IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU J.A IN CHAMBERS)

CIVIL APPLICATION NO. NAI 174 OF 2014

BETWEEN

MINISTRY OF ROADS

ATTORNEY GENERAL…….....……..APPLICANTS

AND

GEORGE KIMANI MBUGUA FELIX WACHIRA KIRIKO

MIRIAM ANYANGO MALLA (suing as officials of

AIRPORT VIEW NEIGHBOURS GROUP…....……..... RESPONDENTS

in

Constitutional Petition No.75 of 2011

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RULING

1. The Attorney General, acting for the Ministry of Roads, hereinafter referred to as "the applicant," has brought this application under **rules 4, 42 and 77** of this court's rules. The applicant seeks the following orders:-

a. ***THAT the Honourable Court of Appeal does grant the Applicant extension of time to serve the Notice of Appeal out of the time stipulated of 7 days***

b. ***THAT the Notice of Appeal filed in the court on 30th September 2013 and served upon the Respondents on 22nd October 2013 be deemed as properly served and proper before the court.***

c. ***THAT costs of this application be provided for."***

The application is based on the following grounds, set out on the face of the application:

> ***"(i) THAT the delay in serving the Notice of Appeal within the stipulated period of 7 days was due to an inadvertent mistake on the part of the court clerk at the Attorney***

General's chambers.

ii. ***THAT the delay and mistake to serve the Notice of Appeal is excusable and will not prejudice the respondent.***

iii. ***THAT the intended appeal is meritorious and raises serious issues of law which require proper determination by this Honourable Court.***

iv. ***THAT it's for the interest of justice that this application be allowed."***

The application is supported by the affidavit of **Anastacia Kamande**, a state counsel in the office of the Attorney General incorporating an affidavit by **Joseph Pakia**, a clerical officer in the state law office. The gist of these affidavits is that the notice of appeal was filed on time and the delay in serving the notices within the stipulated time was occasioned by the inadvertent mistake of the clerk in forgetting to collect the notice of appeal after he left the copies at the registry for sealing by the Deputy Registrar. A supplementary affidavit by the said **Anastacia Kamande** was filed by the applicant in response to the replying affidavit contents of which I would refer to later on.

2. The application is strenuously opposed by way of a replying affidavit sworn by **George Kimani Mbugua**, one of the respondents. Mr. Mbugua contends that the reasons advanced by the applicant are false, self serving and do not merit favourable exercise of discretion by this court. Moreover, Mr. Mbugua depones that the application is theoretical and moot as the default in serving the application for proceedings within the prescribed time of sixty days has caused abatement of the intended appeal by operation of law. Mr. Mbugua also indicated that the respondents had taken steps leading to taxation of party and party costs, a certificate of order against the government has been issued and judicial review proceedings instituted to enforce the trial court's judgment. He goes ahead to state that it was only when the application for judicial review aforementioned came up for hearing that the applicants awoke from slumber and filed the present application and also filed an application for stay. Mr. Mbugua also alluded to past incidences where the applicant had failed to pursue their appeal with dispatch and that this application was done as an afterthought. According to the respondent, the applicant had squandered their opportunity to ventilate their case in court to the detriment of the applicant and had therefore approached court with unclean hands and does not deserve the equitable remedy sought.

3. This reply prompted the state counsel to file a supplementary affidavit to address the issues raised. The crux of the supplementary affidavit is that the state counsel was not indolent as she had served the notice of appeal 15 days out of the stipulated seven days which cannot be considered inordinate. Moreover, the state counsel had proceeded on maternity leave in early November 2013 and only resumed duty on 27th March 2014. It was apparent that there was inertia on the matter while counsel was on leave with the office file getting misplaced and even closed. It was only upon her return to duty that she diligently pursued the matter and took the steps she has taken on the matter including tracing the status and filing the necessary applications.

4. Of note is that the learned state counsel's action was well within the knowledge of the respondent's counsel, the issues having come up in previous proceedings between the parties arising from the same course of action. Indeed, the position was acknowledged by both parties in their respective affidavits in acknowledging the ruling by the trial judge allowing the application for stay of proceedings. The learned state counsel urged the court to invoke the provisions of **Article 159(2)(d)** of the Constitution emphasizing the overriding objective of the court envisaged in **sections 3A and 3B** of the Appellate Jurisdiction Act, the appeal being meritorious.

5. The parties made oral arguments before me on the application reiterating their respective positions. The applicant was represented by learned state counsel **Anastacia Kamande** while the respondent was represented by **Andrew Ombwayo**. Both counsel also referred me to several authorities in support of their positions, which I have considered. However, I must point out that

all but one of the authorities filed by the respondent emanates from the High Court which have no binding effect on this court. Having said that, the authorities cited are mere guidelines as this application requires me to exercise my unfettered jurisdiction.

6. Briefly, the impugned judgment of the trial court against which the applicant intends to appeal had issued orders against the applicant requiring the applicant to compensate the respondents for the violent deprivation of the respondent's housing following the respondent's demolition of the applicant's house structures. This order was issued on the backdrop of the trial judge's finding that the respondents had more than six months notice to vacate the suit land, which is a road reserve set aside for the public purpose of constructing the eastern by-pass. The applicant is aggrieved with these orders and intends to appeal on the grounds set out in the draft memorandum of appeal.

7. This is an application for extension of time and further seeks prayers to allow the notice of appeal filed within time and served out of time to be deemed to be properly before this court. As this court has stated time and again, I have unfettered discretion in considering the orders sought. This is not to mean that I exercise the discretion capriciously. Several factors have been laid down to guide on how the discretion is to be exercised. They include the length of delay, the explanations advanced for the delay, the conduct of the party seeking to benefit from the discretionary orders, the prejudice to be suffered by the respondent and the greater overriding objective of achieving the interests of justice. This position was set out in the case of **Leo Sila Mutiso V Rose Hellen Wangari Mwangi Civil Application No. Nai 255/1997**. See also the case of **Mwangi v Kenya Airways Ltd. [2003] KLR 48**, where it was stated as follows:-

> ***"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive.*** Rule 4 ***of the*** Court of Appeal Rules (Cap 9) ***gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered."***

8. The respondent is emphatic that the applicant is not deserving of the orders sought. From the record, I noted that the issues and arguments advanced by the parties have previously been canvassed by the parties before different courts both in the High Court and in this Court and determinations made in favour of the applicant. In the circumstances and nothing new having been raised before me that has not been argued before, I see no basis to disagree with the previous exercise of discretion in favour of the applicant. I am convinced that the learned state counsel for the applicant has been diligent in handling the matter and it was only upon her proceeding on maternity leave that the matter stalled. However, upon her resumption of duties from leave, learned state counsel has demonstrated that she has taken a keen interest in the conduct of the matter.

9. I have perused the draft memorandum of appeal and without going to its merit, I am of the view that the appeal is arguable. The applicant having already obtained orders of stay of execution pending appeal in the high court, it is only proper that the appeal be allowed to proceed on merit. The impugned judgment involves making payments from the public purse in favour of the respondents and it is only proper that the matter is determined conclusively on merit at appeal. Moreover, in line with **Article 201(d)** of the **Constitution**, one of the principles that guide public finance is that public money shall be used in a prudent and responsible way.

10. I note that the respondent raised an argument on abatement of the intended appeal. This was further to the observation by the trial court that the issue of abatement of suit could only be properly addressed by the court of appeal. The respondent disputes that the letter requesting proceedings was served on them as should be done in accordance with **rule 82(1) and (2)** of this court's rules. The applicant on the other hand states that the letter was filed and served concurrently with the notice of appeal. A glance at the said letter dated 26th September, 2013 by the applicant to the deputy registrar requesting for a copy of the judgment and proceedings reveals that the same was filed on 30th September, 2013 and copied to the respondent's advocates.

However, unlike the notice of appeal which bears the acknowledgment stamp by the respondent's advocates, the same cannot be said of the letter. The affidavit by Joseph Pakia is rather vague on whether the letter was served though he acknowledges in paragraph 2 of the affidavit of having received the notice of appeal and the letter requesting for proceedings to effect service on the respondents' advocates. The application only seeks extension of time in respect of the notice of appeal but makes no mention of the letter requesting for proceedings.

11. If I correctly understood learned counsel for the respondent, I am being asked to strike out the notice of appeal on grounds of abatement of the intended appeal. Service of the letter requesting for proceedings in my view is a question of fact and it was either done or not. In my view, the determination of the validity of the appeal or striking out of the same is not an issue for my determination as a single judge under **rule 53** of this court's rules but rather an issue for the full bench of this court. **Rule 53(2)(c)** of this court's rules provide:

> ***"53. (1) Every application, other than an application included in sub-rule (2), shall be heard by a single judge:***
>
> ***Provided that any such application may be adjourned by the judge for determination by the Court.***
>
> ***(2) This rule shall not apply to—***
>
> c. ***an application to strike out a notice of appeal or an appeal;"***

12. Besides, an application to strike out a notice of appeal must be made in a formal manner as envisaged under **rule 84** which provides as follows:-

> ***"A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."*** *(emphasis mine)*

The respondents therefore have recourse under the rules where they feel that the applicants have not taken the necessary steps or the steps were not undertaken within the prescribed time. For the above reasons, I am therefore not in a position to consider the striking out of the notice of appeal or consider the abatement of the intended appeal as that is within the purview of the full court. I am guided by this court's decision in **Samuel Thuita Wanjama v Celestine Mwaniki Muna & Another [2009] eKLR** where it was held as follows:-

> ***There is in fact a notice of appeal on record. Whether or not that notice is valid one cannot be a decision to be made by a single Judge. That is a province of a full bench. Mrs. Gudka at first told me that I should treat the notice of appeal before me to be deemed to have been withdrawn pursuant to rule 82. I do not know that a single Judge of the Court can validly deem a notice of appeal to have been withdrawn and then proceed to act as though there was in fact no notice of appeal. It is to be noted that under rule 52 (b) an application to strike out a notice of appeal can only be heard and determined by the Court not by a single Judge."***

13. In the end and bearing in mind the foregoing circumstances, I allow the application dated 14th July 2014 with costs to abide the outcome of the intended appeal and further order that the applicant to move with speed to have the record filed.

Dated and delivered at Nairobi this 4th day of December, 2015.

P. M. MWILU

……. JUDGE OF APPEA

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

DEPUTY REGISTRAR