IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME. J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 254 OF 2014 (UR)

BETWEEN

NYAHURURU D.E.B. PRIMARY SCHOOL

Through its Executive Officials namely;

JOHN ALUMA EKAI CHAIRMAN

MARY NJERI MUNENE SECRETARY

GERALD NDUHIU TREASURER.....APPLICANT

AND

CATHERINE WANGUI KARIUKI.....RESPONDENT

(Being an application for leave to appeal out of time against the ruling and orders of Honourable Lady Justice L. N. Waithaka delivered on 20th June, 2014

in

Nakuru H.C. E. L. C. No 329 of 2013)

RULING

This is an application brought principally under the provisions of Rule 4inter alia, of this Court Rules. The applicant is a public primary school, in Nyahururu in Nyandarua County. The applicant was was sued, through its elected officials before the High Court at Nakuru by the respondent over the ownership of a property known as Title No. Nyandarua/Nyahururu Municipality Block 6/660 (hereinafter referred to as the suit premises). As it has become a practice nowadays, simultaneously with the filling of the suit, the respondent also filed a Notice of Motion under certificate of urgency seeking for interim orders of injunction to restrain the applicant from interfering with the suit premises pending the hearing and determination of the suit. Upon hearing the application, in a ruling dated 20 th June 2014, the learned

Judge, made the following orders;

"Now, the applicant is effectively seeking interlocutory mandatory injunction. She requires the respondent to cease being present on the suit land. That means that the respondent must vacate the suit

land and thereafter not interfere with the applicants' quiet occupation of the same. The Court of Appeal in; KIG Bar Grocery & Restaurant Ltd vs. Gatabaki and Another (1972) 1 EA 503, held inter alia that "an order for mandatory injunction should be couched in positive terms rather than negative terms"

In that regard, the order of this court shall be that the respondent is hereby ordered to vacate the suit land within the next 30 days from the date of this ruling and hand over the same to the applicant. Should the respondent fail to do so, the applicant is at liberty to evict him from the suit land. In doing so the applicant should enlist the assistance of the court bailiff"

This is the order the applicant wishes to appeal against. However, the applicant was represented by the Attorney General before the High Court. Through the affidavit that was sworn by Mary Njeri Munene, in support of the instant application, it is stated that the applicant was not present in court when the ruling was delivered on the 20th June, 2014. The Attorney General did not inform the applicant about the ruling and the applicant became aware of it on the 25th August, 2014 when it received a letter from the respondent's advocates enclosing an order of the court requiring it to vacate the suit premises. The applicant convened a management committee meeting and agreed to change the Advocates andapproached its present advocates. The advocates wrote to the office of the Attorney General requesting them to furnish him with the court file, but they received a negative response and it was not until the 12th September, 2014, that they were able to obtain copies of proceedings from the court file and thus filed the present application for extension of time to file an appeal out of time.

According to the applicant, failure to file the intended appeal was basically occasioned by the office of Attorney General who failed to inform it of the outcome of the matter despite the fact that

it affected the school, which was required to be evicted from the suit premises occupied by the school to render public education. On the issue of the intended appeal being arguable, Mr. Chege, learned counsel for the applicant, pointed that the respondent's prayers as pleaded in the Notice of Motion was for interim orders of injunction to restrain the applicant entering, remaining, interfering, erecting structures or in any other way whatsoever from dealing with the suit premises pending the hearing and determination of the suit. However the leaned Judge went ahead to issue final orders requiring the applicant to be evicted from the suit premises even before their defence was heard. The respondent did not appear during the hearing of this application, although a hearing notice was duly served upon her Advocates firm of Ndegwa Wahome & Co. Advocates. This application proceeded for hearing exparte.

The prayers sought in this application call for the exercise of the court's discretion which is generally unfettered. However, where the court has to exercise its discretion, there must be some reasonable basis of fact or law to warrant the orders being made. In other words, judicial discretion cannot be exercised whimsically or capriciously. The parameters that guide the court are well set out in a long line of authorities. See the case of Leo SUa Mutiso v Rose Hellen Wangari Mwangi, C. A. Appl. No. Nai. 251/97 (ur):

"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay; secondly, the reason for the delay; thirdly, (possibly); the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent if the application is granted."

The above list is of course not exhaustive as held in the case of Mongira& Another v Mukaria& Another, 2005 2 KLR 103 at page 106-10**7*, where the Court*** again cited Leo Sila Mutiso (supra), and went on to state:

"These, in general are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words "in general" Rule 4 gives the Judge unfettered discretion and so long as the discretion is exercised judicially a Judge would be perfectly entitled to consider any other facts outside those listed in the paragraphs we have quoted above so long as the factor is relevant to the issue being considered. To

limit such issues only to the far set out in paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way."

With the above principles in mind, I now approach the application before me. The applicant was late in filing the Notice of Appeal by a period of about three months. The applicant is a public primary school that is run by a management committee and was represented in the High Court by the office of the Attorney General. The applicant has explained that the delay was caused by the office of the Attorney General who did not communicate with the applicant. This is also a matter of concern that counsel from the Attorney General's office can fail to inform their client of the outcome of a matter that affects them so profoundly such as in this matter. If this was the only factor, I would have ruled that the applicant choose their own lawyers and, therefore, they should bear the consequences of their advocates' mistakes which should not visit it upon the respondents.

However, I have to look also at the merit of the appeal and that is not to say an arguable appeal will of necessity be successful. These are the grounds raised in the proposed memorandum of appeal:

1. The learned Judge erred in law and fact in granting a mandatory injunction when conditions for doing so had not been met by the respondent.
2. That the learned trial Judge erred in law and fact in granting orders which had not been pleaded by the respondent thereby occasioning a travesty of justice.
3. That the learned Judge erred in law in and fact in making draconian final orders at the interlocutory stage without conducting a hearing leading to a miscarriage of justice.
4. That the learned Judge erred in law and fact in making final orders at an interlocutory stage before the parties had filled all their pleadings.
5. That the learned Judge erred in law and fact in purporting to summarily adjudicate the dispute before her without such an application being made by either party.

From the submissions of counsel for the applicant, grounds of appeal contained in the draft memorandum of appeal and a cursory glance at the pleadings that were before the High court, an issue arises on whether final orders that were prejudicial to the applicant were made at an interlocutory stage. Another issue is whether those final orders disposed of the applicant's case before they were fully heard. It is not my province as a single Judge to comment substantively on the merit of the appeal that is for the three Judge Bench to decide. What I can say at this point is that the grounds of appeal are arguable. The defence by the applicant was not determined on merit and if the order of eviction from the suit premises is executed, they will certainly suffer prejudice

In view of the foregoing, I am satisfied that this is a proper matter for me to exercise my discretion in favour of the applicant and to grant them leave to appeal. Accordingly the applicant's Notice of Appeal is deemed properly filed and the record of appeal should be filed within the next 30 days from today. As the respondent did not appear, there will be no order as to costs.

Dated and delivered at Nairobi this 14th day of November, 2014.

MARTHA K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR