IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, JA (IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 7 OF 2018

BETWEEN

DOMINIC MIKE KAMINJA.....APPELLANT

AND

NGIRI IKUA.....1ST RESPONDENT

(REPRESENTED BY AGOSTINO NDARU MUITANJAU)

MINISTER FOR LANDS.....2ND RESPONDENT

THE LAND REGISTRAR MBEERE DISTRICT.....3RD RESPONDENT

(An application for extension of time to serve the notice of appeal and the letter bespeaking proceedings and time to file and serve record of appeal from the Ruling and Order of the Environment and Land Court at Embu (Y. M. Angima, J) dated 28th June, 2017

in

ELC Judicial Review No. 31 of 2016

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RULING

The main appeal was filed on 15th January, 2018 but there are two interlocutory matters filed by the parties. The first in time is a notice of motion dated 30th January, 2018 and filed on 31st January, 2018, by the appellant seeking the following orders:

> ***"2. Time of service of Notice of Appeal and letter bespeaking proceedings be extended.***
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> ***3. The Notice of Appeal and the letter bespeaking proceedings dated 3rd July, 2017 and served upon the 1st Respondent on 30th August, 2017 be deemed served within time.***
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> ***4. Time of filing and service of Record of Appeal be extended.***
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> ***5. The Record of Appeal filed on 15th January, 2018 be deemed filed within time.***
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> ***6. The Record of Appeal served upon the 1st Respondent on 24th January, 2018 be deemed as served within time.***
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> ***7. Costs of the application be provided for."***

Several provisions of the law are invoked, including ***Article 48*** of the Constitution, ***section 3A*** and ***3B*** of the Appellate Jurisdiction Act **(AJA),** and ***Rules 1 (2)*** and ***(4)*** of the Court of Appeal Rules, 2010 **(the Rules)**.

The second application was filed on 19th February, 2018 by the 1st respondent seeking to strike out the notice of appeal filed on 4th July, 2017, and the memorandum and record of appeal filed on 15th January, 2018.

Logically, if the first application is granted, the second is rendered otiose, and the converse is true if the first application is dismissed. I will therefore consider the first application which was urged by the parties. At the hearing of the application, the appellant/applicant ***(the applicant)*** was represented by learned counsel **Mr. Mwaniki Gachumba** instructed by M/s Onyoni Opini & Gachumba Advocates, while the 1st respondent was represented by learned counsel **Mr. D. N. Kamunda**, instructed by M/s Kamunda Njue & Company Advocates. There was no appearance by Attorney General for the Minister of Lands and the Land Registrar, Mbeere.

At the root of the pending appeal is a land dispute between two clans of the Mbeere community in Embu, going back more than 35 years to the land adjudication process in Mbeere District. The **Ngugi clan**, represented here by the 1st respondent objected to the adjudication of various parcels of land in Mavuria Land Adjudication section in favour of the **Rweru clan**, represented here by the applicant. The Objection was No. 430/1980 and was decided in favour of the Ngugi clan on 21st August, 1987. The Rweru clan appealed to the Minister in Appeal No. 35/1989 and the District Commissioner **(DC),** on behalf of the Minister, overturned the decision on 30th August, 2011, thus conferring title to the parcels of land to Rweru clan.

Rweru clan thought that was the end of the litigation and embarked on enforcement of the DC's decision through the Director of Land Adjudication and the Chief Land Registrar in the years 2014, 2015 and 2016.

Unknown to them, the Ngugi clan had gone to the High Court on 27th February, 2012 and obtained leave *ex parte*, to institute Judicial Review **(JR)** proceedings to quash the decision of the DC made on 30th August, 2011 and to stop the Land Registrar from registering the parcels of land in favour of Rweru clan or its members. Leave was granted, the motion was filed on 16th October, 2012, the Attorney General conceded it, and the orders as sought were granted on 17th April, 2013 by Ong'undi, J. **(the Ong'undi order).** According to Rweru clan, they were kept in the dark in all these proceedings, since the Attorney General alone was served, and their representative was not. They only knew about the proceedings in February 2016 when they were stopped by the police from enforcing the orders issued in their favour on 30th August, 2011.

They moved swiftly to the High Court and sought review/setting aside of the Ong'undi order through a motion dated 4th February, 2016. When the Environment and Land Court **(ELC)** became functional, the matter moved there and Rweru clan amended their motion without leave, abandoning the prayer for setting aside the Ong'undi order, and instead introduced new prayers for stay of execution of the Ong'undi order; striking out the chamber summons, the order for leave, and the motion filed by the Ngugi clan which led to the Ong'undi order. The contention in the amended motion was that the High Court admitted, heard and made orders on the JR without jurisdiction since the subject-matter concerned land.

Before the application could be heard, Ngugi clan filed a notice of Preliminary Objection **(PO)** on several grounds, including lack of leave; delay in filing; want of jurisdiction by ELC to review or set aside a JR order of the High Court; disguising an appeal as a review; and raising factual issues on merit rather than attacking the decision making process. **Angima, J.** considered the PO and found that it was not necessary to obtain leave to amend the motion; that some grounds in the PO were not pure points of law; and that the ELC had the jurisdiction to review the Ong'undi orders as if they were its own. However, the court held, since the contention in the amended motion was that the High Court had no jurisdiction to admit and hear the JR, only an appellate court could consider and grant such orders. The amended motion was accordingly struck out on 28th June, 2017, thus provoking the applicant's desire to appeal.

With that background, I now advert to the application before me. The orders sought are discretionary but the discretion, as always must be exercised on reason and not caprice. There is no uniform manner in which such applications shall be considered as each case is always different from the other. For that reason, the factors relevant for consideration are never closed. ***Rule 4*** on which the motion is principally premised provides as follows:

> ***"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".***

I considered the application of that Rule in the case of ***Habo Agencies Limited vs Wilfred Odhiambo Musingo [2015] eKLR*** **where my decision was upheld by the full bench on a reference, and stated as follows:-**

> ***"I am aware that the discretion I have to exercise under Rule 4 is unfettered and does not require establishment of "sufficient reasons". Indeed I stated as much as a single judge and was upheld by the full court in Fakir Mohamed vs Joseph Mugambi & 2 Others Civil Appl. 332/04 (UR), thus:-***
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> ***"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of 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, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: See Mutiso vs Mwangi, Civil Application No. Nai. 255 of 1997 (UR), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M'Ethare & Attorney General, Civil Application No. Nai. 8 of 2000 (UR) and Murai vs Wainaina (No. 4) [1982] KLR 38".***
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> ***I am also aware that there is a duty imposed on the Court under Sections 3A and 3B of the Appellate Jurisdiction Act to ensure***

that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court."

Those are the principles that will guide my decision herein.

The Rweru clan was aggrieved by the decision of Angima, J. made on 28th June, 2017 and filed a notice of appeal through their Advocates on record on 4th July, 2017. They also applied for copies of the proceedings and the letter bespeaking copies was copied to the respondents' counsel and filed in court on the same day. All that was done within the rules. But the notice of appeal, as well as the letter bespeaking copies dwere not served on counsel for the respondent as soon as they were filed. The notice of appeal was served on 30th August, 2017 while the letter was served on 29th January, 2018.

As for the record of appeal, copies of the proceedings and ruling were obtained on 10th October, 2017 and a certificate of delay issued on 14th November, 2017 confirming that it took 98 days to prepare the record. The record of appeal was then filed two months later, on 15th January, 2018. On the face of it therefore, there was a delay of 50 days in serving the notice of appeal and even a longer delay in delivering the letter bespeaking copies. Ordinarily, the record of appeal should have been filed within 60 days of filing the notice of appeal, that is by 3rd September, 2017, and so on the face of it again, there was an apparent delay of about four and a half months or 134 days.

The sworn explanation given by learned counsel for the applicant Mr. Gachumba on the delay in serving the notice of appeal is that there was an inadvertent oversight due to confusion in his offices when he had to leave Nairobi for Embu to handle an election petition between July and September 2017. As correctly pointed out by the respondent's counsel, however, that cannot be a good excuse since the petition came in September after the general elections in August. The respondent's counsel further submitted that a notice of appeal was a jurisdictional document and where the rules are not complied with in filing and/or serving it, the process of appeal is vitiated. The dissenting dicta of Kiage, JA in ***Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 Others [2013] eKLR*** and the case of ***Patrick Kiruja Kithinji vs Victor Mugira Marete [2015] eKLR*** were cited in aid of that submission.

The applicant's counsel further swore that he diligently worked on the record of appeal after receiving the copies and was able to file it after the Christmas court vacation when time does not run. He tendered his apology for the delay caused which, in his view, was not inordinate, dilatory or intentional. He further submitted that there would be no prejudice caused to the respondents if the orders for extension of time are granted.

On the other hand, counsel for the respondent found no reason to empathize with the applicant despite the apologies made. In his view, there was lack of diligence by counsel and numerous missteps in complying with the rules of procedure which this court should not countenance.

I have anxiously considered the affidavits on record and the submissions of both counsel. There can be no argument about the centrality of a notice of appeal in the appeal process. Indeed the Supreme Court in the case of ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR,*** pronounced it as jurisdictional in the following words:

"***A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.*** [Emphasis added].

But that was in an election petition and this Court has since considered and granted several applications for striking out election petition appeals where the notices of appeal were fundamentally incurable. See, for example, ***Lesirma Simeon Saimanga vs Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR***; ***Musa Cherutich Sirma vs Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR*** and ***Apungu Arthur Kibira vs Independent Electoral & Boundaries Commission & 2 Others, EPA No. 11 of 2018 (UR).***

In the latter case, a distinction was drawn between ordinary civil appeals and election petitions which are *sui generis.* The majority stated thus:

"...in ordinary civil appeals, this Court retains a wide discretion under sections 3A and 3B of the Appellate Jurisdiction Act and of Rule 1 (2) of Court of Appeal Rules, 2010 to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The doctrines of equity reign large and that is the philosophy behind the decisions on extension of time made under Rule 4.. which were cited and relied on by the applicant here. The only limitation is that the Court's discretion be exercised judiciously."

Applying that philosophy in this case, it is evident that the applicant complied with the rules in filing the notice of appeal. It is also evident that there was considerable delay in serving it and the explanation given is not satisfactory. But that finding alone does not preclude the consideration of other relevant factors. The apparent delay of 134 days in filing the record of appeal seems to be explicable. That is because 98 days were taken up by the court registry as duly certified by the Deputy Registrar. The certificate of delay is not in issue. There is also the Christmas court vacation or recess of 23 days when time does not run from 21st December to 13th January. See ***Order 50 Rule 4*** of the ***Civil Procedure Rules*** and ***Rule 3*** of the ***Court of Appeal Rules.*** The arithmetic of it shows a residual delay of 18 days which I would not declare inordinate as there is plausible explanation for it.

More importantly, however, I have considered the subject-matter of the appeal and the nature of the dispute between the two clans as summarized above. Whether or not the appeal has chances of success is in the province of the full Court, but I have no reason to opine that it is frivolous. Suffice it to say that the dispute has taken many years to disentangle owing to the multiplicity of the parties involved and the sensitivity of the subject-matter. It is unlikely that a summary procedure will permanently quell the raging fires. In the case of ***Richard Nchapi Leiyagu vs IEBC & 2 Others, Civil Appeal No. 18 of 2013***, this Court expressed itself as follows:-

> ***"The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."***

For those reasons, I am inclined to exercise my discretion in favour of giving liberty to the parties to exhaust themselves before this Court.

Accordingly, I allow the application as prayed. The appeal is deemed to have been filed within time and shall proceed to hearing. With that holding, the motion filed by the 1st respondent seeking to strike out the appeal dissipates. The applicant shall pay to the 1st respondent the costs of this application in any event.

I so order.

Dated and delivered at Nyeri this 11th day of October, 2018.

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR