



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 227 OF 2011

BETWEEN

THE COMMISSIONER OF POLICE.....1ST APPLICANT

THE COMMISSIONER OF LANDS.....2ND APPLICANT

THE HON. ATTORNEY GENERAL.....3RD APPLICANT

AND

JOSEPH MBURU GITAU

FELISITA WARIAPA NDUKU

KEZIAH WANJA NJUGUNA

CECILIA WANJIRU GICHURU

GEOFFREY MINAHANJI ANAIMBO

FLACIA NJOKI MUIRURI

CHRISTIAN MUNJANJI AJAMBO

MARY WAMBUI KARARI

ISAAC MBURU NJUGUNA & 633 OTHERS....RESPONDENTS

(Being an application to serve Notice of Appeal dated 7th July, 2009 out of time filed on 24th June, 2009 emanating from the judgment and decree of the High Court of Kenya (Nyamu J., (as he then was) dated 2nd May, 2008 in Nairobi High Court Misc Application No 673 of 2008)

RULING

1. The Attorney General (3rd applicant) has filed the instant application seeking leave to serve a Notice of Appeal that was filed out of time on the 24th June, 2009. Although there are other prayers sought in the same application, such as leave to adduce additional evidence and to file a supplementary record, those do not fall for my determination. The only one I am mandated to deal with under Rule 4 of the Court of Appeal Rules as a single Judge is the prayer seeking leave to file the Notice of Appeal out of time or to deem it duly filed.

2. The application is supported by the grounds stated on the body thereto, to wit;- that the office of the Attorney General that represented the Commissioner of police, the 1st applicant filed a Notice of Appeal dated 7th July, 2009 but erroneously indicated the judgment being appealed therein was by Dulu J., instead of Nyamu J., (as he then was). The name of Dulu J., was a typo which was not an intentional mistake but inadvertent. Blame was also visited upon counsel instructed by the Attorney General to represent 1st and 2nd applicants, one Mr J.A. Atanda who was faulted for failing to file a response or written submissions before the High court. Also during the hearing of the Petition before the High court, the same state counsel made oral submissions stating that the police did not have an interest in the matter and

were therefore not opposed to the orders sought. This was a misrepresentation and in actual fact contrary to the instructions given by the Commissioner of police and the Commissioner of lands who had confirmed that the suit land was government land measuring 28.67 hectares and there stood a government housing project with over 500 maisonettes meant for security agencies where the government had spent over 2 billion Kenya shillings.

3. Be unknown to the applicants judgment was entered against the Commissioners of police and lands on 2nd May, 2008 by Nyamu J., The applicant applied on 17th June, 2009 for leave to file and serve a Notice of Appeal. By a twist of fate, two notices of appeal were filed, one on 24th June, 2009 and another on 7th July, 2009. Further, when preparing the record of appeal, the notice dated 7th July, 2009 was erroneously used which had a typographical error.

4. The application was supported by the affidavits of Kepha Onyisho sworn on 23rd October, 2017 and Silas Opiyo, the director of Planning Research and Development. During the hearing of the application, Mr Onyisho reiterated the above averments and stated that the respondents will not suffer any prejudice as the record of appeal was filed and served on the respondents; even the notice of appeal has been on record only that the wrong notice was served erroneously, otherwise the respondents have been aware of it therefore they will not be prejudiced. Counsel also stated the appeal raises a matter of great public importance, involving public land and resources and it will be in the interest of all parties that the appeal be heard on its merits.

5. Mr. Opiyo learned counsel for the 1st respondent who was teaming up with Mr. Onyisho also emphasized that the appeal was arguable; this is because an order of prohibition was issued to stop an eviction which had already taken place; that the subject matter is a parcel of land that is registered in the name of the Government where 595 housing units were developed and are occupied by security personnel.

6. The application was vigorously opposed; Mr Joseph Mburu Gitau appearing in person submitted that the applicants are merely buying time as they were granted leave again to file another Notice of Appeal in 2009 which they failed to do. He also accused the applicants of filing a multiplicity of applications and using every means to silence the respondents including using the police to charge him with offences of uttering false documents of title. He underwent a lengthy criminal trial but emerged triumphant when he was acquitted of all the charges in **Criminal Case No 1733 of 2008** before the Chief Magistrate's court at Nairobi. He claimed to have bought the suit property for value by paying the allotment fees and other charges but it is nearly ten years and he and other respondents have been denied occupation.

7. Opposing the application was Mr. Kamere learned counsel for the 5th respondent and Mr Mutahi learned counsel for Isaac Mburu one of the named respondents. Both counsel associated themselves with the sentiments expressed by the 1st respondent. They faulted the applicants for coming to seek leave after 8 years. The applicants did not explain why they prepared two notices and why it took them 8 years to seek leave; nor did they demonstrate they had an arguable appeal. Counsel submitted that the delay would prejudice their clients as they have been kept away from the fruits of their litigation and judgment for many years.

8. Counsel on both sides and also the 1st respondent who appeared in person were in agreement the principles that guide the court in determining whether to grant leave to file a notice of appeal out of time or to undertake any other necessary steps are well settled in a long line of cases by this court to wit; - the case of; - ***Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, C. A. Appl. No. Nai. 251/97 (ur)***:

“It is now 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.”

