



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WARSAME J.A. IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 123 OF 2020**

**BETWEEN**

**JOSEPHAT MULWA MUKIMA.....APPLICANT**

**AND**

**JESSE NG'ANG'A GAKOBO.....1ST RESPONDENT**

**CHRISTOPHER MUTURI KURIA.....2ND RESPONDENT**

**HENRY KURIA KINUTHIA.....3RD RESPONDENT**

**PIUS MATINGI.....4TH RESPONDENT**

**MBATHI MUTISYA.....5TH RESPONDENT**

**ANAH KALUKI KITHYOI.....6TH RESPONDENT**

**CHRISTOPHER MBATHA MUIA .....7TH RESPONDENT**

**AFYA INVESTMENT CO-OPERATIVE**

**SOCIETY LIMITED.....8TH RESPONDENT**

**WINNIE MUTHONI MARU, TABITHA MUGURE**

**NJOROGE & ROSEMARY NJAMBI NGUGI (Being trustees**

**of MWITHIGE SELF HELP GROUP).....9<sup>TH</sup> RESPONDENT**

**HAZINA HOUSING CO-OPERATIVE**

**SOCIETY LIMITED.....10TH RESPONDENT**

**SAWA SAVINGS AND CREDIT**

**CO-OPERATIVE SOCIETY LIMITED.....11TH RESPONDENT**

**THE LAND REGISTRAR, MACHAKOS.....12TH RESPONDENT**

*(An application for extension of time to file and serve a notice of appeal and record of appeal against the ruling and order of the Environment and Land Court at Machakos ( Angote J.)dated 1st November, 2019*

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**RULING OF THE COURT**

1. In an application dated **19<sup>th</sup> May 2020**, the applicant, **JOSEPHAT MULWA MUKIMA** seeks extension of time to file a Notice of Appeal, Memorandum of Appeal and Record of Appeal against the ruling and order of the Environment and Land Court at Machakos (Angote J.) delivered on 1st November, 2019; and to exempt the 2nd, 3rd 9th and 12th Respondent from being served with the Notice of Appeal and record of appeal.

2. The applicant wishes to appeal to the ruling of the court wherein Angote J. declined to allow the applicant's application dated 23rd April, 2019 seeking to reopen his case to enable him to produce the Title Deed for parcel **number Donyo Sabuk/ Komarock Block 1/373** which he had claimed was lost.

3. The grounds in support of the motion and reiterated in a supporting affidavit sworn by the applicant **Josephat Mulwa Mukima** are that: the applicant timeously filed a notice of appeal dated 4th November 2019, which was lodged in the Court of Appeal on 26th November 2019 and a letter requesting proceedings on 4th November 2019; that without due consideration of the filed notice of appeal, the High Court dismissed the applicant's entire suit in a judgment delivered on 24th April 2020; that it came to the applicant's notice that the filed notice had glaring defects in form resulting in its withdrawal vide a notice of withdrawal dated 27th April 2020 and this error was remedied by filing a fresh notice on 29th April 2020; that the typed proceedings were obtained on 7th May 2020 and a certificate of delay issued on 8th May; that the reason for delay for filing the record of appeal was because the file was in the custody of the trial Judge and was only released after the delivery of the Court's judgment; that the applicant has an arguable appeal and stands to suffer great prejudice if the sought orders are not granted in its favour. The application is also supported by the applicant's submissions where it is submitted *inter alia*, that the applicant has shown sufficient cause for the exercise of the court's discretion in his favour, that the court be guided by the overriding objectives and that the 2nd, 3rd 9th and 12th Respondent will not be prejudiced by being exempted from being served with the notice of appeal and record of appeal given their lack of participation in the trial court.

4. The application was opposed by the 8th respondent, **Afya Investment Co-Operative Society Limited** vide a Replying Affidavit dated 26th June, 2020 and sworn by **Felix Mutisya Ndoi** the Chief Executive Officer and Managing Director, who stated inter alia: that the notice of appeal was served outside the stipulated statutory limits; that the applicant has not explained the 6 month delay in filing the instant application since the delivery of the ruling and lastly that the applicant's appeal had no chance of success and the orders proposed were merely academic.

5. The application was similarly opposed by the 10th respondent, **Hazina Housing Co-Operative Society Limited** in a Replying Affidavit dated 29th June 2020 sworn by its Chairman **Charles Musungu** who deponed that: final judgment was been delivered by the court on 24th April 2020 rendering the instant application an abuse of the court process and without of merit ; the applicant has filed **Civil Application 118 of 2020** before this court seeking injunctive orders against the said final decision pending the lodging, hearing and determination of the intended appeal and that the applicant failed to file a stay of proceedings following the ruling delivered on 1st November 2019 and that it is in the interest of justice that the orders sought be declined.

6. I have considered the application before me. The principles that guide this Court in considering an application for leave to file an appeal out of time are well settled. In **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** (1999) 2 EA 231, it was thus stated:

***“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”***

7. The impugned ruling was delivered on 1st November 2019. Under Rule 75 of this Court's Rules, the applicant should have given notice in writing and lodged it in duplicate with the Deputy Registrar of the High Court within 14 days. The applicant herein failed to comply with the stipulated time. He lodged a notice of appeal dated 4th November 2019 which bears a stamp of the Court of Appeal registry as received on 26th November 2019 and served the respondents on 16th December 2019. Given the blatant defects on the face of the notice, the applicant chose to withdraw the notice vide a notice of withdrawal filed on 27th April 2020. The proceedings in the Superior Court were not stayed and this is telling by the delivery of the court's final judgment delivered on 24th April 2020 dismissing the applicant's suit in the superior court.

8. The applicant is now before this court, having filed a fresh notice of appeal before the High Court on 29th April 2020, seeking to enlarge the time to file a Notice of Appeal, Memorandum of Appeal and Record of Appeal against the ruling delivered on 1st November, 2019. He contends that the delay in filing the appeal from the date of filing the notice of appeal dated 4th November 2019 was caused by the delay in receiving typed copied of the proceedings and the inaccessibility of the court file which was retained in chambers by the Learned Judge in preparation for the Judgment.

9. From the outset it is instructive to note that once the applicant opted to withdraw the defective notice of appeal, it was of no consequence. It is quite clear that by the time the applicant filed a fresh notice of appeal on 29th April 2020, the final judgment had already been delivered by **Angote J.** rendering the trial court *functus officio*. It is trite that once a court has made a final pronouncement on a matter, it cannot reopen the case save for clerical or arithmetic errors. (See **Telkom Kenya Limited vs. John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)** [2014] eKLR).

10. The applicant has already filed an application before this court seeking injunctive orders against the superior court's final decision pending the lodging, hearing and determination of his intended appeal being **Civil Application 118 of 2020**. Consequently there must be finality in proceedings before the High Court and to allow this application will be an exercise in futility as it has been overtaken by events. The applicant will have an opportunity to ventilate his grievances in the second appeal. In the circumstances, I am unable to exercise my discretion under Rule 4 and dismiss the application. Costs shall abide by the outcome of the intended appeal.

***Dated and delivered at Nairobi this 2nd day of October, 2020.***

**M. WARSAME**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

*Signed*

**DEPUTY REGISTRAR**