

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
APPLICATION NO. 1 OF 2021
(Mwilu, DCJ & VP; Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

—BETWEEN—

MARVIN OPIYO AMBALA 1ST APPLICANT
NANCY AMBALA.....2ND APPLICANT
AUMA MBALA.....3RD APPLICANT

—AND—

ODUOR HAWI AMBALA1ST RESPONDENT
OGOLA KODHEK AMBALA.....2ND RESPONDENT

(Being an application for temporary injunction and extension of time to lodge and serve the record of appeal against the ruling and order of the Court of Appeal (Kiara, Sichale & Murgor, JJ.A) delivered at Nairobi on 9th October, 2020 in Civil Appeal (Application) No. 116 of 2016.)

RULING

A. INTRODUCTION

[1] The application before Court is dated 14th January 2021, and was lodged on 18th January 2021. It is brought pursuant to the provisions of Articles 23 (3), 25 (c), 27 (1)(2), 48, 50 (1), 159, 163 (4) (a) and 259 of the Constitution, Sections 15 (2), 21 (2) and 24(1) of the Supreme Court Act and Rules 3, 21 and 22 of the Supreme Court Rules, 2020. The applicants seek the following orders:

- i) *A temporary injunction restraining the respondents or their agents from trespassing, wasting constructing alienating or otherwise interfering or dealing with Land Reference Nos. 1160/286, 287 and 288 and their respective sub-divisions and assents (the suit property) pending the hearing and determination of the application;*
- ii) *A temporary injunction restraining the respondents or their agents from trespassing, wasting, constructing alienating or otherwise interfering or*

dealing with the suit property pending the hearing and determination of the intended appeal;

- iii) Extension of time to lodge and serve an appeal and record of appeal against the Ruling and Order of the Court of Appeal (Kairu, Sichale & Murgor, JJA) in Civil Appeal (Application) No. 116 of 2016; and*
- iv) Costs of the application.*

[2] The application is grounded on the supporting affidavit sworn on 14th January 2021 by **Mercy Wanjiru Mathai**, Advocate. It is opposed via the respondents' Grounds of Opposition dated 5th March 2021 and Replying Affidavit sworn by the 1st respondent on even date.

B. BACKGROUND

[3] The trial Court in a judgment delivered on 29th June 2016 in *Succession Cause No.68 of 1986* revoked a consent order dated 3rd December 2004 which had distributed the assets subject of the succession cause to the beneficiaries, it cancelled and invalidated all prior transactions relating to the suit property and reverted the suit property to the estate for redistribution. In the impugned judgment, the Court of Appeal (*Githinji, Okwengu & Mohammed, JJA*) allowed the appeal before it. It set aside the High Court judgment, reinstated the consent order of 3rd December 2004, revoked the cancellation of transfers of the part of suit property and revoked all transaction entries relating to the suit property made after the date of the High Court judgment. Aggrieved, the applicants filed a review application against the entire judgment and orders and the appellate court (*Kairu, Sichale & Murgor, JJA*) dismissed the application for lack of merit vide its ruling delivered on 9th October 2020.

C. THE PARTIES SUBMISSIONS

i) The Applicants' Case

[4] In the written submissions dated 18th January 2021, the applicants submit that the delay in filing the appeal and record of appeal was partially occasioned by the

Appellate Court's failure to issue typed proceedings within time and their inability to raise legal fees due to economic hardship caused by the Covid-19 pandemic. They urge that after delivery of the Court of Appeal's impugned ruling, they immediately filed the Notice of Appeal dated 21st October 2020 and simultaneously requested for typed proceedings. It is their case that they exercised due diligence in following up on the typed proceedings and despite several reminders to the Deputy Registrar of the Court of Appeal, the proceedings were only availed on 2nd December 2020, which was out of time to file an appeal without leave of Court.

[5] They submit that the delay was not inordinate as the reasons advanced are genuine and the instant application has been brought without undue delay. They rely on this Court's decision in ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral & Boundaries Commission & 7 others***; SC Application No 16 of 2014, [2014] eKLR (***Nick Salat Case***), to urge that they have satisfied the principles set for extension of time.

[6] On the prayer for temporary injunction, the applicants submit that this Court has jurisdiction under Section 21 of the Supreme Court Act, 2011 and Article 23 (3) of the Constitution to grant orders for injunction. They rely on this Court's decision in ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae)***; SC Petition No 3 of 2018, [2021] eKLR. It is their further case that the intended appeal raises constitutional issues, specifically that the Court of Appeal judgment was made in error and infringed on their rights of access to justice and right to fair trial. In conclusion, the applicants urge that unless the orders sought are granted, there is a high probability that the respondents will adversely deal with the suit property, rendering the intended appeal nugatory.

ii) The Respondents' Case

[7] The respondents filed their submissions dated 5th March, 2021 on 8th March 2021. They submit that the applicants have been dishonest and indecorous in purporting that the delay was occasioned by lack of legal fees. The respondents thus vehemently oppose the applicants' assertions and urge that the applicants are engaged in gainful employment and have inherited a vast estate from their father. It is the respondents' further case that the delay is inordinate and inexcusable. They urge that the application is one for dismissal as it has failed to satisfy the Court's guiding principles on extension of time set in the **Nicholas Salat Case**; and **Hassan Nyanje Charo v Khatib Mwashetani & 3 others**; SC Application No 15 of 2014, [2014] eKLR (**Hassan Nyanje Charo Case**).

[8] On the prayer for temporary injunction, the respondents submit that the applicants' application is incompetent and misplaced in law as there is no appeal properly before the Court. Relying on this Court's decision in **Yusuf Gitau Abdallah v Building Centre (K) Limited & 4 others**; SC Petition No. 27 of 2014, [2014] eKLR, they urge the Court to dismiss the prayer for temporary injunction.

ISSUES FOR DETERMINATION

[9] Two issues fall for this Court's determination;

- i) *Whether the application meets the threshold for grant of extension of time to file the intended appeal; and*
- ii) *If the answer to (i) above is in the affirmative, whether the application meets the threshold for grant of a temporary injunction.*

D. ANALYSIS

[10] It is the applicants' submission that they have satisfied the principles for extension of time settled in the **Nicholas Salat Case**. They urge that the delay in filing the appeal and record of appeal was partly occasioned by the Appellate Court's failure to furnish them with typed proceedings in time. They assert that they filed the Notice of Appeal within time, timeously applied for the typed proceedings and exercised due diligence in following up on the same. They add that the delay in filing

the instant application after the typed proceedings had been availed was occasioned by their inability to raise legal fees, due to economic hardship occasioned by the Covid-19 pandemic.

[11] The respondents strongly oppose this assertion. On the contrary, they submit that the applicants have been dishonest and are guilty of misrepresentation. While attaching documentary evidence, they submit that the applicants are engaged in gainful employment and have inherited a vast estate from their father hence were able to raise legal fees specially to file an application for extension of time. This has not been rebutted by the applicants.

[12] We settled the principles that are to guide us in the exercise of our discretion to extend time in the **Nicholas Salat Case**. The applicants urge that the delay in filing the appeal was partly occasioned by the Appellate Court's failure to issue typed proceedings within time. On the issue of delay of typed proceedings, this Court has previously extended time and held that such a delay is not on the part of the party but the court and that this issue consists of facts beyond a party's reach.

[13] In the **Hassan Nyanje Charo Case**, we stated:

“[27] Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail...”

“[28] Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court's administrative machinery? We think not.”

[14] However, this reason is only sufficient to explain the delay from the date of applying for the typed proceeding to 20th December, 2020 when the same were availed. It is trite law that, in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. This was our finding in the case of **County Executive of Kisumu v County Government of Kisumu & 8 others**; SC Application No 3 of 2016, [2017] eKLR.

[15] The applicants filed the instant application on 18th January 2021, 29 days after the proceedings had been availed. They explain that this additional delay was occasioned by lack of legal fees to instruct an advocate and the time taken by the advocates to draft the instant application. This reason fails to persuade the Court to exercise its discretion to extend time, especially in light of the uncontroverted evidence adduced by the respondents to support the assertion that the applicants are gainfully employed and/or have inherited a vast estate hence could afford legal fees.

[16] Rule 40 of our Rules allow the filing of requisite documents late, but with leave of court. Having filed a Notice of Appeal on 21st October 2020, nothing prevented them from filing the appeal with the available documents within the 30 days. Typed proceedings are in any event not among the mandatory documents that must accompany a petition of appeal in the first instance. In *Mombasa County Government v Kenya Ferry Services & another* SC Application No.29 of 2018[2019]eKLR, we held that the applicant ought to have filed the appeal and the record with the documents that were available to demonstrate some diligence, then later seek leave of this Court to file the Supplementary Record out of time.

[17] Having so considered, we find that on the basis of the principles set out by this Court for extension of time, the applicants have not satisfactorily explained a basis for this Court to exercise its discretion in their favour.

[18] In the absence of the intended appeal to be filed, the issue of temporary injunction as sought does not arise. Consequently, the application before us is one for dismissal.

E. ORDERS

[18] In the event, we hereby exercise our discretion and order as follows;

- (i) The Notice of Motion dated 14th January 2021, and lodged on 18th January 2021, is hereby dismissed;*
- (ii) The costs of this application shall be borne by the applicants.*

It is accordingly ordered.

DATED and DELIVERED at NAIROBI this 16th day of July 2021.

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA