



IN THE COURT OF APPEAL

AT NAIROBI

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

NYERI CIVIL APPLICATION NO. 78 OF 2017

BETWEEN

CATHOLIC DIOCESE OF MERU

GATUNGA CATHOLIC MISSIONAPPLICANT

AND

NDUME NTUIRU & 53 OTHERSRESPONDENTS

(Being an application for extension of time within which to file and serve record of appeal from the ruling of the High Court of Kenya (Hon. I. Lenaola, J.) dated 28th January 2008 In Meru HCC No. 235 of 1992

RULING OF THE COURT

- UPON** perusing the Notice of Motion dated 11th July 2017 under **Rule 4** of the **Court of Appeal Rules 2010**, substantively seeking an order that this Honourable Court be pleased to extend the time within which the intended appellant shall file the record of appeal; an order that this Honourable Court be pleased to grant leave to file the intended appellate record within a period of thirty (30) days from the date of the ruling and to serve the same within seven days of such filing; and lastly, an order that the costs of the application be in the cause; and
- UPON** reading the grounds in the body of the application and the supporting affidavit of **Fr. Eliud Mwenda** sworn on 11th July 2017 together with annexures thereto blaming the advocate then on record for them for the failure to file the appeal after he had timeously filed the notice of appeal; and
- UPON** perusing the replying affidavit sworn by **Ndume Ntuiru** on 16th November 2017 together with annexures thereto contending that the applicant is guilty of laches, has been indolent considering that the application was filed nine years after the filing of the Notice of Appeal, and almost ten years after the delivery of the intended impugned ruling; that the applicant is also not suited on their application for the failure to apply for a typed certified copy of the proceedings and decree for the intended appellate purpose. Further, that following the applicant's failure to timeously file and progress the intended appeal whose memorandum of appeal has not also been filed to demonstrate the existence of an arguable appeal, the consent judgment entered by **Hon. Lady Justice Ruth Sitati** dated 27th July 2005 was fully implemented more than ten (10) years ago. It would therefore be a futile exercise for the Court to grant the application under consideration. Some of the named respondents are deceased borne out by the contents of the copies of their annexed death certificates; that the explanation that it is the applicant's advocates to blame for the inordinate delay in progressing the timeously initiated appellate process does not also hold water as no explanation has been given as to why it took them nine (9) years to find out the progress from the said advocates; that the application is one of the tactics the applicant has employed with the sole aim of frustrating the execution of the decree resulting from the intended impugned ruling; and lastly, that there is doubt as to whether all the respondents to the application were served with the application under consideration; and
- UPON** perusing the further supporting affidavit from **Fr. Eliud Mwenda** sworn on 2nd February 2018 in response to the 1st and 4th respondents replying affidavit contending *inter alia* that issues raised by the 1st and 4th respondents in the said replying affidavit fall for consideration in the intended appeal, extension of time within which to comply is a discretionary remedy, although it was alleged that there are fifty-four (54) respondents, only six (6) still lay claim to the applicant's land, the various litigations alluded to in the replying affidavit though relevant are totally distinct from the issues they intend to canvass on appeal, all the named respondents have all along been represented by the firm of **M/s Ndubi Ondubi & Associates Advocates** who were served with the application under consideration on 23rd August 2017 and accepted service on behalf of all the respondents. Issue of non-service raised by the same firm four months after service upon them of the application and accepting the same service on behalf of all the respondents is made in bad taste and cannot therefore hold. Further, that the substratum of the intended appeal holds crucial public utilities namely **Mukothima Girls Secondary School, Mukothima Health Centre** and **Mukothima Water Project** all of which are crucial public utilities likely to be put to risk if the orders sought herein are not granted. Lastly, that the mistake of their former advocate should not be visited against them. The delay is not so inordinate so as to disentitle them to the relief sought especially when it has sufficiently been explained; and

5. **UPON** considering the applicant's written submissions and legal authorities relied upon in support of the application; and
6. **UPON** considering the 1st and 4th respondents' written submissions and legal authorities cited therein in opposition to the application; and
7. **HAVING** considered the principles that guide the Court in the exercise of its mandate under Rule 4 of this court's rules as restated and crystalized in the case of **Martin Njiru vs. Attorney General [2020]eKLR** and **Vishva Stone Suppliers Company Limited vs. RSR Stone [2006] Limited [2020]eKLR**, among numerous others and which I fully adopt; and
8. **UPON** also considering that the invitation to intervene on behalf of an applicant in an application of this nature is purely discretionary but which discretion must be exercised judiciously with reason and in the best interests of justice to the parties before Court; and
9. **UPON** applying the above threshold to the reason advanced by the applicant for the delay in progressing their intended appellate process after timeously filing the notice of appeal namely, in action on the part of their former advocates on record to progress the appellate process upon timeously filing the notice of appeal; and
10. **UPON** considering that, notwithstanding that upon going through both the supporting and further affidavits put forth by the applicant in support of the application, I have not traced any letter from the applicant instructing their former advocate to progress the timeously initiated appellate process. Nor any follow up letter inquiring about the progress made on their appellate process; and
11. **UPON** considering that there is also no affidavit sourced from the said former advocates to confirm the applicant's allegation, I cannot however give a blind eye to the applicant's uncontroverted assertion that the land in dispute houses public utilities, the dispute I have been confronted with herein therefore, transcends beyond the real contestants herein. It is, therefore, my considered opinion that interests of justice would demand that I exercise my discretion in favour of the applicant for ends of justice to be met to both parties herein which in my view would best be realized in law if the issues in controversy as between the contestants herein are crystalized on appeal; and
12. **HAVING** reached that conclusion, I make orders as follows:

1) The applicant's application dated 11th July 2017 be and is hereby allowed as prayed.

Dated and delivered at Nairobi this 20th day of November, 2020.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR