

**IN THE COURT OF APPEAL
AT NAIROBI**

CORAM: KIAGE JA (IN CHAMBERS)

CIVIL APPLICATION NO. E213 OF 2023

BETWEEN

WALTER NAMASAKE & 65 OTHERSAPPLICANTS

AND

ABDI SHEIKH AHMED1ST RESPONDENT

TARAGAURI LALITCHANDRA PANDIT2ND RESPONDENT

DHRUV LALITCHANDRA PANDRA3RD RESPONDENT

ABRAHAM MURIUKI MUNENE.....4TH RESPONDENT

(An application for extension of time to file and serve a Notice of Appeal and Record of Appeal against the Judgment of the Environment & Land Court at Nairobi (Lucy N. Mbugua, J.) dated 8th December, 2022

in

ELC Civil Case No. 98 of 2010)

RULING

The applicants filed a Notice of Motion dated 27th April 2023 seeking the following orders, in the main;

“2. THAT time be extended for the applicants to file and serve the Notice of Appeal.

3. THAT if leave is granted it do operate as stay of proceedings in the High Court.

4.THAT this matter be certified as one of general public importance.”

Before I proceed to contemplate this application, I reckon that the only prayer that I can consider is prayer number 2, requesting for extension of time to file and serve the notice of appeal.

The application before me is premised on grounds on the face of it and is supported by two affidavits sworn on 27th April 2023 and 6th June 2023, respectively. by **Walter Namasake**, the Chairman of the applicants. It is averred that judgment in **ELC No. 98 of 2010**, the decision sought to be challenged, was delivered on 8th December 2022; thereafter the Christmas court recess commenced and the applicants’ advocates erroneously thought that the time for filing the notice of appeal was supposed to be 30 days from the date of judgment excluding the period of vacation; on 6th February 2023, having realized the error, they filed the notice of appeal. The first notice of appeal was rejected for non-payment, the second one was also rejected because of the date indicated therein, and the third dated 5th May 2023 was accepted.

The applicants depose that the offices of their advocates were broken into by thieves who made away with equipment that were

necessary for preparing the intended appeal and before long, their advocate fell sick to the extent that he could not file the appeal on time. They plead that they are not to blame for the mishaps that encumbered their advocate and hence this Court should not punish them. The applicants assert that they have an arguable appeal.

In written submissions dated 8th June 2023 filed by **B. N. Mbuthia & Co. Advocates** for the applicants, it is admitted that the delay in lodging the notice of appeal is approximately 4 months, excluding the Christmas and Easter recesses of the Court. Counsel cited my decision, in chambers, in **NANCY WANJIRU MWAURA Vs. JENNIFER WAIRIMU NJOGU & 3 OTHERS [2019] eKLR** where I opined that, *‘365 days are not few. But they are not the longest days that this Court has excused. What matters is whether a plausible explanation is given for the delay.’* I was urged to allow the application in view of that decision.

The 1st respondent replied to the application vide an affidavit sworn on 29th May 2023, and written submissions dated 10th June 2023, lodged by **Bryan Khaemba, Kamau & Company Advocates**. He contends that the applicants’ allegations of theft at their advocate’s offices some time in February 2023 and his ill-health

sometime in March 2023 are irrelevant as those events took place way after the 14 days within which they were required to file their notice of appeal. The 1st respondent avers that on advice by his counsel, the Court's Christmas recess commenced on 21st December, 2022 and ended on 12th January, 2023. In essence therefore, the applicants ought to have filed their notice of appeal on or before 16th January 2023. He contests the applicants' explanation that their advocates mistakenly believed that they were required to file a notice of appeal within 30 days and not 14 days, terming it grossly insufficient and inexcusable. Moreover, it is submitted, ignorance of the law is not a defense and legal practitioners are presumed to know the law.

The principles to be considered by the Court in exercising the discretion on whether to extend time, as delineated by Supreme Court's decision in **NICHOLAS KIPTOO ARAP KORIR SALAT Vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR** are cited. The 1st respondent asserts that the intended appeal is unmerited as the court below made a finding to the effect that the applicants had no *locus standi* to sue the respondents as they had no proprietary rights in the suit property.

He urges that the application be dismissed with costs as the applicants have not set forth any sufficient reasons to warrant extension of time.

The 2nd to 4th respondents replied to the application vide an affidavit sworn on 5th June 2023, by the 4th respondent on their behalf. The law firm of **Muri Mwaniki Thige & Kageni LLP** also lodged written submissions, which are undated, on their behalf. It is deposed that the application herein is incompetent and this Court lacks jurisdiction to consider it. The reasons advanced for that argument are that, the applicants already filed a notice of appeal out of time and are therefore moving the court to remedy an illegality; the draft notice of appeal bears a different heading from the proceedings appealed from as it omitted 35 of the plaintiffs who were parties in the proceedings before the court below and included one **Walter Namasake** who was not a party to the said proceedings, but swore the supporting affidavit of the applicants as their chairman. The 2nd to 4th respondents contended that the said deponent did not provide any letter of authority showing that he had authority to swear the affidavit on behalf of the applicants herein.

It was submitted that the alleged illness of the applicants' advocate and theft in his office, happened after the delay had occurred and subsequent to his filing a defective and incompetent notice. The applicants were blamed for failing to take advantage of the electronic filing system of the Court to file the in notice time. Further, it was urged that the appeal is not arguable as the applicants did not prove any legal interest or right to the suit property and thus were without *locus standi* to impeach the title in the 1st respondent's name.

Enlargement of time lies in my discretion to be exercised judicially in accordance with sound principle, not out of whim, caprice or sympathy. More importantly, my considerations are to be guided by the laid down parameters as espoused by the Supreme Court in **NICHOLAS KIPTOO ARAP KORIR SALAT** (Supra);

- “1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***

- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

I have considered the rival contentions around the burglary at the offices of the applicants' advocates as well as his illness.

A reading of the police abstract on record shows that a report was made by one **Benson Mbuthia** about a laptop that was stolen on 21st February 2023. On record are also two sick off forms where the said **Benson Mbuthia** was given off duty days from 1st March 2023 to 13th March 2023, and 17th March 2023 to 8th April 2023. The impugned decision having been rendered on 8th December 2022, it is obvious that the foregoing events happened long after the stipulated 14 days under which the notice ought to have been lodged.

I am unimpressed by the plea that counsel erroneously believed that they had 30 days within which to file the notice. He is presumable to know the law. I note that they have beseeched me to excuse them from the delay while citing my decision in **NANCY WANJIRU MWAURA** (supra) where I overlooked the delay and granted the prayer for extension of time. However, the said case is distinguishable from this one. In that case, it was evident that even though the applicant had followed up on the status of her appeal for about a year, her advocates kept on misleading her that they had filed a notice of appeal, which they had not. In this matter, there is no demonstration that the applicants checked on the status of their appeal from 8th December 2022 when judgment was issued to 6th February, 2023 when there were attempts to lodge the notice.

In the result, I decline to grant the prayer to extend time.

The application is dismissed with costs.

Dated and delivered at Nairobi this 28th day of March, 2024

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR