



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: KIAGE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 7 OF 2019

BETWEEN

NATHAN TIROP KOECH.....1ST APPLICANT

ZACHARIA KIMUTAI KOSGEL.....2ND APPLICANT

EZEKIEL KIPTOO.....3RD APPLICANT

ERNEST KIBET.....4TH APPLICANT

AND

CHIEF LANDS REGISTRAR.....1ST RESPONDENT

REGISTRAR OF TITLES.....2ND RESPONDENT

MINISTRY OF LANDS.....3RD RESPONDENT

DIRECTOR OF SURVEYS.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

NATIONAL LAND COMMISSION.....6TH RESPONDENT

(Application for extension of time within which to appeal to the Supreme Court)

RULING

By the Motion dated 31st January, 2013 the four applicants above-named pray that “*the time within which [they] can seek leave and or issue of certificate that this matter is fit for appeal to the Supreme Court be extended,*” and that pursuant to grant of that prayer, their application dated 17th January, 2019 be deemed as having been filed within time.

In the grounds appearing on the face of the motion it is stated that after this Court delivered judgment on 6th December, 2018, they were aggrieved and wanted to appeal to the Supreme Court but they did not do so in time as the 1st applicant, Nathan Tirop “*fell ill in the month of December and has been under medication since then.*” He is described as the Principal Petitioner who is fully conversant with the facts of the matter and swore all affidavits and attended to the matter on behalf of his co-applicants at all stages of the proceedings. The delay was therefore “*beyond human control.*” They state that the delay is not inordinate and that the extension sought would not prejudice the respondents in any way.

At the hearing of the application before me, **Mr. Esikuri**, the applicants’ learned counsel relied on that supporting affidavit. In answer to my question, he conceded that the Supreme Court Rules do make provision for extension of time on application to that Court but nonetheless prayed that I exercise my discretion and extend time as prayed, which he was to repeat in his reply.

There was no affidavit in reply filed as at the time the motion was heard but **Ms Lang’at**, learned counsel holding brief for **Mr. Eredi**, for

the respondents, applied and I acceded to the request, that she address me in opposition to it. She contended that no good reason had been advanced to justify extension of time as the other three applicants suffered no handicap and could have given instructions whilst Nathan Tirop Koech was indisposed. She also submitted that only the Supreme Court can extend time for any late filing of an application for certification.

Rule 4 of the Court of Appeal Rules on which the motion before me is premised, is in rather straight-forward terms, admitting to no ambiguity;

“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 or 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.” (my emphasis)

The time that an applicant may seek extended must be limited by the Rules or by an order of this Court or of a superior court and an applicant comes to a single Judge and pleads that he has been caught by the said timeline and prays that the same be enlarged.

The applicants before me have not indicated in their application and in their learned counsel’s submissions before me, which timeline it is they were unable to meet. That immediately raises the question whether the application before me is competent. It is not open to a party to request extension of time unless the time in question is clearly set out in the Rules or in an order of this Court or a superior court. Absent a showing of such timeline, an applicant who moves the court to extend that which is neither expired nor indeed limited will be inviting the court to act *in vacuo* and in vain.

Indeed, it seems clear to me that the applicants have fully confounded and conflated two separate processes namely, *leave to appeal* and *certification*. The two are separate and distinct and should not be used in combination, interchangeably or in omnibus fashion as has happened in this application. Appeals to the Supreme Court from decisions of this Court do not require leave, where *leave* means permission to appeal in cases where an appeal does not lie as of right.

What a party requires with regard to an appeal to the Supreme Court is a certificate or certification by this Court that the appeal intended to be filed at the Supreme Court involves a matter of general public importance. This is a jurisdictional requirement and a special procedure introduced by, and expressly spelt out in **Article 163(4)(b)** of the **Constitution**. It is therefore a plain and fatal error that renders an application incompetent and incurably defective for a party to seek, as do the applicants herein, a prayer seeking extension of time with regard to those different processes improperly conjoined. I think, with respect, that parties and their legal advisers who wish to invoke this Court’s certification jurisdiction must perform invoke it as such, not carelessly speak of and seek “*leave to appeal to the Supreme Court*,” a procedure that is wholly unknown.

I need also state that the current situation highlighted by the motion before me, despite its defects, reflects an unsatisfactory state of the law where there are no timelines in our Rules within which an application for certification under **Article 163(4)(b)** of the **Constitution** is to be brought. I very much doubt that it is the intention of the law maker that such applications be brought *at any time* as that would be clearly absurd. The time for bringing an application must necessarily be fixed and limited, not left open-ended as appears to be the case since no time is specified in our Rules or in the Supreme Court Rules, which I have painstakingly perused. The situation is intolerable and calls for amendment of the Rules to accord with rationality.

That said, I come to the inevitable conclusion that the application before me does not lie and is incompetent. In consequence, the same be and is hereby struck out, but with no order as to costs.

DATED and delivered at Kisumu this 31st day of October, 2019

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR