REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu DCJ &VP, Ibrahim, Ojwang, Wanjala, Lenaola, SCJJ)

APPLICATION NO. 34 OF 2018

BETWEEN

MOSES ONCHIRI (Suing on behalf and in the interest of 475 persons being former inhabitants of K.P.A, Maasai Village within Nairobi).....APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

MINISTER OF INTERNAL SECURITY AND PROVINCIAL ADMINISTRATION.....3RD RESPONDENT

MINISTRY OF LANDS.....4TH RESPONDENT

HONORABLE ATTORNEY GENERAL.....5TH RESPONDENT

(Being an application for extension of time to file an appeal out of time against the decision of Court of Appeal (Makhandia, Ouko, M'inoti, JJA) sitting in Nairobi, in Civil Appeal No. 299 of 2014, delivered on 24th of March, 2017)

RULING OF THE COURT

A. INTRODUCTION

[1] This is an application by way of a Notice of Motion dated 26th November, 2018 brought Under Article 163(4), (5) and (6) of the constitution, section 5 of the Supreme Court Act, rules 24, 3(1), 35(3) and 53 of the Supreme Court Rules). The application seeks the following orders:

a) *That the Application is urgent and should be dispensed with in the first instance.*
b) *That this Honorable court be inclined to issue or order granting the Applicant leave to file an appeal out of time.*
c) *That this honorable court do grant or order certifying that this matter raises issues of general public importance.*

B. BACKGROUND

i. Proceedings at the High Court

[2] The genesis of this cause is the evictions that took place in Maasai Village in Embakasi area of Nairobi County on the morning of 29th October, 2011 where the applicant together with many others had made their homes and complimentary social amenities. It is their case that they had settled in an area comprised in thirteen (13) titles from 1982, constructed permanent and semi-permanent dwelling houses, schools, churches, medical facilities and other establishments; that they enjoyed actual and uninterrupted possession for a period of 18 years; and that the Government also provided additional social amenities and security to the residents. However, on the 15th September, 2011 the Kenya Airports Authority (the 1st respondent) placed a notice which the applicant described as a reminder in the *Daily Nation* newspaper of 18th September, 2011 that read;

> **"NOTICE TO VACATE ILLEGALLY DEVELOPED AND ENCROACHED PORTIONS OF KENYA AIRPORTS AUTHORITY LAND L.R NO.21919 AT KYANGOMBE, AND SYOKIMAU, JOMO KENYATTA INTERNATIONAL AIRPORT AND L.R NO.209/13080 MITUMBA VILLAGE AT WILSON AIRPORT."**

The notice required those who had encroached upon the identified parcels to vacate them within seven days of the reminder. The notice did not affect the applicant as the portions they occupied were only adjacent to **L.R.NO.21919**.

They nonetheless, through their advocate wrote to the 1st respondent drawing its attention to a pending suit being Petition No.103 of 2011 and the existence of an order therein in respect of the parcels of land adjacent to the parcels forming the subject matter of the notice. On the morning of 29th October, 2011 despite this letter, a battalion of police officers, said to be acting on the instructions of the 3rd respondent, officials of the 2nd respondent and other state officials descended on the applicant's structures on the suit land with bulldozers and earth movers evicting the applicant and the families in occupation of the suit land, after razing to the ground their dwellings and all other amenities.

[3] This prompted the applicant to petition the High Court pursuant to numerous provisions of the Bill of Rights under the Constitution alleging that their rights and fundamental freedoms to privacy, property, housing, dignity and against any form of violence or torture, were violated by the actions of the respondents. They thus prayed for, *inter alia*:

i. *A declaration that their Fundamental Rights and Freedoms as espoused under Articles 27, 28, 29, 31, 40, 43, 45, 47, 53, 54, 56 and 57 of the Constitution of Kenya had been violated.*
ii. *A declaration that the said actions and inactions of the respondents in destroying, demolishing the appellants' structures and evictions were in breach of International Human Rights Law as espoused under the Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1996, the International Covenant on Economic Social and Cultural Rights and the African (Banjul) Charter on Human and Peoples Rights.*
iii. *An Order for: Mandatory Injunction, restoration of possession, Compensation in terms of the Valuation Report they had annexed and general, exemplary and punitive damages on an aggravated scale for the damage caused by the respondents.*

[4] When the petition came up before Majanja, J, by consent of counsel representing all the parties, it was agreed that the petition be canvassed through written submissions. But of significance, counsel also argued that since the cause of action and the issues involved in the petition were similar to those in a previously decided petition by the same court, being Nairobi Petition No.356 of 2013, ***June Seventeenth Enterprises Ltd (Suing on behalf of and in the interest of 223 Others) v Kenya Airports Authority and 4 others*** [2014] eKLR that only the question of quantum would be tried. The aforesaid earlier petition had involved some 223 residents of Maasai Village whose structures were also damaged in the demolitions of 29th October, 2011, for which reason parties and the learned Judge found it necessary to record that consent and agreed that liability having been settled as against the 3rd, 4th and 5th respondents, counsel was to prepare their submissions on quantum of damages. In the previous suit, the learned Judge had made the following four determinations and declarations;

i. *That the case against Kenya Airports Authority and Nairobi City Council be dismissed with no order as to costs as no cause of action against the two was disclosed;*
ii. *That the state violated the provisions of Article 21 by failing to develop and enact a policy and legislation to deal with forced evictions;*
iii. *That the rights and fundamental freedoms of the occupants of LR No.209/13418, 209/13419, 209/13420 and 209/13421 situated along Airport North Road otherwise known as Maasai Village protected under Articles 28, 29, 43 and 47(1) of the Constitution were violated by the 3rd and 4th respondents through eviction from the said land on 29th October 2011; and*
iv. *Judgement entered for each of the 223 persons represented in those proceedings in the sum of Kshs.150,000/= as damages for the violation of their rights and fundamental freedoms.*

[5] The learned Judge considered the submissions made with regard to quantum of damages for *"the losses and damages suffered by the petitioners (applicant) in terms of the valuation report."* In particular, he evaluated the submissions around the preliminary report prepared by M/S Dantu Valuers dated 13th January 2012 which estimated the total value of loss to the appellants as Kshs.1,557,000,000/-. He also considered the submissions by the respondents that the question of quantum be restricted only to the 45 persons who authorized, in writing, the institution of the petition.

On the first issue the learned Judge held that;

> "5. *The principles upon which the court grants special damages are well settled. They must be pleaded and proved. This has not been done in the petition and furthermore, even the evidence, while demonstrative of some loss, does not point to specific loss by specific individuals. In the circumstances, the pleadings do not support the claim and the evidence lacks actual basis."*

On the second issue he stated;

> *"6. Whether the Court should award damages to all the persons whose names are stated is an important issue. In a representative suit such as this one, the parties represented must consent to their names being used in the suit by appending their signatures or some explanation must be given as to the failure to do so . . . The signatures on the list confirm that the persons listed therein have agreed that they be represented in the suit.*
>
> *7. In the circumstances, I find and hold that unless the other claimants establish that their instructions were given at the time of filing the suit, the damages shall be limited to those who have signed the authority."*

With that, the learned Judge, like he did in the previous petition, entered judgement in favour of only those who had given authority for the bringing of the petition and ordered the case against the 1st and 2nd respondents dismissed with no orders as to

costs for failing to disclose a cause of action; issued declarations that the state violated the provisions of Article 21 by failing to develop a policy and enact legislation to deal with forced evictions; that the rights of the Occupants of Maasai village protected under Articles 28, 29, 43 and 47(1) of the Constitution, were violated by the 3rd and 4th respondents in the manner in which they were evicted on 29th October 2010; that the persons who executed the legal authority would be awarded Kshs.150,000/= each as damages for violation of their fundamental rights and freedoms; and that the costs of the suit would be awarded to the appellants.

ii. Proceedings at the Court of Appeal

[6] Aggrieved by the decision of the High Court, the applicant filed an appeal at the Court of Appeal, ***Civil Appeal No.299 of 2014*** against those conclusions and the award of damages by the High Court.

[7] In a judgement delivered on the 24th day of March, 2017, the Court of Appeal upheld the decision of the High Court and dismissed the appeal with no orders as to costs.

iii. Case at the Supreme Court.

a. Applicant

[8] The applicant has lodged an application dated 26th November, 2018 and supported by his affidavit seeking for extension of time to file an appeal out of time. The applicant states that the reason for delay in filing the appeal within the prescribed time are facts that are beyond their control. They further submit that they filed their Notice of Appeal immediately after the judgement was delivered by the Court of Appeal on 24th March, 2017; that the delay was occasioned by the financial difficulty they have faced and were not able to raise the requisite legal fees within good time.

[9] The applicant relies on Article 159 of the Constitution stating that justice should be administered without undue regard to procedural technicalities and they cited the

case of ***Kamlesh Mansukhlal Pattni vs Director of Public Prosecution & 3 others*** [2015] eKLR to support that preposition.

[10] Additionally, the applicant submits that their case is arguable with a probability of success; that in ***Mwangi vs Kenya Airways*** [2003] eKLR the Court explained that in extending the time to file an appeal out of time, a Court should consider the following grounds: the period of delay; reason for delay; the arguability of the appeal; the degree of prejudice which could be suffered by the respondent if the extension is granted; the importance of compliance of time to the particular litigation or issue and the effect if any on administration of justice or of public interest.

[11] The applicant also submits that their case is one of general public importance and proceeds to quote the case of ***Hermanus Phillipus Steyn vs Giovanni Gneechi-Ruscone*** Supreme Court Application No. 4 of 2012 [2013] eKLR that defined general public interest which quoted the case of ***Murai vs Wainaina*** (No.4) Civil Appl. No. Nai 9 of 1978 that explained that issues of land rights are of general public importance.

b. 1st Respondent

[12] The 1st respondent is opposed to the application herein. On 21st January 2019 it filed a Replying Affidavit by Jonny Andersen, its CEO / Managing Director. The gist of the said affidavit is that the applicant has not given any reason or explanation for the delay of 20 months since the impugned decision was rendered thus the delay is an inordinate one and that the affidavit of Moses Onchiri does not make any attempt to explain or give any reason for the delay.

[13] It is the 1st respondent's submission is that the applicant failed to take any other steps for a period of 1 year 8 months until the 27th November 2018 when they lodged the current Application seeking leave of the court to file an appeal out of time and certification that the matter raised issues of general public importance.

[14] Further, the 1st respondent avers that an order to grant leave to the applicant shall prejudice them because it has closed its books of accounts in respect of the potential liability arising out of this particular claim as the financial year that they had made a provision in its books for the potential liability has long passed.

[15] That the law on the question of eviction was adequately addressed by the High Court and the Court of Appeal. The dismissal of the appeal by the Court of Appeal meant that parties reverted to the High Court. The High Court dealt with the issue of violation of fundamental rights and found in favour of the applicant. The only issue that was rejected was the claim for special damages of Kshs.1,557,000,000/-such a claim being a claim for special damages cannot be said to be of great public importance since it deals with monetary benefits to the applicant.

[16] On the issue of evictions as being one of great public importance, they submit that by virtue of the enactment of the Land Laws (Amendment) Act, No.28 of 2016, Parliament provided the "procedures on eviction from land". They therefore submit that there is now in place a law on the procedure for eviction thus there is no lacuna on the applicable law in order for the issue to qualify as a matter of great public importance.

[17] They cite the case of ***Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others*** [2014] eKLR where this Court laid the criteria for considering an application for extension of time to file an appeal to the Court and the case of ***Hermanus Phillipus Steyn case*** (supra) where the question of whether an Appeal raises a matter of general public importance was addressed and submit that the present application does not satisfy the threshold set by the two cases. The 1st respondent thus prays for the dismissal of the application with costs.

c. 2nd Respondent

[18] The 2nd respondent opposes the application. It filed a replying affidavit sworn by its Acting County Attorney, David Oseko and written submission all on 4th March 2019. Their first assertion is that the application is not properly founded in law as the provisions cited do not support the application rendering it an irregular application. They elaborate their argument by pointing out the following: that the applicant has not specified whether he is relying on Article 163(4)(a) or (b) for his intended application; that Article 163(6) of the Constitution of Kenya, 2010 under which the applicant purports to base his application for extension of time is not the correct one as the applicant is neither the national government nor a state organ nor a county government hence cannot invoke the jurisdiction of the court to give an advisory opinion; that Rule 24 of the Supreme Court Rules on which the applicant purports to base his application for extension of time to appeal to this Court as read together with Article 163(4)(b) and (5) of the Constitution of Kenya, 2010 ,the applicant is required first to apply for certification in the Court of Appeal and then to the Supreme Court for review within 14 days, if the Court of Appeal declines to certify the matter as one of public importance and the applicant seems not to have adhered to the set procedure before invoking the jurisdiction of this honourable Court. They rely on ***Glencore Energy (UK) Ltd v Kenya Pipeline Company Ltd*** [2018] eKLR, that section 5 of the Supreme Court Act No.7 of 2011 on which the Applicant purports to base his application for extension of time to appeal to this court provides for order of precedence of judges, he has not demonstrated how this provision of law is relevant to his application; he has also not demonstrated how the provision of law in Rule 3(1) of the Supreme Court Rules is relevant to his application; and that Rule 35(3) of the Supreme Court Rules under which the applicant has brought this motion to this Court is non-existent.

[19] In addition, they submit that the Application and intended Appeal suffer from inordinate delay and no reasons or justification have been offered for the delay

contrary to the established principles laid down by this court in the case of ***Nicholas Kiptoo Korir Arap Salat case*** (supra), cited in ***Hellen Cheruto & another v Sisilia Mwikali Kirwa*** [2018] eKLR.

[20] Further, the 2nd respondent submits that this application is futile, misconceived and an abuse of the Court Process; that the application should be denied with costs to the applicant.

d. 3rd , 4th and 5th Respondents

[21] The 3rd respondent (Minister of Internal Security), 4th respondent (Ministry of Lands) and 5th respondent (Attorney General) also oppose the application. They filed their submissions on 15th March 2019. They contend that the applicant are guilty of inordinate delay and have failed to explain the same. Other than lack of money, they have failed to demonstrate that they approached the Court of Appeal for typed proceedings, leaving the present application as an afterthought. They refer us to our decision in ***County Executive of Kisumu v County Government of Kisumu & 8 others*** SC. Civil Appl. No. 3 of 2016; [2017] eKLR. Their second contention is that the matter does not meet the threshold for certification as one involving great public importance as per the dictate of the Constitution and the Supreme Court Act as the issues of land in question raised are not amenable to legal protection offered under Article 40 of the Constitution. They argue that it is in the interests of justice that litigation must come to an end, the matter having been heard and appropriate reliefs given.

C. ISSUES FOR DETERMINATION

[24] The application raises one issue for determination by this Court, namely:

> ***Whether this Court should extend time for the applicant to file its appeal? Has the applicant laid satisfactory basis to warrant this Court to extend time to file the appeal?***

The application also seeks a prayer for certification of the intended appeal as one raising issues of general public importance.

D. ANALYSIS

[25] Rule 53 of the Supreme Court Rules, 2012 grants this Court discretion to extend time. It provides that *"the Court may extend the time limited by these Rules, or by any other decision of the Court."*

[21] It is the applicant's submission that upon the Court of Appeal delivering its verdict on *24th March 2017*, it filed a Notice of Appeal *immediately*. Nevertheless, the applicant claims that his delay in filing within the prescribed time is due to facts that were beyond his control and further that the delay was occasioned by the financial difficulties of the applicant and those on whose behalf the suit was instituted owing to their eviction. The respondents on the other hand oppose this application by stating that there has been inordinate delay by the applicant, he has not offered an explanation for the delay and they have also not complied with the proper procedure for seeking certification from the Court of Appeal in order to bring this matter to the Supreme Court.

[22] Rule 33(1) of the Supreme Court Rules thus provides:

> *"An appeal to the Court shall be instituted by lodging in the Registry within thirty days of the date of filing of the notice of appeal-*
>
> a) *a petition of appeal;*
> b) *a record of appeal; and*
> c) *the prescribed fee".*

[23] Rule 33(4) of the Supreme Court Rules thus provides:

> *"For purposes of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under sub-rule (3) and*

shall further contain the following documents relating to the appeal in the first appellate court—

a. *the certificate, if any, certifying that the matter is of general public importance;*
b. *the memorandum of appeal;*
c. *the record of proceedings; and*
d. *the certified decree or order"* [emphasis supplied].

[24] Further**,** Rule 33(6) of the Supreme Court Rules, provides as follows:

"Where a document referred to in sub-rule (3) and (4) is omitted from the record of appeal, the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal."

[25] Concerning extension of time, this Court has already set the guiding principles in the ***Nick Salat Case*** (supra) 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"* [emphasis supplied]

[26] Further, in the case of ***County Executive of Kisumu case (supra)***, this Court emphasized the need for the applicant, in an application for extension of time, to satisfactorily declare and explain the whole period of delay to the Court.

[27] In the present case, we note that there is no certificate of delay from the Deputy Registrar of the Court of Appeal.

[28] In considering the applicant's explanation that there were financial challenges, we take note of the number of persons involved in the application vis-a-vis the requisite court filing fees and are not satisfied that the 476 of the affected parties could not raise the court registry filing fee which is about Kshs.1,500/-. Moreover, the applicant being represented by counsel, it is inconceivable that counsel would not have invoked the provisions of section 50 of the Supreme Court Act on proceedings in *forma pauperis*, which is designed to assist financially challenged litigants.

[29] Consequently, in light of all the above, it is our finding that the applicant has not satisfactorily explained the inordinate delay of twenty (20) months and has thus not met the threshold required for extension of time as per the guidelines/principles laid down by this court in the ***Nick Salat Case***.

[30] We are thus inclined to **disallow** the application for extension of time with costs against the applicant.

[31] Having said so, we now turn to the remaining prayer seeking to have the matter certified as that raising issues of general public importance. The applicant seems to invoke our jurisdiction under Article 163(4), (5) and (6) and section 5 of the Supreme Court Act. As rightly submitted by the 2nd respondent, section 5 of the Supreme Court Act and Article 163(5) and (6) of the Constitution do not suffice as they do not bear relevance in the matter at hand. This leaves us with Article 163(4) that grants us

appellate jurisdiction from the Court of Appeal. This provision relates to our appellate jurisdiction in two respects – as of right and pursuant to certification as involving general public importance.

[32] We note that the matter originated by way of a petition for enforcement of fundamental rights and freedoms under several provisions of the Bill of Rights enshrined in our Constitution following a forceful eviction process that involved demolition and razing to the ground dwellings situated at Maasai Village along North Airport Road inhabited by the applicant, those he represents and their families with the aid of a battalion of police, bulldozers and earthmovers. The applicant had sought declaratory reliefs relating to violation of Articles 27, 28, 29, 31, 40, 3, 45, 47, 53, 54, 56 and 57. He had also sought other reliefs for injunction, restoration of property, compensation, general and exemplary damages.

[33] From the foregoing, we see no basis for the applicant failing to invoke Article 163(4)(a) of the Constitution to lodge his appeal as of right involving the application and interpretation of the Constitution. The enforcement of the Bill of Rights transcended to the Court of Appeal although the Court of Appeal noted that the dispute had been settled by consent, leaving only the question of damages for its determination. These damages may as well be considered in the context of violation of the applicant's constitutional rights, the basis upon which the suit was instituted.

[34] However, even if the applicant opted to pursue his case under Article 163(4)(b) of the Constitution, as he seems to be doing and to which he is entitled, then it is clear, as we have stated in the past that such an application ought to be originated at the first instance before the Court of Appeal. In any event, should he be unsuccessful in that process, he retains further recourse to invoke our jurisdiction under article 163(5) of the Constitution to review such a decision by the Court of Appeal on certification. Unfortunately, the applicant makes no reference to this step or why he should be exempted from it, leading to our inevitable conclusion that the present application for

certification before us is premature. We cannot therefore grant the said prayer as sought.

E. ORDERS

[35] Consequently, we make the following Orders:

i. The Certificate of Urgency and Notice of Motion dated 26th of November, 2018 be and is hereby disallowed.

ii. The applicant shall bear the costs of the respondents.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **8th** day of **November 2019.**

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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

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J.B. OJWANG
JUSTICE OF THE SUPREME COURT

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S. C. WANJALA
JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT