IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: DR. K. I. LAIBUTA, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. 336 OF 2019

BETWEEN

SIMON GEORGE KAMAU (*Suing as the personal*

representative of the Estate of Cecilia Wanjiru Kimwere (Deceased))**....APPLICANT**

AND

THE ATTORNEY GENERAL.....1st RESPONDENT

JOHN GATHARA WACHUKA.....2nd RESPONDENT

(Being an application for extension of time to file and serve the Record of Appeal out of time, from the Ruling and Order of Justice D. A Onyancha dated the 8th day of March 2013

in

Nairobi High Court Civil Appeal No. 622 of 2007)

RULING

Background

The Applicant, Simon George Kamau suing as Personal Representative of the Estate of Cecilia Wanjiru Kimwere (Deceased), has filed a Notice of Motion dated 16 th October 2019 under **Rules 4,41 and 42**of the Court of Appeal Rules in which he seeks –

(1) this application be certified as of utmost urgency and service be dispensed with in the first instance due to reason of urgency;

(2) this Honourable Court be pleased to extend time for filing of the appeal;

(3) this Honourable Court be pleased to grant leave to file the appeal; and

(4) the costs of, and incidental to, this application be costs in the intended appeal.

The application is supported by the annexed affidavit of the deceased, Cecilia Wanjiru Kimwere, sworn before her demise on 16th October 2019, and is made on ten grounds set out on the face of the Motion. As I understand them, the grounds,which are also recited in the supporting affidavit, are that –

(1) the deceased was the absolute proprietor of Land Reference No. DAGORETTI/RIRUTA/2437 together with all rights and privileges appurtenant thereto;

(2) the application is made consequent to leave granted by Hon. Mr. Justice Mbogholi Msagha on 6th April 2017 to appeal the decision of Hon. Mr. Justice D. A. Onyancha in High Civil Appeal No. 622 of 2007 dated 8th March 2013.

(3) by his Ruling given on 8th March 2013, Justice Onyancha ordered that the suit property together with LR.No. DAGORETTI/RIRUTA/2438 be resurveyed in such a manner as was contrary to the descriptions in the registered title deeds of the individual properties as provided for in the Registered Land Act, Cap. 300 (now repealed);

(4) the Ruling of Justice Onyancha was made in disregard of the proprietary rights of the individual title holders, and in breach of their constitutional right to property;

(5) the said Ruling was an illegality and offended the principle of res judicata in that the matter brought to court by the second Respondent had previously been adjudicated upon and settled, and that the Notice of Motion to which the Ruling relates could not substitute for a substantive appeal against matters previously settled;

(6) it is in the best public interest that the intended appeal be heard to determine the legitimacy of consent orders entered by five proprietors expressed in the mutation form of survey of LR No. DAGORETTI/RIRUTA/1185, which was subsequently invalidated by Justice Onyancha who quashed the consent contrary to law;

(7) the original subdivision of LR No. DAGORETTI/RIRUTA/1185 catered for all overriding interests under Section 30 of Cap.300 through surrender of land by the five former proprietors and that Justice Onyancha's Ruling had the effect of disrupting and interrupting existing public service lines as provided for in the extant land registry maps for public planning;

(8) the Respondents will not suffer undue prejudice because the Memorandum of Appeal and record of appeal is ready for filing and service if leave is granted as sought; and

(9) the appeal is arguable and has a high chance of success, and this Court has unfettered discretion to grant leave to file an appeal out of time.

Accompanying the Motion are (a) the Applicant's Notice of Appeal dated 3rd May 2017 and lodged on 8th May 2017;(b) the draft Memorandum of Appeal;(c) a certified copy of the Ruling of Hon. Justice D. A. Onyancha dated and delivered on 8th March 2013; (d) a certified copy of the court's Order issued on 22nd March 2019; and (e) a Certificate of Delay issued dated 3rd May 2019.

The first prayer for certification was dispensed with on 18th October 2019 by Hon. Lady Justice Koome, JA (as she then was), who directed that "the matter be listed before a single judge as and when the cause list allows". Likewise, the 3 rd prayer was granted by Justice Mbogholi Msagha on 6th April 2017. That leaves me with the 2nd and 4th prayers to determine in respect of extension of time to file the intended appeal, and costs of the application.

In addition to the foregoing, the Applicant explains the reasons for delay in instituting the intended appeal within the prescribed period. According to her, she became aware that her advocate, Mr. H. A. Khan, did not take appropriate action to institute the intended appeal despite her constant follow-up and reminders.

Submissions

The Applicant has filed written submissions dated 30th June 2021 in which he relies on the authority of ***Belinda Murai and nine others v Amos Wainaina*** **[1979] eKLR** and ***Donald O. Rabala v Judicial Service Commission and another*** **[2020] eKLR,** both of which advance the principles that guide the Court in the exercise of its discretion under Rule 4 of the Court of Appeal Rules. Though duly served, the Respondents have not replied to the application or filed any submissions.

Determination

This matter having been dealt with as respects the application for certification as urgent, and leave having been granted to appeal, I now turn to the remaining prayers under **Rule 4** of the Court of Appeal Rules, which gives the Court unfettered discretion to ***"… extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act …,"*** on such terms as it thinks just.

The Court of Appeal in ***Leo Sila Mutiso v Helen Wangari Mwangi*** **[1999] 2 EA p231** set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that "the decision whether or not to extend time is discretional. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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 case of ***Fakir Mohammed v Joseph Mugambi and two others*** **[2005] eKLR** lends clarity to the issue of the Court's jurisdiction in determination of applications made under Rule 4. The discretion is unfettered. In its decision, the Court observed:

"The exercise of this Court's discretion under Rule 4 has followed a 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, 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 importance – are all relevant but not exhaustive factors."

In addition to the foregoing, I have considered the decision in ***Wasike v Swala*** **[1984] KLR p591** where this Court stated:

"As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:

(a) that there is merit in his appeal;

(b) that the extension of time to institute and file the appeal will not cause undue prejudice to the respondent; and

(c) that the delay has not been inordinate."

With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. The application before me also turns on the authority of ***Joseph Wanjohi Njau v Benson Maina Kabau*****, Civil Application No. 97 of 2012 (Unreported),** where the Hon. Mr. Justice Kathurima M'Inoti held that ***"the Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before the Court."***

I have carefully considered the contents of (a) the Applicant's undated draft Memorandum of Appeal; (b)the grounds set out on the face of the Motion dated 16th October 2019; (c) the deceased's supporting affidavit sworn on 16th October 2019; and (d) the

certified copy of the annexed Ruling delivered on 8th March 2013. The grounds set out in the draft Memorandum are, in my considered view, arguable with the possibility of success. The Applicant's contention that Justice Onyancha quashed consent by five proprietors on the basis of which the suit properties were mutated and the boundaries placed to accommodate public service lines is arguable. The claim that the Applicant has undertaken substantial development on LR No. DAGORETTI/RIRUTA/2437, and that revision of boundaries as ordered by Justice Onyancha would occasion irreparable loss, is weighty and calls for further examination in the intended appeal. Suffice it to say that whether or not the intended appeal will succeed is not for me to judge, but remains to be seen on scrutiny by the Court of the entire record of appeal once filed, and on consideration of the relevant law relating to the matters in contention. Moreover, it is not within my jurisdiction to consider the merits of the intended appeal with finality at this stage in the proceedings.

As regards the issue as to whether the extension of time to institute and file the intended appeal will cause undue prejudice to the respondents, I find that no such prejudice would be suffered. In my considered view, it might in fact be in the interest of the Applicant and the 2nd Respondent to have the issue of the boundary between their two properties determined once and for all.

With regard to the period of delay, the Court of Appeal in ***Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet*** **[2018] eKLR** observed that ***"… the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable."***

The applicant has explained to the Court's satisfaction the cause for her delay in filing her Notice of Appeal, Memorandum and Record of Appeal. In any event, soon after becoming aware of her advocate's inaction, she took steps to prepare the record of appeal, which is said to be on hand and ready for filing as soon as this application is determined. I do not consider the delay in filing and serving her Notice of Appeal for a period of 41 days to be inordinate in light of her "constant follow-up and reminders" to her advocate.

In view of the foregoing, I find that the Applicant's Notice of Motion dated 16th October 2019 merits the orders sought under Rule 4. Accordingly, I hereby order and direct that –

(a) time be extended for the Applicant to file and serve the Memorandum and Record of Appeal within fourteen (14) days from the date hereof;

(b) costs of this application be costs in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021.

DR K I LAIBUTA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR