



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(IN CHAMBERS: MAKHANDIA, J.A.)**

**CIVIL APPLICATION NO. 26 OF 2016**

**BETWEEN**

**MOHAMED SHALLY SESE (SHAH SESE).....APPLICANT**

**-VERSUS-**

**FULSON COMPANY LTD.....1<sup>ST</sup> RESPONDENT**

**KILIFI BEACH PROPERTIES LIMITED ...2<sup>ND</sup> RESPONDENT**

*(Being an application for leave to extend time within which to file a Notice of Appeal and/or Appeal from the Ruling of the High Court of Kenya at Mombasa (Emukule, J.) dated 5<sup>th</sup> June, 2015 in H.C.MISC.JR. APPLICATION NO. 74 OF 2013*

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**RULING**

By his Notice of Motion application dated 30<sup>th</sup> May 2016, **Mohamed Shally Sese** (“*the applicant*”) prays in the main for leave of this Court to file and serve out of time Notice of Appeal in respect of a ruling delivered by the High Court (*Emukule, J.*) sitting in Mombasa on 5<sup>th</sup> June 2015. The application is expressed to be brought pursuant to “*rule 4 and 75 (2) of the Court of Appeal Rules, 2010, section 3A of the Appellate Jurisdiction Act, section 5 of the Court of Appeal (Organization and Administration) Act 2015, Article 164 (3), 159 (2) (d) and 259 (1) (a) (b) of the Constitution of Kenya, 2010.*” The application is premised on the grounds set out on its face and supported by an affidavit sworn by the applicant.

The ruling the applicant craves leave of Court to lodge an appeal against was in respect of **Judicial Review Application No. 74 of 2013** that had been consolidated with **Judicial Review Application No. 75 of 2013** with the respondents appearing as the applicants respectively. The applicant appeared as an interested party alongside one, **Edward Mzee Karezi** (“*Mzee Karezi*”). The gravamen of the judicial review proceedings was a decision by the National Land Commission (“*the Commission*”) contained in an internal memo dated 25<sup>th</sup> September 2013 directing the Chief Land Registrar to revoke the title of Land Reference Number 1783 (“*the suit premises*”) hitherto in the name of Mzee Karezi and re-register it in the name of the applicant.

A brief background of the dispute is that, the suit premises were registered in the name Mzee Karezi. However, his ownership and registration was challenged by Brawny Properties Limited which also had a Certificate of Title over the same. The legitimacy or not of the two competing titles had been the subject

matter of various suits *lis pendens* in the Court of Appeal, the High Court and even criminal proceedings in the Magistrates court. That however did not stop Mzee Karezi from subdividing the suit premises into seven parcels with Land reference Nos. 17835/1-7. These parcels were later sold and transferred to the respondents and other third parties, who in time joined the various suits pending determination in the various courts alluded to above.

So how did the applicant supposedly acquire a proprietary interest in the suit premises? In an affidavit dated 5<sup>th</sup> May 2014 sworn by the applicant in the judicial review proceedings, the applicant deponed that his family had been in actual use and occupation of the suit premises since 1954. That sometime in the late 1980s the applicant sought to have the suit premises allocated to him by the Government. That due to his illiteracy, he entrusted Mzee Karezi to pursue the allocation on his behalf. He however later learnt that Mzee Karezi had falsified the allocation and obtained the title to the suit premises in his own name instead.

Following a complaint he lodged with the National Land Commission sometime in the year 2013, the Commission commenced investigations as to the ownership of the suit premises. Following what the Commission termed as thorough investigations, the Commission directed the revocation of the titles to the suit premises on the basis that it was illegally and/or fraudulently acquired. Thereafter it directed the Registrar to re-register the suit premises in the name of the applicant. On learning about the Commission's decision, the respondents filed the judicial review applications already alluded to seeking in the main, orders of certiorari and prohibitory to quash the Commission's decision to revoke the title of Mzee Karezi, from whom they were claiming title and prohibit the Registrar from cancelling the title.

What are the reasons behind this application? It is the case of the applicant that following the delivery of the ruling in the judicial review applications quashing the decision of the Commission, his counsel then on record failed to inform and communicate to him the outcome. He stated that he only came to know that there were adverse orders against him when he went to Kilifi Police Station to report a case of trespass whereupon he was informed that the alleged trespassers who were infact the respondents had obtained orders in their favour. He states that as a result of failure by his advocates to inform him of the delivery of the ruling, he was unable to lodge a Notice of Appeal within the 14 days period stipulated in **rule 74 (2)** of the Court of Appeal Rules.

He depones further that his intended appeal is meritorious with high chance of success. Further, that the intended appeal raises fundamental issues of public importance regarding the powers and authority of the National Land Commission both under the Constitution and the National Land Commission Act ("*the Act*"). He contends that the right to property is a right enshrined in the Bill of Rights and protects a person from being deprived of his property without sound constitutional and/or legal reasons. He therefore seeks to have his grievances conclusively determined on merits in the intended appeal as he risks loosing the family property. According to the applicant, loosing the suit premises would mean leaving him and his family destitute for the rest of their lives.

The application was opposed by the respondents in a Replying Affidavit dated 11<sup>th</sup> July 2016 sworn by their learned counsel **Nyongesa Wafula**. Counsel denied that the applicant was a party in the judicial review proceedings. Counsel deponed that infact in those proceedings, it was *Shah Sese alias Shali Sese* who was a party and was represented by **Nabhan Swaleh** advocate. That the advocates of Shali Sese who had appeared in those proceedings as an interested party filed a Notice of Appeal. Counsel attached a Notice of Appeal filed by the firm of **Sachdeva, Nabhan and Swaleh Advocates** dated 12<sup>th</sup> June 2016. He concluded his affidavit by deposing that the present application was misconceived, incompetent, an abuse of the court process and was proper for dismissal.

The applicant inadvertently premised his application on "*rule 75(2) of the Court of Appeal Rules*" rather than rule 74 (2) of the Court of Appeal Rules. However, no mischief or prejudice has been occasioned to the respondents as the spirit and import of the application is clear. Furthermore, the applicant relies on **Article 159 (2) (d) of the Constitution** which stresses that justice should be administered without undue regard to technicalities. However, for the applicant to properly lodge his intended appeal, he must seek leave of this Court to file and serve a notice of Appeal out of time and hence the present application

before this Court. This is not a technicality.

The sole issue for determination in this application is whether the applicant is deserving of the orders he seeks *to wit* extension of time within which to file and serve a Notice of Appeal. The Supreme Court has pronounced itself on the factors a court should consider in determining whether to extend time in the case of **Nicholas Kiptoo arap Korir Salat v the Independent Electoral & Boundaries Commission & 7 Others (2014) eKLR** relied upon by the applicant. The court set out the following as the guiding principles:

- “(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 a 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 respondents if the extension is granted;*
- (6) Whether the application has been brought without undue delay; and*
- (7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

So has the applicant met these requirements? It must be borne in mind that under **Rule 4** of this Court’s rules a single judge has unfettered discretion to extend time, the only condition attached to that exercise of discretion is that it must be exercised judicially. The ruling the applicant intends to appeal against was delivered on 5<sup>th</sup> June 2015. He pleads that he failed to lodge a Notice of Appeal timeously because he was never informed of the ruling. That he only learnt of the ruling on April 2016 when he visited Kilifi Police Station to report a trespass complaint against the respondents and was informed that the alleged trespassers had in fact orders in their favour. The delay was therefore for a period in excess of one year from the date of delivery of the ruling. That delay is inordinate in my view. The reason for that delay has also not been satisfactorily explained to Court. A litigant must be vigilant in the conduct of his affairs and the applicant should have made efforts to find out the progress of his case from his advocate. After all, extension of time is essentially equitable [See **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, Civil Application No. NAI. 255 of 1997**] and equity aids the vigilant and not the indolent. As it is, the implication is that the applicant and his advocate never communicated for a period of over one year and the applicant took no steps whatsoever to find out about the outcome of the suit. This is simply incredible and hard to believe. Given the emotive nature of land ownership in this part of the country and given further that the applicant had actively participated in the proceedings, it is implausible that he would have gone for a whole year without as much as finding out from his advocate the fate and outcome of the proceedings.

The respondents’ main ground in their opposition to this application is that the applicant was not a party to the suit in the High Court. That in fact, Shah Sese alias Shali Sese who was the 1<sup>st</sup> interested party in the High Court proceedings had filed a notice of appeal through Messrs Sachdeva, Nabhan & Swaleh Advocates. The record shows that Nabhan Swaleh Advocate had been appointed by Shah Sese alias Shali Sese to act on his behalf in the proceedings vide a Notice of Appointment of Advocate dated 31<sup>st</sup> January 2014 and filed in court on 3<sup>rd</sup> February 2014. On 5<sup>th</sup> June, 2015 **Emukule J.** delivered the ruling in the proceedings. By a Notice of Appeal dated 12<sup>th</sup> June, 2015 drawn by Messrs Sachdeva, Nabhan & Swaleh Advocates it is indicated that the same was filed on behalf of Mohamed Shali Sese who was a party in the

proceedings. These set of facts have not in any way been controverted or challenged by the applicant nor any alternative explanation whatsoever offered. This begs the question why the applicant would be before this Court seeking extension of time to file a notice of appeal yet he had already filed one through his advocates unless of course as submitted by the respondent, the applicant was not a party to the proceedings. Nor has the applicant in any way suggested that the Mohamed Shally Sese referred to in the Notice of Appeal aforesaid is not the same person as him.

It is apparent that the applicant has not been candid with this court. The orders the applicant seeks are discretionary in nature and equitable. Equity calls to those seeking its aid to come before it with clean hands and also do equity. In **John Njue Nyaga v Nicholas Njiru Nyaga & Another (2013) eKLR**, the Court of Appeal sitting at Nyeri observed as follows:

***“It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings.” The applicant has not done so and is underserving of the orders he seeks.”***

This is the situation obtaining here. Accordingly this application is for dismissal with costs to the Respondent.

**Dated and delivered at Malindi this 30<sup>th</sup> day of September, 2016**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**