



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: D. K. MUSINGA, J.A.)**

**CIVIL APPLICATION NO. 40 OF 2019 (UR 46/2019)**

**BETWEEN**

**NAIROBI CITY COUNCIL ASSEMBLY.....1ST APPLICANT**

**HON. MARGARET W. MBOTE.....2ND APPLICANT**

**HON. PETER W. KIMUHU.....3RD APPLICANT**

**HON. JACOB NGWELE.....4TH APPLICANT**

**HON. HABIBA HASSAN.....5TH APPLICANT**

**HON. ESTHER NYANGWESO.....6TH APPLICANT**

**HON. EVE MURENYA.....7TH APPLICANT**

**HON. JOSEPHINE KAMAU.....8TH APPLICANT**

**HON. BERYL OGUTA.....9TH APPLICANT**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....RESPONDENT**

**(Being an application for extension of time to file and serve Notice of Appeal  
and a Record of Appeal out of time in an intended appeal from the Judgment  
of the Anti-Corruption and Economic Crimes at Nairobi (H. I. Ong'undi, J.)  
delivered on 5th December 2018 *in ACEC Misc. No. 41 of 2018.*)**

\*\*\*\*\*

**RULING**

1. This is an application for extension of time by the applicants to file and serve both notice and record of appeal against the judgment and order of the High Court at Nairobi delivered on 5th December 2018 by *Ong'undi, J.* in *ACEC Misc. No. 41 of 2018*. The applicants further prayed that the notice of appeal filed herein be deemed to have been duly filed in time.

2. The affidavit in support of the application sworn by *Ahmed Siro Makokha*, the acting Clerk of Nairobi City County Assembly, the 1st applicant, states, *inter alia*, that following delivery of the impugned judgment, the applicants' advocates wrote to the 1st applicant on 6th December 2018 informing them about the outcome of the case and requested for instructions on whether to proceed on appeal; inadvertently the letter was not responded to until 31st January 2019; that the applicants verily believe that the intended appeal has high chances of success; that unless the orders sought are granted the applicants will suffer great prejudice as they will have been denied their constitutional right of appeal; and that the respondent will not suffer any incurable prejudice if the application is allowed.

3. The respondent filed a replying affidavit that was sworn by **Ditim Musi**, an investigator with the respondent. He deponed, *inter alia*, that the intended appeal is frivolous; that the letter that was written to the Clerk of the 1st applicant by the applicants' advocate had not been exhibited; and that the response that gave instructions to pursue an appeal had also not been exhibited. The respondent also filed submissions in tandem with the aforesaid grounds. The application was disposed of by way of written submissions.

4. I have considered the application as well as the submissions filed by both parties.

5. The principles that guide this Court in an application under **rule 4** of this Court's Rules are well settled. The Court exercises unfettered discretion and is required to consider, *inter alia*, the period of the delay; the reason for the delay; (possibly) the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the respondent if the application is granted. See **Mwangi v Kenya Airways Ltd [2003] KLR 486**.

6. The delay was for about 48 days. The 1st applicant's acting Clerk stated that "**due to the large number of correspondences received at my office, the letter was misfiled and thus was not responded to.**" The error was discovered on 31st January 2019 and immediately the applicants' advocate was given instructions he filed this application on 7th February 2019. I do not think that it was absolutely necessary that the applicants exhibit the letter that was written to the 1st applicant seeking instructions as well as the response thereto. I am satisfied that the delay has been well explained.

7. Having perused the impugned judgment and the Draft Memorandum of Appeal, I am persuaded that the intended appeal is arguable.

8. The respondent will not suffer any incurable prejudice if this application is allowed. On the other hand, the applicants' constitutional right of appeal will have been frustrated unless their application is granted.

9. Consequently, the Notice of Motion dated 5th February 2019 is allowed as prayed. The costs of the application shall be in the appeal.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of November, 2020.**

**D.K. MUSINGA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**