

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
(Coram: Mwilu; DCJ & V-P, Ibrahim, Wanjala, Njoki, & Lenaola, SCJJ)

APPLICATION NO. 3 OF 2018

—BETWEEN—

JOHN MBOGUA GETAO.....APPLICANT

—AND—

- 1. SIMON PARKOYIET MOKARE1ST RESPONDENT**
- 2. KAREMPU KAATA.....2ND RESPONDENT**
- 3. NKAMA GROUP RANCH.....3RD RESPONDENT**
- 4. CHIEF LAND REGISTRAR.....4TH RESPONDENT**
- 5. HON. ATTORNEY GENERAL.....5TH RESPONDENT**

(Being an application for extension of time to file an appeal out of time and stay of execution pending the hearing and determination of an appeal against the Judgment and Orders of the Court of Appeal in Civil Appeal No.361 of 2014 (Makhandia, Musinga & Gatembu, JJ.A) delivered on 1st December, 2017)

RULING OF THE COURT

[1] UPON perusing the amended Notice of Motion application dated and lodged in the Registry on 24th May, 2018 and filed under certificate of urgency for leave to lodge and serve an appeal out of time and for stay of execution against the decree and orders of the Environment and Land Court (Hon. J.M. Mutungi, J) made on 25th September, 2014 in ELC Civil Misc No.929 of 2012 pending the hearing and determination of the applicant’s intended appeal against the entire judgment and orders of the Court of Appeal made on 1st December, 2017 in *Civil Appeal No. 361 of*

2014. In the alternative, the applicant prays for an order that there be status quo prevailing prior to the ELC judgment of 25th September 2014. The application is premised on Article 159(2)(d) and 163(4) of the Constitution, sections 3, 21(2), 24(1) of the Supreme Court Act, Rules 3 and 53 of the Supreme Court Rules, 2012; and

[2] UPON reading the applicant's supporting affidavit sworn on 24th May, 2018; and the written submissions filed by the applicant wherein it is contended that the delay in filing the appeal was occasioned by the Court of Appeal's failure to provide certified copies of typed proceedings, despite having applied for the same vide a letter dated 6th December, 2017, the same day they filed a Notice of Appeal against the Court of Appeal decision, and further that the failure to file the appeal was as a result of inadvertence by the applicant's advocates, whose mistakes should not be visited upon the applicant; and

[3] UPON reading the applicant's written submissions in reply to the 1st, 2nd and 3rd respondents' Preliminary Objection wherein they submit that their intended appeal is anchored on the interpretation of the Constitution as stipulated under Article 163(4)(a) of the Constitution and section 15(2) of the Supreme Court Act, the applicant having filed a constitutional petition in the Environmental and Land Court being ELC Civil Misc. No. 929 of 2012 in which he sought the interpretation of Articles 27 on equality and freedom from discrimination, 40 on the right to own property, 47 on fair administrative action, and 50 on the right to be heard; and

[4] UPON reading the 1st 2nd and 3rd respondents' Notices of Preliminary Objections dated and filed on 5th April 2018 and 19th July 2018 respectively, wherein they contend that this court lacks jurisdiction as per Article 163(3) and (4) of the Constitution and sections 15 and 16 of the Supreme Court Act to hear and determine the application; and

[5] UPON reading the 1st 2nd and 3rd respondents' submissions reiterating their objections that the application and intended appeal are incompetent and non-starter, the matter involving a personal and selfish interest that does not engage our jurisdiction, echoing the decision in *Teachers Service Commission v Kenya National Union of Teachers & 3 others* SC App. No. 16 of 2015 [2015] eKLR that the application should be dismissed and that the applicant neither meets this court's principles for extension of time nor establishes the conditions for the grant of an order for stay of execution.

[6] WE HAVE CONSIDERED the application, preliminary objections and written submissions of the parties. The core of the application is whether to grant leave to file the intended appeal out of time and whether to grant stay of execution.

[7] On the first issue, it is apparent that the matter arose out of a petition for the interpretation and application of Articles 23, 27, 50, 63, 40, and 47 of the Constitution. This clothes us with jurisdiction as of right under Article 163(4)(a) of the Constitution. The preliminary objections in our view go to the merit of whether the issues raised qualify as constitutional matters and upholding them at this instance is premature as the issues raised can be sufficiently argued and considered in the substantive appeal. Back to the issue at hand, if the matter raised constitutional issues as contended, the applicant has not explained why he could not file his appeal, as he was obliged to, within the stipulated timelines under this court rules. He merely states that there was inadvertence on the part of his advocate, without elaborating. Does this reason, compel us to exercise our discretion in his favour?

[8] Without seeking to validate the inadvertence on the advocates' part, we note that the delay in issue is 19 days as the appeal ought to have been filed by 28th January 2018 and the applicant filed his initial application for extension of time on 22nd February 2018. Moreover, it is uncontroverted that the applicant is yet to receive certified copies of proceedings, which remains a prerequisite for a record of

appeal under the applicable rule of this court. We therefore find that the applicant has satisfied the threshold for us to exercise our discretion to extend time within which to lodge his appeal. Under the circumstances, we find it appropriate that the applicant meets the 1st 2nd and 3rd respondents' costs for this application.

[9] On the second issue, we are guided by the conditions set out in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* SC App. No. 5 of 2014 [2014] eKLR. These are – arguability of intended appeal, whether the appeal would be rendered nugatory if the stay orders are not granted and if it is in public interest to grant the stay orders. It follows that the intended appeal raises arguable points, the merits of which we cannot venture in at this juncture. The interests of justice tilt towards the protection of the substratum of the matter. Should the appeal eventually not succeed, appropriate remedy will be granted at the time based on parties' positions as presented during the prosecution of the appeal.

[10] From the foregoing, by a unanimous decision of this bench, pursuant to the provisions of sections 21(2) and 23(2)(b) of the Supreme Court Act, 2011 and Rules 21(1) and 53 of the Supreme Court Rules, 2012; we make the following Orders:

- a) *The preliminary objections by the 1st respondent dated 5th April 2018 and by the 2nd and 3rd respondents dated 18th July, 2018 are hereby disallowed.*
- b) *The Application dated 24th May, 2018 is hereby allowed.*
- c) *The Applicant shall file its appeal within 7 days from receipt of the typed proceedings from the Court of Appeal;*
- d) *The Applicant to take measures towards pursuing the proceedings from the Court of Appeal in order to expedite the filing of the appeal;*
- e) *The Applicant to meet the costs of the respondents in this application.*

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

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

.....
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