



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, JA (IN CHAMBERS)]

CIVIL APPLICATION NO. NAI 150 OF 2019 (UR.105/2019)

BETWEEN

IKUMBI ESTATE INVESTMENT LIMITED.....APPELLANT/APPLICANT

VERSUS

JOHN MBOGO NYAMBURA.....RESPONDENT

(Application for leave to file and serve notice of Appeal and record of appeal out of time against the decision/Ruling of the environment and Land Court at Muranga (J.G. Kimei, J.) Dated and Delivered 28th March, 2019

in

Environment and Land Court No. 332 of 2017)

RULING

Before me is a Notice of Motion dated 12th September, 2019, and filed on the 13th September, 2019, substantively seeking an order of Court granting leave to the applicant to file and serve a record of appeal out of time. The application is premised on **Rules 4,42 and 43** of the Court of Appeal Rules (CAR) and **Article 159** of the Kenya Constitution 2010, and all other enabling provisions of the law. It is supported by grounds in its body and a supporting affidavit deposed by **Lincoln Mbogo Babu** describing himself as a director of the applicant with no mention that he had authority of the applicant both to depose the supporting affidavit and initiate the intended appellate process. It has been opposed by a replying affidavit deposed by the respondent **John Mbogo Nyambura** on **the 22nd October, 2019 and filed on the same date.**

The application was canvassed by way of oral submissions. Learned counsel **Miss Gitau** holding brief for **Rigaga** appeared for the applicant, while **Mr. John Mbogo Nyambura** the respondent appeared in person.

Supporting the application, **Miss Gitau** reiterated the grounds in the body of the application and the content of the supporting affidavit. It is **Miss Gitau's** submission that the applicant was aware of the date of the delivery of the intended impugned ruling delivered on 28th March, 2019 (the ruling); that the applicant was aggrieved by the said ruling and desired to appeal against it but then parties entered into negotiations with a view to settling the matter amicably out of court. The parties however failed to reach an out of court amicable settlement as anticipated; that by the time the negotiations for an out of court amicable settlement fell through, time for lodging of a notice of appeal had lapsed hence the need to seek leave to validate the intended appellate process.

It is also **Miss Gitau's** submission that the intended appeal is not frivolous, borne out by the content of the memorandum of appeal annexed to the application; that the delay in seeking the court's intervention to validate the intended appellate process is not inordinate nor deliberate. Neither is it intended to prejudice the respondent in any way; that the same has been sufficiently explained as alluded to above; that the respondent stands to suffer no prejudice if the applicant were to be granted the relief sought; that the Court is vested with jurisdiction to grant the relief sought; that denying the applicant the relief sought will be contrary to the principle against technicalities as enshrined in **Article 159(2) (d)** of the Kenya Constitution 2010.

Opposing the application, the respondent entirely relied on the content of the replying affidavit without orally highlighting the same. In the said replying affidavit, the respondent set out the background to the litigation resulting in the application under consideration and then submitted.

That the applicant stands non suited on the application under consideration as the deponent of the affidavit in support of the application has not exhibited any authority authorizing him either to depose the supporting affidavit or to initiate the intended appellate process on behalf of the applicant, a jurisdic person.

Without prejudice to the foregoing submissions, respondent submitted that the ruling dated 28th March, 2019 was delivered in the presence of the applicant's advocate/representative and the respondent; that the applicant is guilty of non-disclosure of material information as it has failed to disclose when it was advised by its advocate of the outcome of the application and when it instructed its advocate to hold an out of court negotiations in an attempt to settle the matter amicably; that the applicant has not attached anything to show that there were negotiations undertaken with a view to settling the matter amicably out of court. Neither has the applicant indicated when the alleged negotiations commenced and collapsed, especially when it was not disputed that the applicant has all along been represented by counsel who were well aware of the statutory timelines within which a party ought to initiate an appellate process within the time line stipulated for within the rules.

It was further the respondent's contention that the intended appeal is not arguable. Neither has the applicant explained the delay in filing the application under consideration five (5) months after the delivery of the intended impugned ruling, which in the respondent's view is in ordinate. The applicant is therefore in the circumstances of this application un deserving of the exercise of the court's discretion in its favour. Also that granting the orders sought will be highly prejudicial to the applicant especially when the application as presented is a nullity for lack of *locus standi* in the deponent of the supporting affidavit.

My invitation to intervene has been invoked under **Rules 4,42 and 43** of the CAR and **Article 159** of the Kenya Constitution 2010. **Rules 42 and 43** are merely procedural. They need no further interrogation. The substantive rule for accessing the relief sought is Rule 4 of the CAR and which falls for interrogation.

The parameters for the Court exercise of jurisdiction under this rule now form a well beaten path with well-known crystalized guiding principles which I find prudent to highlight as hereunder.

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 in ordinate 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.

Article 159 of the Kenya Constitution on the other hand is a constitutional provision enshrining the non-technicality principle. The parameters for invoking this provisions have also been delineated by case law. 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.”

I have applied the above threshold to both rival pleadings and submissions. It is therefore my finding that under the **Rule 4** of the CAR procedures, the applicant as the party aggrieved by the ruling of 28th March, 2019 was obligated to lodge a Notice of Appeal within fourteen (14) days of the date of the delivery of the said impugned ruling pursuant to **Rule 75 (1) (2)** of the CAR. In addition to the above prerequisite the applicant was also obligated to comply with the prerequisite in **Rule 82(1) and (2)** of the CAR by applying for a typed copy of the ruling and proceedings within thirty days of the date of the delivery of the ruling with a mandatory service of the letter bespeaking the said documents to the opposite party. It is the non-compliance with the above prerequisites that set in motion the applicant’s invocation of the Rule 4 of the CAR procedures with a view to validating the above highlighted default on the part of the applicant. All that the applicant is obligated to do in order to succeed on the application under consideration is to demonstrate that it has brought itself within the ambit of the principles that guide the exercise of discretion under the Rule 4 CAR procedures in its favour.

Under the rule 4 of the CAR procedures, I am obligated to take into consideration the following factors: -

- (i) **The length of the delay.**
- (ii) **The reason for the delay**
- (iii) **Chances of the appeal succeeding.**
- (iv) **Degree of prejudice to the respondent if the application were to be allowed.**
- (v) **Any other relevant consideration.**

On the length of the delay, the ruling was delivered on 28th March, 2019. The application under consideration was filed on 13th September, 2019, a period of five (5) months and 15 days.

In **George Mwendu Muthoni versus Mama Day Nursery and Primary School Nyeri CA No. 4 of 2014 (UR)** extension of time was declined on account of the applicant’s failure to explain a delay of twenty (20) months. In **Aviation Cargo Support Limited versus St. Marks Freight Services Limited [2014] eKLR**, the relief for extension of time was declined for the applicant’s failure to explain why the appeal was not filed within the sixty days stipulated for within the rules after obtaining a certified copy of the proceedings within time, and second, for taking six (6) months to seek extension of time within which to comply. In **Christopher Mugo Kamotho versus the Hon. Attorney General [2009] eKLR**, the relief was withheld for the failure to explain why it took thirteen (13) days to apply for a certified copy of the proceedings on the one hand and seeking extension of time soon upon being capacitated to do so with a certificate of delay on the other hand.

Considering the length of time in the cases reviewed above in which leave to extend time within which to comply was declined and the length of time involved herein which is five (5) months and fifteen (15) days delay, I do not find that the delay herein amounts to what in law would be termed as inordinate to warrant the withholding of the relief sought. I therefore find that the delay is not so inordinate as to

disentitle the applicant to the relief sought. This finding is however subject to the applicant meeting the threshold on the other factors enunciated above.

The reasons given for the delay was that parties were engaged in negotiations with a view to settling the matter amicably out of court. As deposed by the respondent in his replying affidavit and to which deposition, the applicant filed no reply, there is nothing on the record to show that indeed parties were engaged in any negotiations with a view to settling the matter amicably out of court. In the absence of demonstration of existence of such proof, there is no basis for accepting the explanation given by the applicant.

With regard to the arguability of the intended appeal, the applicant has exhibited a memorandum of appeal. They intend to argue that the trial court exercised its discretion improperly when it declined to grant the applicant an opportunity to exercise its appellate right of access to justice. In **Joseph Wanjohi Njau versus Benson Maina Kabau** Civil Application No. 97 of 2012 (UR), 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.

Applying the above threshold to the content of the memorandum of appeal exhibited by the applicant in support of this ground, it is my finding that issue as to whether the trial court in the ruling exercised its discretion judiciously when it declined to grant the applicant a right to exercise its appellate right, which in the case of **Richard Nchapi Leiyagu versus IEBC & 2 others** Civil Appeal No. 18 of 2013, the Court stated was not only constitutionally entrenched but is also the cornerstone of the rule of law, cannot be said to be frivolous. I therefore find that the intended appeal is arguable.

As for prejudice to be suffered by the respondent, apart from the respondent deposing in his replying affidavit that he stands to suffer prejudice, no particulars of the prejudice likely to be suffered by the respondent in capable of compensation by way of costs was demonstrated to exist.

Under any other relevant factors, there was the issue that the respondent raised with regard to the applicant's failure to exhibit authority for the deponent of the supporting affidavit to depose the said supporting affidavit on the one hand and to initiate the intended appellate process on behalf of a jurisdic person, to which the applicant gave no response either orally in Court or by way of a further affidavit. In the absence of such authority, the applicant's intended appellate process has no legs on which to stand. This default on the part of the applicant cannot be cured by the non-technicality principle in **Article 159 (2) (d)** of the Kenya Constitution 2010. The failure to annex or exhibit the authority to litigate on behalf of a jurisdic person is fundamental and therefore vitiates the entire application under consideration especially when no reasons were given as to why counsel who argued the application on behalf of the applicant made no response thereto.

The upshot of the above assessment and reasoning is that the application is incompetent for want of *locus standi*, in the person who deposed the supporting affidavit and is therefore deemed to be the person who initiated the intended appellate process on behalf of the jurisdic person. It is accordingly struck out with costs to the respondent.

Dated and Delivered at Nairobi this 8th day of November, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.