The above list of matters to bring to bear on whether to grant leave is course not exhaustive as held in the case of; - ***Mongira & Another vs. Mukaria & Another, 2005 2 KLR 103 at page 106-107***, where the Court again cited ***Leo Sila Mutiso***, (supra), and went on to state:

“Those, in general are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words “in general” Rule 4 gives the Judge unfettered discretion is exercised judicially a Judge would be perfectly entitled to consider any other facts outside those listed in the paragraphs we have quoted above. ... To limit such issues only to the grounds set out in the above paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way”.

9. I have considered the application, the submissions and all the authorities cited. To me, it is an understatement to say this whole dispute has had a chequered history; an appeal that was filed on 27th October, 2011 has never been heard. It has faced several huddles that have necessitated filing of various applications to put the record right. I think a brief outline of the factual background will be necessary as an issue of whether the appeal raises triable issues was raised, as well as a claim that the applicants have been indolent and therefore not deserving the exercise of this court's discretion to extend time.

10. At the centre of the dispute is a huge track of land within the City of Nairobi South C area known as LR No 209/14582 (suit land) measuring over 28 hectares. On one hand the respondents who filed the judicial review application dated 25th May, 2005 claimed that the suit land was allotted to them vide a group known as **Wilson Mutumba Women Group and Organization** and as a consequence thereto, they paid the required fees. They further claimed that they were issued with a lease on 18th December, 1990; that in 1991 the women group was sponsored to put up some 300 residential houses; that the project was abandoned due to a disagreement between the donor and the Government. Thereafter the members of the women group allocated themselves the incomplete houses but on 20th May 2005, the OCPD Langata police station evicted them from the suit premises and arrested some of the members who were charged with various criminal offences.

11. The foregoing triggered the Judicial review application which was heard by Nyamu J and orders issued in favour of the respondents,

apparently there having been no opposition by the applicants as the state counsel appearing on behalf of the AG informed the court that the Commissioner of Police had no objection to the orders sought. Being aggrieved by the orders, the applicants appealed, but the appeal itself has never been heard as all steps taken by the applicants seem jinxed. A case in point is, this is the second application seeking leave under Rule 4 of this Court Rules. Githinji JA., by his Ruling delivered on 17th June, 2009 granted the applicants leave to file the Notice of Appeal within 14 days and serve it within 7 from the date of filing. This is how the learned Judge advanced his reasoning for the said orders as thus;

“In my view, having regard to the nature of the dispute, the acreage of the land, and the value of the land in dispute, it is in the public interest that the applicants should be given an opportunity to appeal against the judgement of the superior court to the effect that the land is owned by the respondents and that they should not be evicted from the land. The respondent did not file a replying affidavit and have not therefore shown that they will suffer undue prejudice if time is extended”

12. Almost 8 years down the line, I am still being asked to exercise discretion this time to extend time to serve a Notice of Appeal filed in Court on 24th June, 2009 because of a typographical error appearing on the notice that indicated the name of Justice Dulu instead of Justice Nyamu. It is common ground the applicant’s counsel from the Attorney General’s office was blamed for not seeking instructions from the Commissioner of police; failing to represent the Commissioner of Police; failing to inform the 1st applicant about the judgment and now it is not clear whether two notices of appeal one with a typographical error was further contrived to frustrate the appeal.

13. Be that as it may, the crucial question for me is whether the applicant has advanced reasonable grounds to warrant exercise of discretion. I must state the lethargy displayed by state counsel from the office of the Attorney General is appalling to say the least. The office of the Attorney General is a Government Law Firm like any other and the AG being the titular head of the Bar should set high standards of professionalism even to be emulated by other law firms. The state counsel from the AG’s office have conducted this matter most slovenly. However, that has not lessened the weight of the matters raised herein which are of immense public interest and which in my view may never go away unless the underlying or the substantive issues of ownership of the suit land is properly addressed and adjudicated upon.

14. I have on one hand the respondents claiming to have been allocated what is alleged to be public land; on the other hand the applicants are claiming the suit land was government land where it has built houses for security agencies who are in occupation of over 500 housing units worth 2 billion Kenya Shillings.

15. These are weighty matters that point to an arguable appeal. I have also not lost sight of the fact that the Notice of Appeal that was included in the record had a typographical error citing the wrong Judge. I am conscious that the Notice of Appeal is the foundation of every appeal. For those reasons, I have asked myself whether a typographical error on the Notice of Appeal can cost the applicants a right to a hearing which is guaranteed in the Constitution. To answer that, I have looked at the prejudice that will be suffered by the respondents. In my view the respondents have suffered delay from executing the judgment and the inconvenience of attending court to defend this application. To me the former, is an imponderable cost of pursuing justice while the latter can be compensated with costs. Both are far outweighed by the bigger picture of administering substantive justice that brings a dispute over suit land to a finality after all the parties are given a hearing.

16. For the foresaid reasons, I am persuaded the seriousness of the issues raised in the appeal far more outweigh the prejudice which can also be compensated with an award of costs of this application which I award to the 1st , 3rd and 5th respondents who opposed this application.

Accordingly I allow the notice of motion dated 3rd November, 2017 and order as follows:-

- 1. The applicants shall lodge and serve on all the respondents its Notice of Appeal within seven (14) days of the date hereof. Alternatively the Notice of Appeal filed on 24th June, 2009 shall be deemed filed and served.**
- 2. Thereafter, the applicant shall lodge the Record of Appeal within thirty (30) days from the date hereof and serve the same on all the respondents within seven (7) days of its lodgment. Alternatively the record of appeal filed shall be deemed as filed on time.**
- 3. The 1st, 3rd and 5th respondents shall have the costs of this application.**

Dated and delivered at Nairobi this 5th day of April, 2019

M. K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR