

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome, CJ & P, Ibrahim, Wanjala, Lenaola, Ouko, SCJJ)*

**CIVIL APPLICATION NO.18 OF 2020**

**—BETWEEN—**

**GEORGE KANG’ETHE WARUHIU.....APPLICANT**

**—AND—**

**ESTHER NYAMWERU MUNENE.....1<sup>ST</sup> RESPONDENT**

**SOLOMON NG’ANG’A WARUHIU.....2<sup>ND</sup> RESPONDENT**

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*(An application for extension of time to file an appeal against the Judgment of the Court of Appeal at Nairobi (**Waki, Nambuye, Gatembu JJA**) delivered on **8<sup>th</sup> March 2019** in **Civil Appeal No. 168 of 2013**)*

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**RULING OF THE COURT**

**A. INTRODUCTION**

[1] This an application by way of Notice of Motion dated 15<sup>th</sup> July 2020 brought under Rules 15(2), 32 and 36 of the Supreme Court Rules, 2020. The application seeks the following substantive orders:

- a) *THAT this Honourable Court be pleased to extend the time for filing a Notice of Appeal against the Judgment and orders of the Court of Appeal (Waki, Nambuye &***

***Gatembu, JJA) delivered on 8<sup>th</sup> March 2019 in Nairobi Civil Appeal No. 168 of 2013;***

- b) THAT in the alternative to prayer (a) above, the Applicant's Notice of Appeal against the whole of the Judgment and Orders of the Court of Appeal (Waki, Nambuye & Gatembu, JJA) delivered on 8<sup>th</sup> March 2019 in Nairobi Civil Appeal No. 168 of 2013, filed in the Court of Appeal on 14<sup>th</sup> October, 2019 be deemed duly filed and properly on record; and***
- c) THAT the costs of this application be provided for.***

[2] The application is premised upon seven (7) grounds as well as the supporting affidavit of George Kang'ethe Waruhiu sworn on 15<sup>th</sup> July 2020.

## **B. BACKGROUND**

### *i. Proceedings at the High Court*

[3] At the High Court, the Respondents and Samuel Njoroge Waruhiu (Samuel), now deceased, filed a plaint dated the 22<sup>nd</sup> May, 2018, against the Applicant stating *inter alia*, that they and the Applicant are among the children of the late Senior Chief Waruhiu, who had five (5) wives namely, Wanjiru Waruhiu, Ruguru Waruhiu (A), Waruchu Waruhiu, Mary Njeri Waruhiu and Ruguru Waruhiu (B); that the deceased died intestate leaving a vast estate, inclusive of a fifty five (55) acre farm, subdivided in the year 1959, into five (5) parcels namely, Githunguri/Giathieko/332, 333, 334, 335, and 336; that the above five subdivisions were registered in the names of the first born sons of each household as trustees for themselves and the deceased's' children of the respective households; that the late David Wainaina Waruhiu (*hereinafter referred to as the late David*) as the undoubted eldest son of the Respondents' mother's household was registered as a proprietor of parcel No. 336 (*the suit*

*property*) as a trustee for himself and all the children of their mother's household; that without their consent, knowledge and/or participation, the late David transferred the suit property to the Applicant on 17<sup>th</sup> October, 1980; and that it was not until the year 2005 that they discovered the fraud and illegality and that efforts to have the issue resolved amicably at family level bore no fruit.

**[4]** Consequently, the Respondents sought from the Court declarations that: they are beneficiaries of the suit property; that the late David, as a trustee for himself and the Respondents, had no mandate to transfer the suit property to the Applicant without their consent and or participation; that the transfer of the suit property by the late David to the Applicant was fraudulent and therefore illegal, null and void and restraining orders against the Applicant from either selling and or transferring the suit property to any 3<sup>rd</sup> party or howsoever, receiving proceeds of such sale.

**[5]** On 20<sup>th</sup> April 2011, *Gacheche, J* (as she then was), dismissed the Respondent's claim against the Applicant. The learned Judge found that the alleged trustee relationship between the late David and the Respondents had not been proved by credible evidence; that allegations of fraud as pleaded had not been established to the required threshold; and that the Respondents' claim was time-barred in terms of the provisions of Section 7 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

*ii. Proceedings at the Court of Appeal*

**[6]** Dissatisfied with the finding of the High Court, the Respondents filed an appeal at the Court of Appeal being Nairobi Civil Appeal No. 168 of 2013; *Esther Nyamweru Waruhiu & another v George Kang'ethe Waruhiu*, raising seven(7) grounds of Appeal which the Court condensed to three namely, *whether the learned Judge erred; in failing to find that the property known as*

*Githunguri/Giathieko/336 was held by the late David in trust for himself and the Respondents; and in failing to find that the property was fraudulently transferred to the Applicant; and in holding that the Respondents' suit was time-barred.*

[7] In a Judgment delivered on 8<sup>th</sup> March 2019, the Court of Appeal set aside the Judgment of the High Court and substituted it with an order allowing the Respondents' claim against the Applicant as prayed in their plaint before the High Court.

[8] Subsequently, the Applicant filed a Notice of Motion dated 5<sup>th</sup> November, 2019 before the Court of Appeal seeking orders to extend time to file a Notice of Appeal out of time or deem a Notice of Appeal filed out of time on 14<sup>th</sup> October, 2019 as properly filed and also leave to file the appeal out of time; certify the matter as one of general public importance for which an appeal can lie to the Supreme Court; and stay of execution of the Judgment of the Court of Appeal delivered on 8<sup>th</sup> March, 2019. On 6<sup>th</sup> March 2020, *Sichale, JA*, found that the Notice of Motion was improperly before the Court of Appeal and proceeded to dismiss the same. The Applicant has now approached this Court seeking extension of time within which to file an appeal before this Court.

### **C. PARTIES SUBMISSIONS**

#### *i) The Applicant's Submissions*

[9] The Applicant filed written submissions on 29<sup>th</sup> July, 2020 and submits that the omission in filing the Notice of Appeal in the Court of Appeal was due to an inadvertent error on the part of his former Advocates and that the consequences of that error should not be visited upon him.

[10] It is further submitted by the Applicant that upon realization of the said error, the Applicant's current advocates, on instructions of the Applicant,

promptly filed a Notice of Appeal, *albeit out of time*. The Applicant urges that the instant application has thus been brought without undue delay and that there is no foreseeable prejudice to the Respondents if the application is allowed in terms of prayers 2 and 3 thereof. To support his submissions, the Applicant cites Rule 15(2) of the Supreme Court Rules 2020 and this Court's decision in the case of ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others***, SC Application No. 16 of 2014; [2014] eKLR (***the Nick Salat Case***).

[11] In his supporting affidavit, the Applicant has added that he could not instruct his current advocates on time as he had been critically unwell to attend to the matter. He also depones that the Courts and his current advocates' offices were closed following the Covid-19 pandemic only to reopen in June 2020 and so, no filings could be undertaken during that period. Accordingly, the Applicant urges this Court to allow the application as prayed.

*i) The Respondents' Submissions*

[12] The Respondents vehemently oppose the application. They filed a Replying Affidavit sworn by Stanley Mburu Munene on 4<sup>th</sup> August 2020, together with written submissions dated 4<sup>th</sup> August 2020 and filed on 5<sup>th</sup> August, 2020. While citing Rule 36(1) of the Supreme Court Rules, ***the Nick Salat Case*** and the American case of ***Silverbrand v County of Los Angeles*** (2009) 46 Cal. 4<sup>th</sup> 106, 113, the Respondents submit that there was undue and unexplained delay on the part of the Applicant in filing the present application. They also urge that the Applicant has not demonstrated a reasonable cause for the delay in filing the application one year and four months after the Court of Appeal's decision of 8<sup>th</sup> March, 2019.

[13] The Respondents further submit that the Applicant's assertion that he was unable to file the Notice of Appeal within time on account of illness is a lame

excuse as he had been fully participating in the proceedings in the Court of Appeal until delivery of Judgment and he could have acted soon thereafter. It is the Respondents' further argument that in any case, the Applicant ought to have issued instructions for filing of an application for extension of time while applying for certification before the Court of Appeal. In any event, that, despite alleging to have been unwell between 15<sup>th</sup> to 17<sup>th</sup> July 2019, the Applicant has not explained why he could not give instructions on filing of the instant application between 8<sup>th</sup> March, 2019 and 15<sup>th</sup> July, 2019. The Respondents in support of their submissions cite this Court's decision in ***County Executive of Kisumu v County Government of Kisumu & 8 others***, SC Civil Application No. 3 of 2016; [2017] eKLR (***the County Executive of Kisumu Case***).

[14] Additionally, the Respondents submit that the Applicant's act of filing the Notice of Appeal at the Court of Appeal instead of the Supreme Court is clear demonstration that he had the opportunity for filing the Notice of Appeal at the Supreme Court and was not prevented from doing so by illness. They maintain that the improper filing cannot be used as an excuse by the Applicant as was decided by this Court in the case of ***Naomi Wangechi Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others***, SC Civil Application No. 41 of 2014; [2018] eKLR.

[15] In response to the Applicant's submissions that his erstwhile advocates inadvertently failed to file the Notice of Appeal within the stipulated timelines, the Respondents submit that the Applicant has a duty as a litigant to follow up on his case where there is purported inaction by the advocates on record. They thus urge that the Applicant has not demonstrated any effort made to follow up on his case as a litigant.

[16] Furthermore, the Respondents submit that there is no matter of general public importance involved in the Applicant's intended appeal as the issue before the Court of Appeal involved customary law trust, which subject has long been

settled by this Honourable Court. Finally, the Respondents urge this Court to dismiss the Application with costs.

#### **D. DETERMINATION AND ANALYSIS**

[17] The Application raises one issue for determination by this Court, namely, *whether this Court should grant an extension of time for the Applicant to file a Notice of Appeal. If the answer is in the affirmative, should the Notice of Appeal filed on 14<sup>th</sup> October 2019 be deemed as duly filed and properly on record?*

[18] The Court's jurisdiction to extend time is provided for by Rule 15(2) of the Supreme Court Rules, 2020 which grants this Court the discretion to extend time in the following specific terms:

***“The Court may extend the time limited by these Rules or by any decision of the Court”***

[19] Concerning the time for filing of a Notice of Appeal, Rule 36(1) of the Supreme Court Rules, 2020 provides that the same shall be filed within fourteen days from the date of Judgment or Ruling which is the subject of appeal. Sub-rule (4) also provides that in lodging an appeal on a matter of general public importance, it shall not be mandatory to obtain certification before filing the Notice of Appeal.

[20] In the present case, we note that the Judgment of the Court of Appeal was delivered on 8<sup>th</sup> March 2019. The last day for filing a Notice of Appeal was therefore 22<sup>nd</sup> March 2019. An application for extension of time before this Court was not filed until 495 days later.

[21] The guiding principles on extension of time have already been set by this Court in ***the Nick Salat Case*** as follows:

***“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for***

***extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.***

***... we derive the following as the underlying principles that a Court should consider in exercising such discretion:***

***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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;***

***5. whether there will be any prejudice suffered by the respondents, if 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”***

**[22]** Further to the above, this Court has always emphasized the need for an Applicant, in an application for extension of time, to satisfactorily declare and explain the whole period of delay to the Court – See the ***County Executive of Kisumu case***.

**[23]** In the present case, the Applicant has submitted that failure to file the Notice of Appeal was caused by an error on the part of his then advocates and that error should not be visited on him. As argued by the Respondents, there is nowhere in the Application where the Applicant has demonstrated any effort and/or due diligence on his part to ensure that the Notice of Appeal and or an

application for extension of time was filed within time or soon after the period for filing had expired. His explanation is therefore not satisfactory.

[24] The other explanation given by the Applicant to justify the delay, was that he was ill and unable to pursue the case. We have perused annexure 5 of the Applicant's supporting affidavit and note that his last admission in hospital was between 15<sup>th</sup> to 17<sup>th</sup> July 2019. However, there is no explanation for the period between 8<sup>th</sup> March and 14<sup>th</sup> July 2019. The Applicant has nonetheless deponed that he instructed his advocates on record on 14<sup>th</sup> October 2019 who filed a Notice of Appeal on the same day (*though out of time*). Although the Applicant contends, at paragraph 11 of his supporting affidavit, that his advocates attempted to file the application before this Court on the same day and were turned away at the Registry, there is no evidence to sustain those allegations. We do not, in any event, understand why an advocate or a litigant could have been turned away from a public registry and no explanation given for that action. That explanation falls flat, in our view.

[25] The Applicant's final explanation is that the Covid-19 pandemic led to closure of Courts and his advocates' offices. Whereas in other circumstances this explanation may attract sympathy, we take judicial notice of the fact that the Covid-19 pandemic did not at any time lead to absolute closure of Courts including this Court. Although service delivery was scaled down, services were still offered, and urgent applications prioritized. Again, we do not find this explanation sufficient to warrant extension of time and to justify the delay in filing the present application.

[26] The upshot of the above finding is that we are inclined to disallow the application for extension of time with costs to the Respondents.

#### **E. ORDERS**

[27] Consequently, we make the following Orders:

- i. The Notice of Motion dated 15<sup>th</sup> July 2020 is dismissed.*
- ii. The Applicant shall bear the costs of the Respondents.*

**[28]** Orders accordingly.

**DATED and DELIVERED at NAIROBI this 6<sup>th</sup> day of August 2021**

.....  
**M. K. KOOME**  
**CHIEF JUSTICE & PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

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

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

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR,  
SUPREME COURT OF KENYA**