IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPLICATION NO. 43 OF 2020

BETWEEN

JOHN SIMIYU WEPUKHULU.....1ST APPLICANT

ISAAC WAFULA WANAKACHA.....2ND APPLICANT

OMOTO DAVID alias OMOTO PHILIP.....3RD APPLICANT

SOLOMON WANYONYI KHAEMBA.....4TH APPLICANT

ABRAHAM CHENGE WEKESA.....5TH APPLICANT

PENANA MTONYI.....6TH APPLICANT

MARY AMBOGO.....7TH APPLICANT

NELLY SIKHOYA BALANGA.....8TH APPLICANT

ANNE NEKESA WEKESA.....9TH APPLICANT

JOTHAM SIMITA.....10TH APPLICANT

WYCLIFFE AIRO SIRIKWA.....11TH APPLICANT

AND

MAURICE ANTONY WANJALA MUSE.....RESPONDENT

(Being an application for leave to appeal out of time and for extension of time to appeal against the ruling and order of Hon. Justice Mwangi Njoroge dated 9th October 2019 **in Kitale ELCC No. 17 of 2011)**

RULING

Before me is a Notice of Motion dated 24th February 2020, brought under rule 4 of the Court of Appeal Rules, substantively seeking an extension of time within which to file both the notice and record of appeal, against the ruling and the order of the **Hon. Mr. Justice Mwangi Njoroge** delivered on 9th October 2019, in Kitale Environment and Land Case (ELC) No. 17 of 2011, together with an attendant prayer that costs of the application do abide the outcome of the intended appeal.

The application is supported by the grounds on its body and a supporting affidavit of **John Simiyu Wepukhulu**, the 1st applicant on his own behalf, and on behalf of the co-applicants together with annextures thereto. It has been opposed by a replying affidavit deposed by **Maurice Anthony Wanjala Musee**, the respondent, on 20th March 2020, together with annextures thereto. The application was canvassed by written submissions. Those for the applicants are dated 1st July 2020, while those of the respondent are dated 27th June 2020.

It is the applicants' averments and submissions that on 29th August 2019, they filed a Notice of Motion dated 27th August 2019, seeking an order to set aside an ex parte judgment entered against them on 31st July 2019, in Kitale E&LCC No. 17 of 2011 and for the matter to begin afresh to give them an opportunity to give evidence; dismissed on 9th October 2019. They filed an application before the same court seeking

leave of court to appeal against the ruling of 9th October 2019, which was also dismissed on 27th November 2019, by which time, time for lodging the notice and the record of appeal against the orders of 9th October 2019, had lapsed prompting the filing of the application under consideration, dated 24th February 2020, and filed on 3rd March 2020.

That the delay in initiating the intended appellate process was neither intentional nor inordinate. The substratum of the intended appeal is land and they should, therefore, be accorded an opportunity to be heard on their intended defence which according to them raised bona fide triable issues of ownership of the suit property considering that they are in possession and have carried out developments thereon. Also that no prejudice will be occasioned to the respondent

if they were to be accorded an opportunity to pursue the intended appellate process as he is not in occupation of the land. Applicants also relied on Article 159(2)(d) of the Kenya Constitution 2010 and submitted that the trial court denied them an opportunity to be heard on their defence which raises a bonafide triable issue of ownership of the suit property based on technicalities and on that account prayed for the application to be allowed as prayed.

In rebuttal, the respondents averments and submissions are that he drew the applicants' attention in his replying affidavit in opposition to their application for leave to appeal that their right of appeal was automatic, which advise was never heeded. The delay in bringing the application under consideration is inordinate. The reasons advanced for the delay are insufficient to warrant the granting of the relief sought. He is the registered proprietor of land parcel **Waitaluk/Kapkoi/Block 10/Kapkoi Sisal/152**, (the suit property). He is therefore entitled to the benefit of the fruits of the judgment issued in his favour on 31st July 2019. He stands to suffer great prejudice by the continued possession of the suit property by the applicants who were declared trespassers by a valid court judgment. The intended appeal is frivolous.

Relying on the case of **Imperial Bank Limited (In Receivership) and Another vs. Alnashir Popat & 18 Others [2018] eKLR**, the respondent reiterated that: there has been inordinate delay in seeking the Court's intervention. The reason for the delay advanced by the applicants does not suffice; the delay from 27th November 2019, when the application for leave was dismissed to 3rd March 2020, when the application under consideration was filed is not only inexcusable but has not also been explained. On that account, prayed for the application to be dismissed with costs to him. In the alternative, that if the court is inclined to grant the relief sought then the same should be granted on terms that meet ends of justice to both parties.

My invitation to intervene on behalf of the Applicants has been invoked under **Rule 4** of the Court of Appeal Rules, which 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 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**

Eldoret Civil Application No. 43 of 2020 RULING 4 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 Court's 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 inordinate 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 a 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 given due consideration of the record in light of the rival pleadings, submissions, and the principles that guide the court in the exercise of jurisdiction under **Rule 4** of the CAR procedures distilled and highlighted above. Only one issue falls for consideration namely, whether the applicants have satisfied the prerequisites for granting relief under Rule 4 of the Court of Appeal Rules.

On delay in seeking the court's intervention to validate their intended appellate process, the parameters to be applied in determining this issue is that set by the Court in the case of **George Mwende Muthoni vs. Mama Day Nurseryand Primary School, Nyeri Civil Appeal No. 4 of 2014 (UR)** in which extension of time was declined on account of the applicants' failure to explain a delay of twenty (20) months.

Rule 75 of the CAR makes provision for the filing of a Notice of Appeal, within fourteen (14) days of the decision while **Rule 82** of the Court of Appeal Rules provides for the mandatory requirement that a certified copy of the proceedings be applied for within thirty (30) days of the delivery of the decision, while the record of appeal is required to be filed within sixty (60) days from the date of the lodging of a notice of appeal against the decision unless if there is demonstration that the circumstances under consideration in an application of this nature fall within the provisal to **Rule 82** which provides for the exclusion from computation of the sixty days within which to file a record of appeal the time taken by the registry for preparation and supply of a certified copy of the proceedings.

The Applicants Notice of Appeal and application for certified copies of proceedings ought to have been filed within fourteen (14) and thirty (30) days from 9th October 2019, which fell on 22nd October 2019, for the filing of the notice of appeal, and 9th of November 2019, for the filing of the letter bespeaking a certified copy of the proceedings. The explanation given by the applicants for the above default is that they were pursuing an application for leave to appeal and that by the time the same was dismissed on 27th November 2019, time for initiating the intended appellate process had long lapsed. The applicants supporting documents are however silent on the level of preparedness with a view to progressing the intended appellate process expeditiously should the court deem it fit to exercise its discretion in their favour and validate their intended appellate process.

The application for capacitation is dated 24th February 2020 and filed on 3rd March 2020, a period of four (4) months and twenty-five (25) days from the date of the ruling. The reasons applicants have advanced for that delay and the respondent's rebuttal of the same are as already highlighted above. Although the period of delay in the application under consideration is much less than the period that was under consideration in the **George Mwende Muthoni** case [supra], and on the basis of which the court declined to exercise its discretion in favour of the applicant therein, the court has to consider the conduct of the applicants in relation to their desire to pursue their intended appellate process. Of critical consideration herein is their failure to controvert the respondent's averments in his replying affidavit that he forewarned

them at the earliest opportunity of the futility of pursuing the application for leave to appeal when their right of appeal was automatic. Second, both the grounds and content of the supporting affidavit are silent with regard to their level of preparedness to pursue their intended appeal expeditiously, once capacitated to do so.

It is explicit from the record that Applicants are represented by counsel who in my view is in a better position to comprehend the necessity of disclosing such crucial factors necessary for determination of applications of this nature. In **Owino Ger vs. Marmanet Forest Co-Operative Credit Society Ltd [1987] eKLR**; **CFC Stanbic Limited vs. John Maina Githaiga & another [2013] eKLR**; **Lee G. Muthoga vs. Habib Zurick Finance (K) Ltd & Another**, **Civil Applications No. NAI 236 of 2009**; and **Catherine Njoguini Kenya & 2 other vs. Commercial Bank of Africa Ltd Civil Application No. Nai 366 of 2009**, the court declined to visit the wrongs of an advocate against their clients where there was sufficient demonstration that instructions for the defaulted process had been given timeously and that it was the advocate's fault that the procedural steps resulting in the application giving rise to the above decisions had not been followed.

Further on the same issue in **Catherine Njoguini Kenya & 2 Others vs Commercial Bank of Africa Ltd Civil Application No. Nai 366 of 2009**, an observation was made that litigants usually place a lot of trust in the good workmanship of their advocates and when their advocates fail them, the role of the court is to balance the scales of justice in such a way so as not to penalize innocent clients for defaults of their advocates.

Bearing in mind the reasoning given above on this prerequisite, it is my finding that responsibility for disclosure of the above crucial factors lay with the advocate on record. Ends of justice herein would therefore demand that default to disclose these crucial factors should not be visited against the applicants but on their advocates. I am therefore satisfied that the delay involved in this matter is not inordinate. It has also been sufficiently explained. It is therefore excusable.

On the arguability of the intended appeal, applicants have annexed a draft memorandum of appeal revolving around alleged infringement of their right to defend themselves which in my view is not frivolous considering that the substratum of the intended appeal is land in respect of which applicants are in occupation. In law as borne out by the above principles, an arguable appeal need not succeed, save that it must be one that raises a bona fide issue for determination by the court. In my view issue of whether applicants ought to be heard on their defence which they allege was already on record is a bona fide issue for determination. The respondent's contention of prolonged prejudce if reliefs sought were granted is in my view capable of compensation by way of costs. This prerequisite has therefore been satisfied.

The third prerequisite to be considered is whether, in light of the above reasoning, sufficient basis has been laid for me to grant the applicants an opportunity to exercise their now constitutionally underpinned appellate right. The threshold to be applied has been crystallized by case laws in the case of **Richard Nchapi Leiyagu vs. IEBC & 2 Others** (supra); **Mbaki & Others vs. Macharia & Another [2005] 2EA 206** and the Tanzanian case of **Abbas Sherally Eldoret Civil Application No. 43 of 2020 RULING 10 & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003;** it was held

inter alia that:

> *(i) the right to a hearing is not only constitutionally entrenched but also the corner stone 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;*

In light of the above assessment and reasoning, I make orders as follows:

> **(1) The applicants have fourteen (14) days of the date of the ruling to file and serve a notice of appeal.**
>
> **(2) The applicants have sixty (60) days of the date of the ruling to file and serve the record of appeal.**
>
> **(3) The respondent will have costs of the application.**
>
> **(4) In default of item (1) and (2) above the leave granted for extension of time to comply shall stand lapsed.**

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