



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 138 OF 2016

BETWEEN

PRESIDING BISHOP REV. SILAS YEGO1ST APPLICANT

ASST. PRESIDING BISHOP GEOFFREY GICHURE2ND APPLICANT

AND

MOSES MUTURI1ST RESPONDENT

LUKA MIBEY2ND RESPONDENT

NAFTALI KAMAU 3RD RESPONDENT

SAMUEL SANG.....4TH RESPONDENT

CHARLES GATOTO5TH RESPONDENT

JOHN MUSYOKA 6TH RESPONDENT

STEPHEN KIOKO7TH RESPONDENT

(For and on behalf of Africa Inland Church, Westlands)

(An application for extension of time to file a notice of appeal from the ruling and order of the Environment & Land Court of Kenya at Nairobi (Gacheru, J.) dated 29th April, 2016

in

E.L.C. NO. 571 OF 2010)

RULING

By the motion dated 30th May 2016 and brought under Rule 4 of the Court of Appeal Rules, 2010, the applicants seek orders that they be granted leave to file a notice of appeal out of time against the ruling of the Environment and Land Court at Nairobi (L. Gacheru, J) dated and delivered on 29th April 2016 and that the notice of appeal attached to the applicant be deemed as duly filed and served. I note that the notice of appeal in question is undated, unsigned and unfiled and the order to deem it as filed and served cannot possibly issue.

Be that as it may, the motion is founded on some nine grounds appearing on its face as follows;

(1) That the matter was mentioned at the Environmental and land Court on the 25th of November 2015 confirmation that the parties had filed their respective submissions. On that date, the advocates for the both parties were present in court. The Court on that date directed that the ruling on the application dated 24th October 2014 would be delivered “On Notice” to the parties.

(2) That the advocates for the respondents was unaware of the delivery of the ruling as the same was to have been delivered “On Notice” which notice was not availed to the said advocates and they could not attend court on the said 29th of April 2016 and the date could be established despite all due diligence.

(3) That it was not until inquiry at the Environment and Land Court Registry on the 23rd of May 2016 by an advocate of the applicants that they became aware that the said ruling had been delivered on the said 29th of April 2016. The said advocates thereafter managed to obtain a copy of the said ruling.

(4) That at the time the applicant's advocates became aware of the development, the time for filing a notice of appeal as prescribed in law had run out.

(5) That the said advocates were also unable to obtain sufficient instructions from the applicants.

(6) That the applicants are apprehensive that the respondents will commence execution and/or contempt of court proceedings against them.

(7) That this application has been timely made and the delay in filing the notice of appeal is neither deliberate nor inordinate. The applicants have always been steadfast in pursuing this matter since the filing of the said application in the Environment and Land Court. Article 159 of the Constitution requires that matters be heard on the basis of substantive justice and not procedural technicalities.

(8) The proposed appeal has high chances of success as evidenced in the annexed memorandum of appeal.

(9) That the respondents will not suffer any prejudice if this application is granted.

In support of the motion Mr. Conrad Maloba, the applicant's learned counsel swore an affidavit which he also relied on in his submissions before me. In a nutshell the affidavit elucidates on the grounds in the motion to the effect that whereas the impugned ruling was delivered on 29th April 2016, he had not been notified in advance notwithstanding that on 25th November 2015 the learned judge had indicated that the same would be delivered on notice. He therefore did not attend court on the date of the delivery. He only became aware of its delivery from his colleague Michael Amalemba who learnt of it on 23rd May 2016 upon enquiry at the registry of the court below. By the time he obtained a copy of the said ruling the time for filing the notice had run out hence the application before me. He swore and submitted that the delay in filing the notice of appeal, which he believes meritorious, is not inordinate and that the respondents are

unlikely to suffer any prejudice by extension or enlargement of time. Counsel cited several authorities including the ruling of my brother G.B.M. Kariuki JA in CONSOLIDATED FINANCE BANK LIMITED vs. KAPURCHAND DEPAR SHAH Civil Application No. Nai. 256 of 2013 and of this Court in SARAH NJERI vs. JOHN KIMANI NJOROGE Civil Application No. 221 of 2008 (UR 140/2008) for the principles applicable in an application such as the instant one, which I was urged to accept and apply and grant the motion.

The respondents opposed the application by way of a replying affidavit sworn by one of them Naftaly Kamau Gitau, on his and their collective behalf. He stated that he had been advised by the respondents advocates that notice of delivery of the ruling was issued to both advocates on record. He exhibited a copy of the notice addressed to both law firms. It bears a hardly legible stamp of the firm of F.N. Kimani & Associates who received it on 27th April 2016 at 4.16pm. There is no corresponding received stamp by the applicants' advocates. He goes on to accuse the applicants of being indolent, guilty of inexcusable and inordinate delay and therefore disentitled to the court's discretion. The deponent swore that allowing the application would prejudice the respondents as the applicants have not been diligent but have **"slept on their rights and now merely seek to prolong the pendency of this matter in the courts for ulterior motives"**. The deponent concluded by averring that the intended appeal does not raise any or any serious grounds and is not arguable so that in the interests of justice the application ought to be dismissed with costs. Mr. Kimani the respondent's learned counsel used that replying affidavit as the basis of his submissions before me.

I have considered the application, the affidavits in support and in opposition thereto, the rival submissions by counsel on record as well as the authorities cited. An application under **Rule 4** is a plea by a litigant who is time-barred for a single judge of this Court to extend time to enable the doing that which was not done in timely fashion. The discretion the judge is possessed of is by definition wide and unfettered. It is of such a character to the end that the judge may be free to make orders that conduce to the doing of substantial justice so that procedural lapses do not lock out a deserving litigant from the seat of justice. That the discretion is wide and unfettered is not to say that it is wild and unaccountable. It is not to be exercised in a capricious manner that swigs with the shifts in a judges mood's or personal preferences. Rather it is exercisable on the basis of settled principles of law to which end a number of considerations have been suggested as legitimate. They were expressed in MOHAMMED vs. JOSEPH MUGAMBI & 2 OTHERS [2003] eKLR to include the following;

"The exercise of this Court's discretion under rule 4 has followed 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 delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importanceare all relevant but to exhaustive factors: See Mutiso v Mwangi, Civil Application Nairobi 255 of 1997 (UR), Mwangi v Kenya Airways Limited [2003] KLR 486, Major Joseph Mwereri Ingweta v Murika M?Ethare and Attorney General – Civil Application Nairobi 8 of 2000 (UR) and Murai v Wainaina Number 4 [1982] KLR 38".

The list is not exhaustive and the judge has to consider the totality of a particular case and seek to do justice between the parties. In the instant case, the applicants' advocate swears that the notice of delivery of ruling was not served on him. The respondents' learned counsel contests this and urges that in so far as the notice was received by his firm and was addressed to both advocates, then it must follow that the applicant's advocates were served. In fact Mr. Kimani doubts that the court could be so unfair as to serve his firm without serving the applicant's advocates. I take the view, with respect, that whereas in an ideal situation service should have been effected, there is no evidence that it was done. There definitely is a gap between what ought to have happened and what can be proven to have actually happened. I am quite satisfied that the delay has been fully and satisfactorily explained. Moreover, it seems clear that the delay was not inordinate in the circumstances and the applicants did move with reasonable speed to make this application so as to regularize the delay, for which I find them blameless.

The upshot is that I am satisfied that the applicants are deserving of my favourable exercise of discretion. I would go so far as to say they deserve it ex *debito justitiae*. I therefore grant the application and direct that the notice of appeal shall be filed and served within **TEN (10)** days of the date hereof.

Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 25th day of November, 2016.

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR