IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 165 OF 2013 (UR 113/2013)

BETWEEN

KENYA AIRPORT AUTHORITY …… APPLICANT

AND

TIMOTHY NDUVI MUTUNGI ……..……. RESPONDENT

(An application for leave to lodge a Notice of Appeal out of time from the Judgment and Order of the High Court of Kenya at Nairobi (Korir, J) dated on 7th March, 2013

in

H.C. Misc. Civil Appl. No. 105 of 2011)

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CONSOLIDATED WITH

CIVIL APPLICATION NO.NAI. 174 OF 2013 (122/2013 – UR)

BETWEEN

KENYA CIVIL AVIATION AUTHORITY …….…..APPLICANT

AND

TIMOTHY NDUVI MUTUNGI……..…….……. RESPONDENT

(An Application for leave seeking to lodge a Notice of Appeal out of time from the Judgment and Order of the High Court of Kenya at Nairobi (Korir,J) dated 8th October, 2012

R U L I N G

By a notice of motion dated 10th July 2013 and filed on 17th July 2013 (Civil Application No. Nai. 165 of 2013) the ***KENYA AIRPORT AUTHORITY*** (1st applicant) seeks leave to lodge a notice of appeal, an extension of time within which to file a suit for recovery of land – LR no. 25799/3 from the respondent and stay of execution of the judgment intended to be appealed from pending the determination of the

proposed appeal. The application is brought under section 3(2), 3A and 3B of the appellate Jurisdiction Act and Rule 4 of the Court of Appeal Rules. The 1st applicant intends to appeal against the judgment of the High Court (*Weldon Korir J*) dated 8th October 2012 granting an order of mandamus against the 1st applicant.

Further, by a notice of motion dated 17th July 2013 and filed on 17th July 2013 (Civil Application No.NAI. 174 of 2013 the ***Kenya Civil Aviation Authority*** (2nd applicant) seeks leave to lodge a notice of appeal and a stay of execution of the judgment of the High Court pending the determination of the proposed appeal. The application is brought under the same provisions of the law as the first application. The two applications have been consolidated.

The two applicants were the respondents in the High Court Miscellaneous Civil Application no. 105 of 2011 in which ***TIMOTHY NDUVI MUTUNGI*** – the respondent in both applications sought an order of mandamus against the two applicants to compel them to issue to the respondent approval or consent to develop LR no. 25799/3 and also to issue the necessary height specifications of any buildings to be constructed by the respondent on the said land.

The two applicants are statutory bodies. The 1st applicant is established by the Kenya Airports Authority Act (Chapter 395 Laws of Kenya). It is the proprietor of LR No. 21919 measuring approximately 4,654 Hectares on which Jomo Kenyatta International Airport constructed. Amongst its functions is the provision of co-ordinated system of aerodromes and management of such aerodromes. By ***section 15*** of that Act it has power to enter upon any private land to prevent accidents including power to apply to the High Court for an order of demolition of any building constructed without its approval which in any way interferes with the operation of any service provided by it.

The 2nd applicant is established by the Civil Aviation Act (Chapter 394 of the Laws of Kenya). Its functions include licensing of air services and provision of navigation services. ***Section 9*** of the Act provides, inter alia, that:-

> ***"the Minister may where he considers it necessary in the interest of the safety of navigation, by order published in the Gazette prohibit the eviction within a declared area of any building area of any building or structure above a height specified in the order".***

Section 9(2) defines **"declared area"** as any area adjacent to or in the vicinity of an aerodrome which the Minister may by notice in the Gazette declare to be a declared area.

By L.N. No. 60 of 8th May, 1998 the Minister for Transport and Communications prohibited the erection of any buildings in the specified areas within 15km of Jomo Kenyatta International Airport (JKIA) except with approval of the Director of Civil Aviation.

The respondent is apparently the lessee of L.R. no. 25799/3 which measures 2.023 Ha (about 5 acres). By a letter dated 2nd July 2010 the respondent applied to the 2nd applicant for permission to commence construction on the said land. The 2nd applicant referred the application to the 1st applicant for comment. By a letter dated 21st March 2011 the 1st applicant advised:-

> ***"We wish to advise that the above parcel of land is within the approach funnel of the proposed second runway according to the Airport Master plan and forms part of JKIA land title. The proposed development is therefore not approved."***

By a letter dated 11th April 2011 the 2nd applicant communicated its decision to the respondent thus:-

> "***Analysis of the proposed development has indicated that the site is within the approach funnel of the proposed parallel runway at JKIA and its development is therefore not approved."***

A subsequent application by the respondent did not bear fruit precipitating the institution of the Judicial Review application.

The High Court declined to determine the issue of ownership of the land claimed by the respondent and stated:-

> ***"It is difficult for a court handling judicial review proceedings to make a final determination as to the ownership of a parcel of land.***
>
> ***For the issue of ownership of land to be finally determined there is need to hear witnesses, peruse the original documents and have somebody from the office of the Registrar of Titles testify on ownership of the parcel of land as per the official records. It would therefore be unwise for this court to issue orders that may end up determining the issue of ownership without hearing the evidence."***

The High Court nevertheless made a finding that the 2nd respondent is under a duty to provide height specifications once an applications is made. Ultimately the High Court allowed the application in the following terms:

> ***"In my view this application should succeed but the same must be tempered with the requirements of public interest.***
>
> ***As such the respondents are given 30 days from the date of this judgment to move to court and claim ownership of the land in question if indeed the land belongs to Kenya Airport Authority as alleged. If at the end of the said period the respondents will not have filed any case then they will have 30 days within which to acquire the said land for their utilization using the mechanisms provided by law. Only after the respondents fail to exercise the options above will the orders of mandamus issue compelling the respondents to give the exparte applicant height specifications ---"***

The applicants intend to appeal against the decision.

It is trite law that the power vested in the Court under ***Rule 4*** to extend time is discretionary and that the discretion should be exercised judicially taking into account all the relevant circumstances of each case including the length of the delay, reasons for the delay, the merits of the intended appeal or appeal, the prejudice which may be occasioned to the respondent if the application is allowed ***(WASIKE V SWALA [1984] KLR 59, SILA MUTISO V LEO ROSE. HELEN***

WANGARI MWANGI **(Civil Application No. NAI. 251 of 1999 (unreported).**

The interest of the administration of justice is an important factor as the duty of the court to administer substantive justice without undue regard to procedural technicalities as embodied in its overriding objective principle in section 3A and 3B of the Appellate jurisdiction Act and ***Article 159(2)(d)*** of the Constitution is a paramount consideration. In the exercise its discretion it is necessary for court to weight and balance all the relevant factors.

Since the reasons for delay and the proposed grounds of appeal proferred by each applicant are distinct, it is convenient to consider two applications serially.

The application by the 1st applicant is supported by the affidavit of Victor Arika, Ag. Corporation Secretary to which numerous documents are annexed. The applicant and the Respondents have filed written submissions respectively. In addition, the respective counsel made oral submissions at the hearing. The reasons for delay given in Victor Arika's affidavit include the commissioning of firm of registered land surveyors to establish when and how the title now held by the respondent was issued, the lengthy process of taxation of bills of costs filed by the respondent, the time taken by the process of overhauling the applicant's entire policy regarding its land holdings; the time taken by the reconstitution

of its entire board and the time taken by subsequent proceedings in the High Court. The respondent contends in his grounds of opposition in the replying affidavit and in the written submissions that the delay of 277 days is inordinate and that the delay has not been reasonably explained.

It is evident that on 10th December 2012, the 1st applicant filed High Court Misc. Application No. 709/2012 seeking three orders namely; leave to lodge a notice of appeal out of time; extension of time within which to file suit and stay of execution of the judgment of the High Court. Victor Arika deponed that at the hearing of the application the learned Judge made it clear that he was not willing to grant the orders sought. On his part, the respondent contends that that application should have been filed in this Court and not in the High Court which had no jurisdiction.

The proceedings of the High Court show that on 17th June, 2013 the respective counsel agreed, amongst other things, and the learned Judge so ordered, that the 1st applicant herein should seek leave, extension of time and stay of execution in this Court within 30 days of the date of the order.

The application of 10th December, 2012 was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to **Rule 7** of **Court of Appeal Rules** which provides:

> ***"The High Court may extend time for giving notice of intention to appeal from a Judgment of the High Court or making an application for leave to appeal or for a certificate that the case is fit for appeal notwithstanding that time for giving such notice or making such appeal may have already expired."***

Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined and since the present application was made within the 30 days stipulated by order of the High Court made by consent on 17th June 2013, the delay which is material is from the date following the delivery of the impugned Judgment (that is 9th October, 2012) to 10th of December, 2012 when the application for extension of time was made in the High Court. That is a delay of about 2 months which is not relatively inordinate considering the nature of the proceedings and which delay has been reasonably explained as largely systemic.

The 1st applicant contends that the intended appeal has excellent chances of success. It has annexed a draft memorandum of appeal containing the proposed grounds of appeal. It has also annexed a copy of the application lodged in the High Court on 10th December, 2012 to which a copy of draft plaint intended to be filed against the respondent was annexed.

A copy of due diligence survey of the 1st applicant's land and the respondent's land conducted by Geo Measure Surveyors Limited is annexed to the application. The report states in part that:

> ***"The two parcels overlap completely where L.R. No. 25799/3 is enclosed entirely within the South – Eastern portion of L.R. No. 21919 (the KAA land)….."***

It seems that the 1st applicant would contend in the appeal, amongst other things, that learned Judge erred in shortening the 12 years statutory period within which the 1st applicant should file a suit to claim the land from the 1st respondent.

Upon consideration of the grounds of the intended appeal alongside the impugned judgment there is no doubt that the intended appeal is not only arguable but also raises an issue of general public interest.

The respondent contends that he will suffer irreparable loss if the application is allowed as he will be unable to develop or use his land. The applicants intends to exercise its undoubted right of appeal. The 1st applicant's right of appeal, apparently in pursuit of protection of public interest, far outweighs any prejudice that the respondent may suffer pending appeal.

The single Judge has only jurisdiction to extend time relating to the intended appeal. The period limited by the High Court for filing a suit is part of the grounds of the intended appeal which can only be dealt with by the Court dealing with the appeal. Further, the respondent has correctly submitted that the application for stay of execution is premature as a notice of appeal has not yet been filed. Furthermore, the application can only be entertained by the full Court.

The applicant states that it has now obtained all the necessary documents including a copy of the judgment decree and proceedings.

The application by the 2nd applicant is supported by the affidavit of ***Cyril Simiyu Wayong'o*** the legal officer of the 2nd applicant. He deposes, inter alia, that ***Messrs Keengwe & Co. Advocates*** then on record for the 2nd applicant did not inform the 2nd applicant of the entry of judgment; that it is on 25th March, 2013 that the 2nd applicant came to know of the entry of judgment from the respondent's advocates; that the 2nd applicant thereupon instructed the current advocates to take up the conduct of the matter; that the current advocates obtained consent to act in the matter from the former advocates on 10th April, 2013, whereupon the current advocates filed an application in the High Court for leave to lodge a notice of appeal out of time and for stay of execution, that on 17th June, 2013, the High Court allowed the 2nd applicant to file the present application in this Court within 30 days and that the delay was due to mistake of the 2nd applicant's former advocates.

The respondent contends that delay of 115 days from 25th March, 2013 to 17th July, 2013 when the present application was filed is inordinate, that the delay has not been sufficiently explained as the 2nd applicant's former advocates appeared in court on six occasions after the judgment was delivered; that there is no tangible evidence that the 2nd applicant's former advocates had refused to release the file and that the 2nd applicant's advocates did not cure the alleged mistake of counsel as they went ahead to file an application for extension of time before the High Court which had no jurisdiction to entertain the application.

The explanation of the 2nd applicant that it came to know of the entry of judgment on 25th March, 2013 is plausible. The 2nd applicant's legal officer stated so in his affidavit sworn on 30th April, 2013 in support of the application for extension of time in the High Court. He has restated the same fact in the affidavit sworn on 17th July, 2013 in support of the present application. The mere fact that the 2nd applicant's former advocates appeared in the High Court on six occasions after the judgment was delivered is not indicative of the fact that he had communicated the decision of the High Court to the 2nd applicant.

The averment that the 2nd applicant's former advocates gave his consent to the current advocates to take over the case on 10th April, 2013 is supported by the consent letter executed on 10th April, 2013. It is evident from the annexed documents and proceedings of the High Court that upon the current advocates coming on record, they filed an application for extension of time in the High Court which application was determined. Rather, the High Court by consent on 17th June, 2013 gave the 2nd applicant 30 days to file the present application which was duly filed on 17th July, 2013 before the expiry of the stipulated 30 days.

As I have already observed, the High Court had jurisdiction by virtue of ***section 7*** of the Appellate Jurisdiction Act to entertain and determine the application for extension of time. It follows that the delay from 30th April, 2013 when the application for extension of time was filed to 17th June, 2013 when the consent order was recorded to the effect that the application for extension of time should be made in this Court is attributable to judicial process. The 2nd applicant complied with the order of the High Court and filed the present application within the 30 days limited by the High Court.

The mistake of a counsel is pardonable in the interest of justice – ***BELINDA MARAI & OTHERS VS. AMOS WAINAINA – CIVIL APPLICATION NO. NAI. 9 OF 1978***. From the foregoing, I am satisfied

that the delay from the date of delivery of the impugned judgment to 24th March, 2013 which is about 4½ months discounting the Christmas vacation as ***Rule 3 (e)*** stipulates, was due to mistake of the 2nd applicant's former advocates and which is pardonable in the interest of justice. Thus the 2nd applicant has given reasonable explanation for the delay.

The 2nd applicant contends that the intended appeal is arguable and has annexed a draft memorandum of appeal containing 10 proposed grounds of appeal. The proposed grounds of appeal largely raises issues of law. The 2nd applicant further contends that the matters involved in the intended appeal are of immense public, national and international importance as they relate to safety of air transport in and out of Kenya air space. It is apparent from the judgment and the proposed grounds of appeal that the intended appeal is not frivolous.

The respondent contends that he will suffer irreparable loss if the application is allowed as he will be unable to develop or use his land. However, the 2nd applicant's right to lodge an appeal which is in public interest far outweighs the prejudice that the respondent would suffer as a result of delay. Such prejudice would appropriately be compensated by costs.

The application for stay of execution pending appeal is premature for reasons already stated.

Both applicants have now all the necessary documents to lodge an appeal. The extension of time to lodge a notice of appeal without extending the time for lodging the record of appeal will not only be inefficacious but would also cause unnecessary delay and expense. Since the Court has jurisdiction to extend time for the lodging of the record of appeal it would be in accordance with the constitutional principle of doing substantial justice without undue regard to technicalities of procedure and also in accordance with the overriding objective of the rules to promote expeditious disposal of appeals to extend time for lodging the record of appeal.

For the foregoing reasons, I allow both applications to the extent that I extend time for lodging the notice of appeal. Each applicant to file and serve the notice of appeal within 14 days. In addition, I extend time for lodging the record of appeal. Each applicant to lodge and serve the record of appeal within 30 days from the date of service of the notice of appeal.

Each application to pay costs of the application to the respondent.

DATED AND DELIVERED at NAIROBI this 21st day of NOVEMBER, 2014.

E.M. GITHINJI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR