appeal to capacitate him pursue the merits of his appeal which is already filed and served. The delay in serving the said notice timeously was neither deliberate nor inordinate. The 1st respondent stands to suffer no prejudice if time was extended to validate the notice of appeal. Sufficient basis has therefore been demonstrated by the applicant to warrant the court to exercise its discretion in his favour by granting the relief sought.

Further, that the application is well merited as the applicant has already filed and served Civil Appeal No. 13 of 2020 at Nakuru Court of Appeal Civil Registry; which is sufficient demonstration that the applicant is desirous of pursuing his already initiated appellate process. The delay in serving the notice of appeal on the respondent was not inordinately long especially when the same was occasioned by a public holiday of 12th of December 2019. The applicant indeed made effort to effect service on the 1st respondent's advocates on the following day of 13th December 2019 only to find that the said advocate had already taken a break for the Christmas holidays. It was only on 20th January 2020 when applicant's advocates resumed work and promptly caused the service of the notice of appeal on to the 1st respondent's advocates on 24th January 2020. The applicant has an arguable appeal with high chances of success. It is therefore in the interest of justice that enlargement of time to serve the notice of appeal out of time be allowed. No prejudice will be occasioned to the respondent if the applicant were granted the relief sought.

To buttress the above submissions, the applicant relied on the case of **Attorney General vs. Zinj Limited [2020]eKLR** and **Fillippo Fedriri vs. Ibrahim Mohamed Omari [2006]eKLR** both on the principles for sustaining an application of this nature and reiterated that no prejudice will be suffered by the respondent if the applicant was to be granted the relief sought especially when he has demonstrated that the intended appeal has high chances of success. The delay in seeking the courts intervention is not inordinate. Plausible reasons have been given for the failure to comply with the timelines within the rules within which to serve a notice of appeal.

In rebuttal, the 1st respondent averred and submitted *inter alia* that the application under consideration is unnecessary, misconceived, frivolous, vexatious and without basis because: (i) it has been brought after an inordinate delay which has not been explained; (ii) the application should have been presented immediately upon expiry of the seven (7) days stipulated for in the rules for service of a notice of appeal. (iii) there is also no explanation as to why the other parties to the proceedings were not served in time.

Further, that the applicant is not serious in pursing his appellate rights but bend on abusing the court process with the sole aim of frustrating the 1st respondent's enjoyment of the fruits of the judgment granted in his favour as no valid reason had been advanced for his inaction which in the 1st respondent's opinion is a fatal blow to his already initiated appellate process. That the draft memorandum of appeal only contains flimsly grounds which do not raise any triable issue. Applicant sat on his rights as it was his duty to pursue the suit and cannot therefore complain of lack of participation when it is on record as correctly captioned by the trial judge that he was fully represented at the trial by his advocate. He is therefore undeserving of the exercise of the courts discretion in his favour especially when the 1st respondent has reasonably demonstrated above that he has been indolent in the pursuit of his quest for justice both at the trial and the now initiated appellate process. He reiterated that the instant application is an afterthought aimed at frustrating him from enjoying the fruits of his judgment and should therefore be dismissed with costs to him.

Relying on the case of **Mbogu Gatuiku vs. Attorney General HCCC No. 1983 of 1980; Rajesh Rughani vs. Fifty Investment Limited & Another [2005]eKLR; Bains Construction Company Limited vs. John Mzare Ogowe [2011]eKLR** and **Fakir Mohammed vs. Joseph Mugambi & 2 Others[2005]eKLR;** submitted that: the applicant's conduct displayed above illustrates the lack of vigilance and seriousness in prosecuting the intended appeal which leads only to one conclusion in the 1st respondent's opinion that applicant's conduct is not only intentional but also contemptuous not only of the 1st respondent's right to enjoy the fruits of the judgment but also for the court process expected of an aggrieved party and which should not be condoned as it was not enough for the applicant to blame their advocate for inaction as it was his duty to pursue his already initiated appellate process which conduct in his opinion was not the kind of mistake that may be countenanced with sympathy by a court of law. On the totality of the above averments and submissions, the 1st respondent prayed for the application to be dismissed with costs to him.

My invitation to intervene has substantively been invoked under **Rule 4**, **75** and **77** of the Court of Appeal rules. Rule **4** which I will revert to shortly is the substantive rule for accessing the relief sought. **Rule 75** is the substantive rule, making provision for the notice of appeal. It provides *inter alia* as follows:

> **"75(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.**
>
> **2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.**
>
> **....."**

The prerequisites in this rule is that such notice of appeal should be lodged within fourteen (14) days of the decision intended to be appealed against, which in the instant application, fourteen (14) days started running from 3rd December 2019 and lapsed on 16th December 2019.

Rule 77 on the other hand is the substantive rule that provides for service of the notice of appeal. It provides inter alia as follows:

> **"77(1) Any An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:**
>
> **....."**

The prerequisite in it is that it requires the notice of appeal to be served within seven (7) days of the date of lodging the same which in the instant application fell on 12th December 2019 which the applicant alleges and correctly so in my view that the said date fell on a public holiday, hence the instances for attempt to effect service on 13th December 2019. It was however not until the 24th of January 2020 that the said notice of appeal was served albeit out of time. The reasons for non-compliance and which I shall revert to at a later stage of this ruling are as already set out above. It is the above default that the applicant seeks the exercise of the courts discretion substantively under Rule 4 of the Court of Appeal Rules to regularize especially now that the appeal on which it was intended to be anchored has already been filed and served.

As already indicated above, my invitation to intervene on behalf of the applicant has been substantively invoked under rule 4 of the Rules of the court. It provides as follows:

> **"4. 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 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 exercise of jurisdiction under the Rule 4 of the CAR procedures are now well settled by numerous enunciations in case law both binding and persuasive. I take it from the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231**, **Fakir Mohamed vs. Joseph Mugambi & 2 Others; [2005]eKLR**; **Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees [2020]eKLR**; **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018]eKLR** and **Athuman Nusura Juma vs. Afwa Mohamed Ramathan CA No. 227 of 2015**.

See also **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR**; **Nyaigwa Farmers' Co-operative Society Limited vs. Ibrahim Nyambare & 3 Others [2016] eKLR; Hon. John Njoroge Michuki & Another vs. Kentazuga Hardware Limited [1998] eKLR; Cargil Kenya Limited Nawal vs. National Agricultural Export Development Board [2015] eKLR; Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge [2013] eKLR;** and **Richard Nchapi Leiyagu vs. IEBC & 2 Others Civil Appeal No.18 of 2013** among numerous others. The principles distilled from the above case law may be enumerated *inter alia* as follows:

(i) The mandate under Rule 4 is discretionary, unfettered and does not require establishment of "sufficient reasons". Neither are the factors for exercise of the courts unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application was granted; the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.

(ii) Orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and in ordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one.

(iii) The discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered.

(iv) As the jurisdiction is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant.

(v) The degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension against the prejudice to the respondent in granting an extension.

(vi) The conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity;

*(vii) Whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word **"possibly"**;*

(viii) The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary power. There has to be valid and clear reason upon which discretion can be favourably exercised.

(ix) Failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable.

(x) An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court;

(xi) The right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.

The above principles were restated by the Supreme Court of Kenya (M**.K. Ibrahim & S.C. Wanjala SCJJ)** in **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others** (supra) as follows:-

"(1) 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.

(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.

(6) Whether the application has been brought without undue delay; and

(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time."

I have considered the record in light of the rival pleadings, submission and principles of case laws relied upon by the respective parties in support of their opposing positions. Only one issue falls for consideration namely, whether the applicant has brought himself within the ambit of prerequisites for accessing the relief sought. On the period of delay, it is not in dispute that the decision was delivered on 3rd December 2019. The notice of appeal whose service on the respondent is sought to be validated was timeously lodged on 5th December 2019. In terms of the prerequisite in Rule 77 of the Courts rules it ought to have been served on all the opposite parties within seven (7) days of 5th December 2019 which according to the applicant and rightly so in my view fell on a public holiday.

The applicant alleges that he made an attempt to serve the 1st respondent's advocates on 13th December 2019, which fell on a Friday and found the offices of the said advocates closed. Further attempts thereafter, bore no fruits as he subsequently learned that the said advocate has closed office for Christmas holidays. His own advocate also followed suit only for them to reopen on 20th January 2020. Following his advocates resumption of office on 20th January 2020 is when the matter was revisited. That is when the notice was served on the 1st respondent's advocates on 24th January 2020.

The record is however silent as to whether the other parties who ought to have been similarly served with the said notice were also served. Neither is there any mention of any efforts made by the applicant to effect service on those parties. The 1st respondent has attempted to agitate the case on their behalf alleging that there is no evidence that any attempt was ever made to serve those other parties or what became of that service. It is my view that nothing turns on this agitation as the 1st respondent is not on record as representing the interests of those parties. At least none has been placed before me. I will therefore confine myself to interrogation of issues relating to alleged noncompliance with the rules with regard to timeous service of the notice of appeal on to the 1st respondent.

The above leads me to the determination of the ground of delay involved. As already indicated above the decision was delivered on 3rd December 2019. The notice of appeal was filed a period of two days from the date of delivery. Service within seven (7) days as already indicated above fell on 12th December 2018, but was not effected for reason already indicated above. It was however subsequently effected on 24th January 2020 a period of forty three (43) days later.

The above now leads me to determine as to whether the forty three (43) days falls into the category of inordinate and unexcusable delay disentitling the applicant to the relief sought. The threshold to be applied is that set by the court in the case of **George Mwende Muthoni vs. Mama Day Nursing and Primary School Nyeri CA No. 4 of 2014 (UR)** in which extension of time to comply with appellate rules was declined on account of the applicants failure to explain a delay of twenty (20) months.

It is my view that a period of forty three days partially contributed to by the undisputed fact that it partially fell into the Christmas holidays when usually advocates offices close from business qualify as a matter of notoriety. I cannot also lose sight of the fact that in term of Order 50 rule 4 of the Civil Procedure Rules the period of time falling between 20th December to 13th of January next is to be excluded from computation of timelines within which to accomplish court business. If discounted, it reduces the amount of delay from forty-three (43) days to nineteen (19) days which in my view is not so inordinate as to disentitle the applicant to the relief sought.

The above finding leads me to the determination of the reasons for the delay. I adopt those highlighted in the above assessment. I find nothing unreasonable about that explanation especially after agreeing with the applicant's contention that 12th December was a public holiday. Second, that is a matter of public notoriety that advocates offices do close for Christmas holidays and open for business in January of the next year. Also that after discounting of the period of time provided for by order 50 rule 4 CPR the applicable period of delay falling for consideration reduces to only nineteen (19) days which in my view is not inordinate.

The above finding now leads me to the interrogation of the prerequisite on the arguability of the intended appeal although this is not a

mandatory requirement by reason of the use of the words **"possibly"**. The draft memorandum of appeal annexed to the application raises thirteen (13) grounds.

I have perused the same.

In summary without delving into indepth analysis of the same, the applicant intends to fault the trial court for the failure to find that the application for review was meritorious, the length of time applicant and his family have been on the land for over thirty seven (37) years, entitled them to possession by way of adverse possession to consider a previous finding by the land registrar that the disputed portion of six (6) acres belongs to the applicant's family, failing to pin responsibility for non-participation in the proceedings on the applicant previous advocate.

Considering the grounds of appeal summarized above in light of the above principle, it is my view that issues raised in the applicants' grounds of appeal are all arguable notwithstanding that they need not ultimately succeed. In law an arguable appeal need not be one that must succeed but one that raises a bona fide issue for interrogation by the Court. Considering that the 1st respondent's acknowledgement that applicants have infact been in the disputed portion of six (6) acres until recently evicted is sufficient ground to demonstrate that the above are bona fide issues intended for the interrogation by the Court on appeal notwithstanding that they may not ultimately succeed.

On the right to be accorded an opportunity to exercise applicants now undoubtedly constitutionally underpinned appellate right, I wish to associate myself fully with enunciations in the case of **Richard Nchapi Leiyagu vs. IEBC** & **2 Others; Mbaki & Others vs. Macharia & Another [2005] 2EA 206**; and the Tanzanian case of **Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003;** for the holding *inter alia* that:

> *(i) the right to a hearing is not only constitutionally entrenched but also the cornerstone of the Rule of law;*
>
> *(ii) the right to be heard is a valued right; and*
>
> *(iii) the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;*

Applying the above threshold to the above assessment and reasoning, it is my finding that sufficient basis has been laid for me to accord the applicant an opportunity to be heard on his already initiated appeal albeit invalid for noncompliance with the timeline within which to serve the notice of appeal on the 1st respondent and therefore needs validation. My reasons are that:

> *(1) The intended appeal is arguable notwithstanding that it may not ultimately succeed.*
>
> *(2) The delay of forty three (43) days before factoring in the period required to be excluded in the computation of time in terms of order 50 rule 4 of the CPR and nineteen (19) days after factoring in the above period falls short of the delay in the case of* ***George Mwende Muthoni vs. Mama Day Nursery and Primary School Nyeri CA No. 4 of 2014 (UR)*** *in which extension of time was declined for failure to explain a delay of twenty (20) days.*
>
> *(3) Applicant and his family though currently evicted according to the 1st respondent have been on the land for a considerable length of time.*
>
> *(4) They were not also heard on their defence due to non attendance a position acknowledged by the 1st respondent.*
>
> *(5) Since eviction is already effected as asserted by the 1st respondent, the 1st respondent stands to suffer no prejudice incapable of compensation by way of costs.*
>
> *(6) He appeal record has been filed and served.*

The upshot of the above assessment and reasoning is that, I am inclined to allow the application dated 7th February 2020 on the following terms:

> **(i) The notice of appeal dated 5th December 2019 already filed be and is hereby deemed as properly filed and served.**
>
> **(ii) Costs of the application to abide the outcome of the appeal.**

Dated and Delivered at Nairobi this 7th day of August, 2020.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR