

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu, DCJ & V-P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

CIVIL APPLICATION NO. 10 of 2017

—BETWEEN—

JAMES MBATIA THUO.....1ST APPLICANT

EPHANTUS MWANGI.....2ND APPLICANT

—VERSUS—

KENYA RAILWAYS CORPORATION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL OF KENYA.....2ND RESPONDENT

(Being an application seeking to review the Orders of the Registrar of the Supreme Court of Kenya (Hon. Esther Nyaiyaki) dated 19th May, 2017)

RULING

A. INTRODUCTION

[1] Before this Court, is an application dated 29th May, 2017 and filed on 30th May, 2017 by James Mbatia Thuo and Ephantus Mwangi, (the applicants) brought under Articles 159 (2) (a), (d) & (e), 163 (4) (b) and 259 (1) of the

Constitution of Kenya, Sections 21 & 24 of the Supreme Court Act and Rule 4 (A) (2) of the Supreme Court Rules, 2012.

[2] The applicant seeks the following prayers, *inter alia*;

- (a) Spent (application certified as urgent by **Ojwang, SCJ** on 30th May, 2017);
- (b) That this Honourable Court be pleased to review and/or set aside the Order of the Registrar, Hon. Esther Nyaiyaki, issued on 19th May, 2017 and allow the application dated 17th May, 2017, be lodged and admitted by the Registrar of the Supreme Court;
- (c) That this Honourable Court be pleased to grant any other relief it may deem fit.

[3] The applicants aver *inter alia*, that:

- (a) They lodged a Notice of Motion application dated 17th May, 2017 seeking stay of the Judgment of the Court of Appeal delivered on 18th December, 2015; the said application was however rejected by the Registrar of the Supreme Court Hon. Esther Nyaiyaki on the 19th day of May, 2017 for reasons that the right of appeal had since lapsed;
- (b) That they had filed and served the 1st and 2nd respondents with the Notice of Appeal dated 23rd December, 2015 as per the Supreme Court Rules; the delay in filing the Record of Appeal was due to the fact that the proceedings of the Court of Appeal were not available despite the same being applied for on 7th January, 2016; and that to date they have not received the proceedings to enable them attach the same to the Petition of Appeal as is mandated by the Supreme Court Rules and Practice Regulations;
- (c) That given the cited grounds, the Registrar of the Supreme Court erred in failing to admit and lodge the application dated 17th May, 2017;

that in the interest of justice and fairness, the decision of the Registrar of the Supreme Court issued on 19th May, 2017 be reviewed and set aside and the application for stay be re-lodged and admitted by the Registrar; and the respondents will not suffer any prejudice from such an Order.

- (e) That the application is urgent, as one of the applicants herein had been served with a letter dated 18th April, 2017 directing them that their tenancy would be terminated from 1st May, 2017 and to therefore handover and vacate the subject premises by 31st May, 2017; they argued that unless the stay of execution is granted, they are apprehensive that there are eminent risks they will be evicted from the suit property by the 1st respondent despite having have faithfully and diligently paid their monthly rent dues to the 1st respondent.*
- (f) That unless stay is granted, there is eminent risk that the intended appeal to the Supreme Court will be rendered nugatory as the suit property will have been sold and transferred to another 3rd party in the public by the 1st respondent; that the intended appeal is of public importance as it touches on a public body that has made a decision affecting members of the public on the subject of land rights and will not only affect the parties to the appeal, but will also affect a large number of the employees and the tenants of the 1st respondent and consequent land owners, by depriving them, causing economic and social upheaval; the intended appeal touches on fair administrative action which is a right under Article 47(1) & (2) of the Constitution of Kenya, and which right espouses the 1st respondent through its Board of Directors; and the Judgment, the subject of the intended appeal, discussed the doctrine of estoppel and legitimate expectation but failed to attend to its relevance in the actions of the 1st respondent;*

[4] The application is further supported by the affidavit of Ephantus Mwangi; sworn on 29th May, 2017 and filed on 30th May, 2017.

[5] In response, the 1st respondent filed its grounds of opposition on 17th January, 2018 raising objection to the application on the grounds that the applicants had failed to comply with Article 163 (4) & (5) of the Constitution and Sections 15 (1) and 16 (1) & (2) (a) of the Supreme Court Act, 2011 and Rule 24 of the Supreme Court Rules, 2012.

[6] The respondent further contends that the applicants did not seek certification that the intended appeal raised issues of general public importance.

[7] The respondent argues that the applicants have also failed to comply with Rule 33(1) of the Supreme Court Rules, 2012 and that consequently, the application is bad in law, incompetent and fatally defective and an abuse of the process of Court.

[8] In response to the grounds of objection, the applicants on 23rd January, 2018 filed their replying affidavit sworn by Ephatus Mwangi on even date reiterating their averments in the Notice of Motion and supporting affidavit and further contending that they had filed a Notice of Appeal dated 23rd December, 2015 thus complying with the provisions of Article 163 (4) (a) of the Constitution; that the intended appeal is one of general public importance; and that the issue in the application is whether the registrar's decision can/should be reviewed by the Court and not whether the matter has been certified as one of general public importance.

[9] The applicants filed their written submissions dated 29th May, 2017 on 30th May, 2017 urging that the Court should be guided by the provisions of Article 159 (2) (d) of the Constitution, and not be encumbered with procedural technicalities such as the filing of the appeal within the stipulated time.

[10] The applicants submit that the Court should be guided by the principles enunciated in the cases of *Lemanken Aramat v. Harun Meitamei Lempaka & 2 Others* (2014) eKLR, *Shabbir Ali Jusab v. Annar Osman & Another* SC Civil App. No. 1 of 2013, *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral & Boundaries Commission & 6 Others* (2013) eKLR and *Joseph Kiangoi v. Wachira Waruru & 2 Others* Civil Appeal App. No. 30 of 2008, where the Courts disregarded procedural technicalities in favour of substantive justice.

[11] In its submissions filed on 17th January, 2018, the 1st respondent relies on the case of *Sum Model Industries Ltd v. Industrial & Commercial Development Corporation* Civil Application No. 1 of 2011 and argue that the applicants needed to have obtained certification before lodging the appeal on an issue of general public importance in compliance with Articles 163(4) & (5) of the Constitution.

[12] It was further submitted that the applicants did not comply with Rule 33 (1), (2) and (3) of the Supreme Court Rules 2012; while lodging the appeal to this Court.

[13] The 1st respondent submitted that the applicants filed their Notice of Appeal on 22nd December 2015; and that since then, have not filed their Record of Appeal or moved the Court to enlarge time to file the Record of Appeal out of time. Towards this end, and in accordance with Rule 37(1) of the Supreme Court Rules, 2012; the respondent contends, the applicants' Notice of Appeal should be deemed as withdrawn. In the premises, submits the respondent, the application for stay has no legal basis.

B. ANALYSIS

[14] The issue for determination is;

Whether this Court should review the decision of the Registrar of the Supreme Court dated 19th May, 2017;

[15] The power of this Court to review the decision and Orders of the Registrar of the Court is provided for under Section 11(1) of the Supreme Court Act, 2011. Any person aggrieved by a decision of the Registrar may apply to a Judge of the Supreme Court to review such a decision. In reviewing the decision, the Judge may confirm, modify or reverse by dint of Section 11 (2) thereof. The power to review such decision is also provided for under Rule 4A (2) of the Supreme Court Rules, 2012. In reviewing the decision of the Registrar under Rule 11 (2) the decision of the Judge of the Court shall be final.

[16] The decision of the Registrar dated 19th May 2017, was made pursuant to and in exercise of the powers conferred by Section 4A of the Supreme Court Rules, 2012. The decision was premised on two (2) grounds;

(i) That the applicants had not made an application for certification of the appeal as one involving a matter of general public importance under Article 163 (4) (b) and Article 163 (5), of the Constitution; and

(ii) That the time for filing the appeal under Article 163 (4) (a) as a matter of right had lapsed as provided under Rule 33 (1) of the Supreme Court Rules, 2012.

[17] It is not in doubt, that by the time the applicants lodged their application for a stay of execution in the registry, there was no appeal before this Court, the same having not been filed for the reasons advanced by the applicants.

[18] The applicants made no attempt to file an application for extension of time to enable them file their appeal out of time as provided for under Rule 53 of the Supreme Court Rules, 2012. The Rule allows the Court on an application by a party and at its own discretion, to extend the time limited by the Rules. The circumstances pursuant to which an extension of time within which to file an appeal may be granted, were explained at length by this Court in ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral & Boundaries Commission & 6 Others*** [2013] eKLR.

[19] Extension of time is an indulgence requested from the Court by a party in default. The applicants cannot reasonably expect this discretion to be exercised in their favour, unless they apply for an extension, and provide a satisfactory explanation for the default. The applicants herein, failed to formally move the Court in this regard. At the time the application dated 17th May, 2017 was presented to the Honourable Registrar of this Court for admittance, the time within which a party is allowed to file its appeal had lapsed.

[20] The Notice of Appeal was filed on 23rd December 2015, while the application for stay was lodged at the Supreme Court Registry on 15th May 2017; more than a year after the expiry of the statutory time provided for filing appeals. The applicants have not provided any reason for their failure to apply for an extension of time, which application, had it been granted, would have enabled them to file their appeal and thereby provided legal grounding for the rejected application for stay.

[21] In the absence of an appeal, or an application for extension of time, accompanied by a memorandum of appeal, the rejected application had no legal basis. We therefore see no reason to interfere with, or upset the decision by the Honourable Registrar rejecting the application.

C. ORDERS

(i) The application for stay dated 17th May, 2017 is hereby dismissed.

(ii) Each party shall bear its own costs.

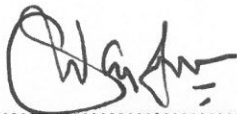
DATED and DELIVERED at NAIROBI this.....Day of....., 2018.



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



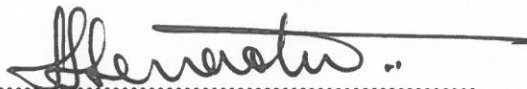
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M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT



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S. C. WANJALA
JUSTICE OF THE SUPREME COURT



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S. N. 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**