



IN THE COURT OF APPEAL

AT ELDORET

CORAM: (NAMBUYE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 118 OF 2018 (UR. 81/2018)

BETWEEN

KIMOI RUTO1ST APPLICANT

ESTHER RUTTO.....2ND APPLICANT

AND

SAMUEL KIPKOSGEI KEITANY.....1ST RESPONDENT

VINCENT KIRWA RUTO.....2ND RESPONDENT

PIUS KIBEREN RUTO.....3RD RESPONDENT

THE AGRICULTURAL FINANCE CORPORATION.....4TH RESPONDENT

ELGEIYO-MARAKWET COUNTY

LAND REGISTRAR.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

(An Application to enlarge time within which the applicants can file and serve record of appeal against the Ruling and Orders of the Environment and Land Court at Eldoret (Anthony Ombwayo, J.) Dated 31st May, 2016

in

Eldoret ELC No. 149 of 2015)

RULING

Before me is a Notice of motion dated 10th December, 2018 and filed on 18th December, 2018, expressed to be brought under **Rule 4** of the Court of Appeal Rules (CAR), seeking relief as follows:

“(1) That the Honourable court be pleased to extend time within which the applicants can file and serve a record of appeal herein.

(2) That costs of this motion be provided for.”

It is supported by a supporting affidavit of **Kimol Ruto** and **Esther Ruto**, deposed on 10th December, 2018. It is opposed by replying affidavits deposed by **Samuel Kipkosgei Keitany**, the 1st respondent on 13th July, 2019, and filed on 15th July, 2019, on his own behalf, **Rashid Ngaira** deposed on 22nd July, 2019, and filed on 23rd July, 2019 on behalf of the 4th respondent, and lastly on points of law by

learned counsel **Mr. Wabwire**, for the 5th & 6th respondents.

The application was canvassed by way of oral submissions. Learned counsel **Mr. A.K. Magut** appeared for both applicants; **Ndarwa I.N.** for the 1st, 2nd & 3rd respondents; **Nyachiro J** for the 4th respondent; and **Wabwire** for the 5th & 6th respondents.

The background to the application is that, during land Adjudication and demarcation in the 1960's, land Parcel number **Cherang'any/Korongoi/1** (the suit property) was adjudicated in favour of the 1st applicant but registered in the name of her late husband **Ruto Chesire (Chesire)**. Unknown to the applicants, one **Julius Kipyego Ruto** (Kipyego), a son and brother to the applicants acquired a loan of KShs. 20,000/- from the 4th respondent using title to the suit property as collateral. He defaulted on the repayment of the loan causing the suit property to be registered in the names of the 4th respondent in the 1990s. After the death of both **Chesire** and **Kipyego** in **2003**, is when the applicants came to learn of the transfer of the suit property from the late **Chesire** into the names of the 4th respondent, and subsequently into the names of the 1st respondent on 6th July, 2007, with the assistance of the 2nd and 3rd respondents, who had fronted him as a family member exercising the right of redemption of family property with the consent and approval of other family members.

Being aggrieved, the applicants instituted Eldoret HCCC No. 147 of 2007 (OS) subsequently renamed ELC Suit No 378 of 2012, seeking adverse possession which was dismissed for want of a cause of action. They subsequently filed Eldoret Land Court case No. 149 of 2015 on which they anchored an application dated 25th May, 2015 seeking interim injunctive orders. In a ruling dated 18th November, 2015, the court sustained a preliminary objection raised by the 1st respondent against both the suit and the injunction on grounds of lack of *locus standi*.

Undeterred, the applicants filed an application dated 1st February, 2016 seeking to review the court's orders of 18th November, 2015 on the grounds of mistake as it had transpired that they had in fact been granted letters of administration *ad litem* vide Kisumu Succession Cause No. 548 of 2007, but which had inadvertently not been extracted by their advocate then on record for them and annexed to the pleadings in Eldoret Land Case No. 149 of 2015. The application was dismissed on 31st May, 2016 for lack of merit. The applicants still feeling aggrieved timeously filed a notice of Appeal on 13th June, 2016 intending to appeal against the entire ruling of 31st May, 2016, but failed to file a record of appeal within the sixty days' time stipulated for in **Rule 82(1) & (2)** CAR hence the application under consideration.

In support of the application, learned counsel **Mr. Magut**, submitted that they have an arguable appeal as they intend to argue on appeal that the Judge fell into error when he failed to appreciate and accept their plausible explanation as to why they had not annexed the grant of letters of administration *ad litem* to the pleadings in suit No. ELC 149 of 2015; that failure to accord them an opportunity to ventilate their claim on merit will be tantamount to the court perpetuating the apparent undoubtedly, admitted fraud and illegality committed against the applicants by the respondents. That the Judge also failed to uphold a cardinal constitutional principle which is now trite that enjoins courts of law to render substantive justice as opposed to upholding technicalities; and lastly that sending applicants away from the seat of justice empty handed will be tantamount to punishing them for the mistakes committed by their advocates then on record for them, firstly for proceeding by way of adverse possession when what the applicants intended to champion before court were succession rights through a deceased person; and secondly for the failure to extract and annex the grant of letters of administration *ad litem* to the pleadings in ELC No. 149 of 2015, causing the suit to be struck out for want of *locus standi*.

On the delay in timeously seeking the court's intervention, **Mr. Magut** cited loss of touch with his clients because of his involvement in the 2017/2018 politics as well as financial challenges faced by the applicants following their eviction from the only home they had known for years rendering them destitute and were now depended on relatives and well-wishers for support.

To buttress the above submissions, **Mr. Magut** cited Eldoret Civil Application No. 90 of 2018, **Francis Barasa Lurare & Another versus Denis Maloba** in which Okwengu, JA, allowed an application for extension of time on account of the applicants' advocates failure to alert them of the date of the delivery of the intended impugned judgment; Eldoret Civil Application No.56 of 2018, **Richard K. Limo versus Hassan K. Ng'eny & 5 others**, in which Githinji, JA allowed extension of time because, there was nothing in the CAR which precluded a party from lodging a document out of time and then subsequently seeking to have it regularized. Eldoret Civil Application No. 91 of 2017, **Andrew Kiplagat Chemaringo versus Paul Kipkorir Kibet**, in which **J. Mohammed, JA** allowed extension of time, because the law does not set out any minimum or maximum period of delay so long as the prerequisites for extension of time are satisfied. Lastly, Nakuru Civil Application No. Nai 93 of 2007, **Musa Kipkorir Arap Baringila versus Mansour Nandlal**, in which, **Okubasu, J** (as he then was) found and appreciated that the delay was long and clearly inordinate but accepted, the applicants explanation that the same was caused due to inaction on the part of the applicants' advocates.

Opposing the application, learned counsel **Mr. Ndarwa**, submitted that the applicants' conduct of filing ELC Case No. 378 of 2012 seeking adverse possession against the 1st respondent was a clear demonstration of their acknowledgement of his good title to the suit property. counsel acknowledges service upon them of the notice of appeal filed on 13th June, 2016 but contends that no explanation has been given as to why no record of appeal was filed within the time stipulated for in the CAR, considering that the applicants advocate timeously informally applied for proceedings in court on the date of the delivery of the intended impugned ruling and pursuant to which the court gave directions that a typed copy of the proceedings be supplied within fifteen (15) days of that date subject to payment of the requisite court fees.

It is further, counsel's submission that the notice of appeal timeously filed on 13th June, 2016 became spent on 13th August, 2016 when the applicants failed to lodge a record of appeal within the requisite sixty days and that to the extent that the applicants have not sought leave of court within which to regularize the said notice of appeal, the application is incompetent; that notwithstanding, the above submission a delay of 858 days is undoubtedly inordinate; that nothing prevented applicants from availing themselves of the Rule 115 of the CAR procedures to redress financial challenges if any. Likewise, allegations that applicants counsel on record ran for a political office in the 2017 general elections does not operate to aid the cause of the applicants' application considering that electioneering for the 2017 elections ended in August, 2017. Granting the application in the circumstances will greatly prejudice the 1st respondent argued counsel.

Learned counsel **Mr. Nyachiro** for the 4th respondent submitted that failure to seek leave within which to regularize the now spent notice of appeal, renders the application under consideration incompetent and therefore a nonstarter; and also that granting the application will highly

prejudice the 4th respondent as the applicants have not satisfied the threshold for granting relief under **Rule 4** of the CAR.

Learned counsel **Mr. Wabwire** for the 5th and 6th respondents opposed the application on points of law. Associating himself with the submissions of his colleagues submitted that the length of the delay is inordinate. Also the reasons advanced for the delay are not plausible and therefore amount to no reason at all.

In reply to the respondents' submission, **Mr. Magut** relied on **Article 159 (2) (d)** of the Kenya Constitution 2010, and urged for the applicants to be accorded substantial Justice to ventilate their intended appeal on its merits as the same is not frivolous. Secondly, that the respondents stand to suffer no prejudice as the 1st respondent is in possession of the land.

I have considered the record, rival pleadings, principles of case law relied upon by the applicants in support of their opposing positions. The first issue to be dealt with is whether the application is incompetent in view of the undisputed position that the notice of appeal on which it is anchored although timeously filed is deemed to have been withdrawn by reasons of the operation of the prerequisite in **Rule 83** of the CAR. The need to determine this issue first is because, if the application is not sustainable, there will be no need to delve into its merits.

The undisputed position on the record is that applicants timeously filed a notice of appeal on 13th June, 2016 in obedience to **Rule 75(2)** of the CAR. They also complied with the prerequisite in **Rule 77(1)** by having the said notice of appeal served on to the respondents within the stipulated time. They did not however comply with the prerequisites in **Rule 82(1) & (2)** of the CAR for the failure to file their record of appeal within the stipulated sixty (60) days from the date of the lodging of the notice of appeal. The consequence of that default is what is provided for in **Rule 83** of the CAR. It provides:

“If a party who lodged a notice of appeal fails to initiate an appeal within the appointed time, he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any person on whom the notice of appeal was served.”

The power donated to the court to deem the applicants now lapsed notice of appeal as having been withdrawn is discretionary by use of the word “may”. The principles that guide the exercise of Judicial discretion were aptly restated by **Ringera, JA** (as he then was) in the case of **Githiaka versus Nduriri [2004] 2KLR67**; namely such discretion has to be exercised on sound reason rather than whim, caprice or sympathy.

Since neither party has moved the court to either strike out the now spent notice of appeal or have it validated, the only provision of law that the court can invoke to exercise its discretion with regard to the determination of the fate of the now impugned notice of appeal is through the invocation of the inherent powers of the court enshrined in **Rule 1(2)** of the CAR. It provides:

“Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court.”

In the case of **Equity Bank Limited versus West Link Mbo Limited [2013] eKLR**, Musinga, JA had this to say about the inherent powers of the Court:

“Inherent power is the authority possessed by a court implicitly without its being derived from the constitution or statute.....”

In **Kenya power & Highlighting Company Limited versus Benzene Holdings Limited t/a Wyco Paints [2016] eKLR**, the Court had this to say about its inherent jurisdiction:

The jurisdiction of the court which is comprised within the term inherent” is that which enables it to fulfill itself, properly and effectively, as a court of law. The overriding features of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over the process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process....In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

.....

This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice.”

The Supreme Court of Kenya in the case of **Board of Governors Moi High School Kabarak & another versus Malcolm Bell [2013] eKLR** added the following:

“Inherent powers are endowments to the court such as will enable it to remain standing, as a constitutional authority, and to ensure its internal mechanisms are functional. It includes such powers as enable the court to regulate its internal conduct, to

safeguard itself against contemptuous or discipline intrusion from elsewhere, and to ensure that, its mode of challenge or duty is considerate, fair and just.”

In light of the above threshold, it is my view that, the case law reviewed above indicates clearly that this is a residual power, sparingly, invoked in instances where there is no provision of a rule or law to cater for the particular situation sought to be remedied or for ends of justice to be met to the parties in the case. Herein, we have the **Rule 4** CAR procedures, which provide an avenue for redress for a party defaulting on compliance with the Rules **75, 77, 82** and **83** of the CAR procedures. **Githinji, JA** in Eldoret Civil Application No. 56 of 2018 **Richard K. Limo versus Hassan K. Ngeny & 5 others** (supra) held that a defaulting party has a right of redress within the said Rules to seek leave to regularize any default. Herein, applicants have counsel on record. It is this counsel who ought to have known that a notice of appeal caught up by the **Rule 83** procedures needs validation. If the invalid notice of appeal is struck out, the application collapses on account of incompetence as the law is that such an application can only be anchored on a valid notice of appeal. If the application collapses, the party to suffer will be the applicants and not their advocate. Applying the threshold in case law assessed above, on circumstances under which the inherent power of the court may be invoked, it is safe for me to state that since the invalid notice has not been struck out, or the opposite parties cross applied for it to be struck out, the inherent power of the court is available to breathe life into it, through granting an order for leave either to file a fresh one or validate the now spent notice, save that such exercise of discretion is only permissible in instances where ends of justice to both parties so demand.

Another avenue that the Court can have recourse to, is the Article **159 (2 (d))** of the Kenya Constitution 2010 which enjoins courts of law to render substantial justice as opposed to upholding technicalities. The principles that guide its invocation have been set out in numerous case law. I will highlight a few for purposes of the record. In the case of **Jaldesa Tuke Dabelo versus IEBC & Another** [2015] eKLR, the Court held inter alia that:

“Rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prescribed by an Act of Parliament that procedure should strictly be followed as Article 159 of the Constitution was not aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action”.

In **Raila Odinga and 5 others versus IEBC & 3 Others** [2013] eKLR, the Supreme Court stated that:

“The essence of Article 159 of the Constitution is that, a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case”.

In **Lemaken Arata versus Harum Meita Lempaka & 2 others** eKLR, it was stated that:

“the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice”.

Lastly in **Patricia Cherotich Sawe versus IEBC & 4 others** [2015] eKLR, it was stated that:

“Article 159 (2) (d) of the Constitution is not a panacea for all procedural short falls as not all procedural deficiencies can be remedied by it.”

Case law reviewed above inclusive of pronouncements from the Supreme Court of Kenya is explicit that, this provision is not a *panacea* for all procedural lapses. Secondly, that rules of procedure were not made in vain. There is therefore need for them to be adhered to. And lastly that each case has to be considered on its peculiar circumstances. The peculiar circumstances of this application are that, applicants set out to pursue proprietary rights in the suit property which according to them ought to have been registered in the name of the 1st applicant had it not been for the then prevailing cultural practices that precluded women from holding title to land; hence its registration in the name of the late **Cheshire**. The late **Kibyego** used it as collateral for a loan from the 4th respondent without their knowledge and defaulted on the repayments. By the time applicants came to learn of the default and offered to redeem the suit property from the 4th respondent and without their knowledge, consent and or participation, the 2nd & 3rd respondents fronted the 1st respondent to the 4th respondent as a family member entitled to redeem the suit property on behalf of the family. The 1st respondent paid the indebtedness to the 4th respondent and was registered as proprietor.

The applicants took out action in abid to recover the suit property and although they had counsel on record, they unsuccessfully asserted their claims twice firstly through adverse possession and subsequently through declaration, that the 1st respondent had gotten himself registered as proprietor through fraud. Both claims were rejected for the failure to follow the correct procedure. In light of all the above, there is no doubt that applicants have an apparent claim intended to be anchored on customary land law and inheritance rights which undoubtedly have not been adjudicated on merit.

The Supreme Court in the case of **Isack M’Inanga Kieba versus Isaaya Theuri M’Lintari & another** [2018] eKLR, expressed itself as follows on customary land rights:

“[52] Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are

therefore not closed. It is for the Court to make a determination on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie V. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group.
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.” [emphasis added].

The holding in the *Isack M’Inanga Kieba versus Isaaya Theuri M’hintari & another* (supra), crystallized in principle the right of a litigant to agitate both customary land rights as well as inheritance land rights. These are the same rights applicants intended to champion in ELC 149 of 2015 that was struck out for want of *locus standi*. Their attempt for review and setting aside of the striking out orders bore no fruits hence the intended appellate process.

It is undisputed as already alluded to above, that the notice of appeal filed timeously is now spent on account of the failure to timeously file the record of appeal. The applicants had counsel on record as at the time the notice of appeal was timeously filed. Nowhere in his submission to court did counsel plead ignorance of the prerequisites in **Rule 82(1) & 2** requiring him to file the record of appeal within sixty days. Nor the prerequisite in **Rule 83** that noncompliance with **Rule 82 (1) & (2)** prerequisite, renders the notice of appeal in valid unless and until otherwise validated in accordance with the **Rule 4** procedures. It is on record that counsel timeously informally applied for proceedings for the intended appellate purpose. It is on record that these were to be supplied within fifteen (15) days of the order subject to the payment of the requisite fees. The record is silent as to when these were paid for and supplied.

As was stated in *Catherine Njuguni Kanya & 2 others versus Commercial Bank of Africa Ltd Civil Application No. NAI 366 of 2009*, litigants place a lot of trust in the good workmanship of their advocates and where such advocates fail them on account of poor workmanship or inaction, the role of the court is to balance the interests of the parties before it without necessarily visiting the sins of the advocate on their client. What was expected of counsel herein as at the time of filing the application under consideration was for him to ensure that the application was well anchored on a valid notice of appeal. Being a lawyer, these matters that were within his knowledge. There is therefore no good reason as to why counsel failed to properly appreciate this important procedure. All that counsel has done is to take refuge under the substantive justice principle enshrined in **Article 159(2) (d)** of the Kenya Constitution 2010. The applicants had no role to play in the need for their advocate to ensure that the application was competent in law. Considering that there is no cross-application by the respondents to have the said notice of appeal struck out, the peculiar circumstances of this application as highlighted above call for the exercise of discretion to sustain the application for consideration on its merit by granting an order of validation in accordance with the rules subject to the grounds applicants advanced in support of the application meeting the threshold for granting relief under **Rule 4** of the CAR.

Having sustained the application, I now proceed to determine its merits. **Rule 4** of the CAR, which is the major Rule for accessing the relief sought provides as follows:

“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 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.”

The principles guiding the exercise of jurisdiction under the Rule 4 of the CAR procedures are now well settled. I will highlight a few by way of illustration. In *Edith Gichugu Koine versus Stephen Njagi Thoithi [2014] eKLR, Odek, J.A.* stated that the mandate under Rule 4 is discretionary, unfettered and does not require establishment of “*sufficient reasons*”. Neither is it limited to the period for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance.

In *Nyaigwa Farmers’ Co-operative Society Limited versus Ibrahim Nyambare & 3 Others [2016] eKLR, Musinga, J.A.*, stated that the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and the degree of prejudice to the respondent if the application is allowed are all relevant factors for consideration. In *Hon. John Njoroge Michuki & Another versus Kentazuga Hardware Limited [1998] eKLR, G.S. Pall JA* (as he then was) added *inter alia* that an applicant has a right to apply for extension of time to file the notice and record of appeal under rule 4 of the CAR; and which order should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond *para adventure*, that the intended appeal is not an arguable.

In *Cargil Kenya Limited Nawal Versus National Agricultural Export Development Board [2015] eKLR, K. M’Inoti J.A* stated that it is a discretion which must be exercised judicially considering that it is wide and unfettered. In *Fakir Mohamed versus Joseph Mugambi & 2 Others CA Nai. 332 of 2004* it was stated that the factors to be considered are not limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application

is granted; the effect of the delay on public administration and the importance of compliance with time limits; the responses of the parties and also whether the matter raises issues of public importance.

There is also **Paul Wanjohi Mathenge versus Duncan Gichane Mathenge [2013] eKLR** in which **Odek, J.A.** stated that failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by the particular applicant that the intended appeal is arguable. In **Joseph Wanjohi Njau versus Benson Maina Kabau- Civil Application No.97 of 2012**, it was observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court; and lastly, in **Richard Nchapi Leiyagu versus IEBC & 2 Others Civil Appeal No.18 of 2013**; it was stated that the right to a hearing is not only constitutionally entrenched but it is also the cornerstone of the rule of law.

The Supreme Court of Kenya (**M.K. Ibrahim S.C.J. & S. Wanjala S.C.J**) in **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others** (supra) as restated the applicable principles as follows:-

“(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.

(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.

(6) Whether the application has been brought without undue delay; and

((7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

Applying the above threshold to the rival positions herein, the prerequisites for granting relief under the **Rule 4** CAR procedures as demonstrated by the case law assessed above, include but are not limited to the length of the delay, reasons/explanation for the delay, prejudice to the opposite party, arguability of the intended appeal and any other relevant reasons.

With regard to the delay, as already pointed out above, the delay taken by applicants before seeking the court’s intervention is two years six months and ten days. As for the reason for the delay, the applicants have cited financial challenges; their advocates’ ill advise, and in action. Nothing turns on financial challenges as apart from making a deposition on it no submissions were made in support thereof. Nor was any reply made to the respondents’ submissions that these could have been cured by the applicants availing themselves of the **Rule 115** CAR procedures. There is therefore no need for any further interrogation of the issue.

The major reason advanced by the applicants for the delay is the apparent lack of proper advise and in action on the part of their advocate, a position admitted by the said advocate with an offer to pay costs of the application, hence counsel’s submission that the sins of their advocate’s in action should not be visited against them. In **Owino Gor versus Marmanet, Forest Co-Operative Credit Society Ltd [1987] eKLR** the Court stated *inter alia* that, mistakes of advocates and clerks where demonstrated to exist may be sufficient basis for the exercise of discretion in favour of a deserving party. In **CFC Stanbic Limited versus John Maina Githaiga & another [2013] eKLR**, the Court declined to visit mistakes of counsel on a litigant who had demonstrated clearly that he had given instructions to his advocate to take a procedural step in the matter. In **Lee G. Muthoga versus Habib Zurich Finance (K) Ltd & another** Civil Application No. NAI 236 of 2009, the Court restated the principle that a litigant should not suffer because of his advocate’s oversight. Lastly in **Catherine Njuguini Kanya & 2 other versus Commercial Bank of Africa Ltd Civil Application No. Nai 366 of 2009**, observations *inter alia* that:

“Litigants place a lot of trust in the good workmanship of their advocates and where this fails then.....

“the role of a court of law is to balance the interests of the parties before it without visiting the sins of an advocate on an innocent litigant.”

Case law reviewed above on instances where sins of an advocate were not visited upon an innocent litigant all related to the failure of the respective advocates to take a procedural step to progress the litigation resulting in the matters either being struck out and or dismissed for want of prosecution. The applicants’ advocate’s then on record for them as at the time the lapsed notice of appeal was timeously filed is the same advocate who is still currently on record for them. He drew and filed the application. He ought to have included a prayer either for revival and validation of the now lapsed notice of appeal or for leave to file a fresh one. That is the expertise the applicants engaged himself for. They had no control over the advocate’s failure to properly appreciate the applicable rules and include a prayer for validation of the now lapsed notice of appeal. It will therefore be unjust to penalize them for their advocate default. Likewise, the applicants had no control over the advocate’s admitted conduct of venturing into politics without advising them on how they could progress their intended appellate process by seeking services of another advocate of their choice. Or alternatively, making adequate arrangements to hand over the brief to another advocate of his choice to progress the matter as he busied himself with electioneering for the 2017 elections. Counsel acknowledges this fact and is willing to pay costs. In the circumstance portrayed above, I find that it will be highly too punitive to penalize the applicants for that default by disallowing the applicants’ application.

As for prejudice likely to be occasioned to the opposite party, none was put forth by the 2nd and 3rd respondents. The 1st respondent has title. The applicants have already been evicted from the land. There are no orders barring him from making use of the land. Inconvenience for

waiting for the crystallization of title in his favour has to be weighed against the applicants desire to have the matter revisited on merit. In the circumstances portrayed above, any inconvenience caused to the respondents can be sufficiently compensated for by way of costs which the applicants counsel has graciously and honourably agreed to pay.

As for the arguability of the intended appeal, the issues that applicants intend to raise on appeal as already highlighted above are definitely arguable notwithstanding that they may not ultimately succeed. Lastly, lack of exhibition of a draft memorandum of appeal to the application is not fatal to the applicants' application as the issues intended to be raised on appeal were ably captured in the deposition in the supporting affidavit as well as learned counsels' oral submission in law.

Not to be overlooked is also the applicants' right of access to justice which undoubtedly is a constitutionally entrenched right. In **Richard Nchapi Leiyagu versus EBC & 2 others** (supra), it was stated that the right to a hearing is not only constitutionally entrenched but also the corner stone of the Rule of law. In **Mbaki & others versus Macharia & Another [2005] 2EA 206** the Court of Appeal stated *inter alia* that:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

In **National Enterprises Corporation versus Mukisa Food Ltd CA. Civil Appeal No. 42 of 1997**, it was stated *inter alia* that:

“Unless and until the Court has pronounced a judgment upon the merits of the case or by consent of the parties, it has power to revoke the expression of its coercive power where that has only been obtained by failure to follow any of the rules of procedure.”

In the Tanzanian case of **Abbas Sherally and Another versus Abdul Fazaiboy, Civil Application No. 33 of 2003**, the importance of the right to be heard was emphasized as follows:

“The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.”

Applying the above threshold to the applicant's arguments that their right of access to justice supersedes procedural technicalities, it is my finding that, in light of the above assessment and reasoning and especially considering the basis laid for the applicants' intention to pursue the intended appellate rights, justice would demand that they be accorded an opportunity to ventilate their intended appellate rights.

In the result, orders that commend themselves for me to make in the disposal of the application are as follows:

- (1) The applicants have fourteen (14) days of the date of the ruling to file and serve a notice of appeal.
- (2) The applicants to file and serve the record of appeal within sixty days from the date of lodging of the notice of appeal to file a record of appeal.
- (3) In default of items 2 and 3 above, the application dated 10th December, 2018 and filed on 18th December, 2018 to stand dismissed.
- (4) Costs of the application to be paid to the respondents personally by the applicants' advocate.

Dated and Delivered at Eldoret this 17th day of October, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR