REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga (CJ&P), Mwilu (DCJ&VP), Ibrahim, Wanjala, Njoki, SCJJ)

CIVIL APPLICATION NO. 7 OF 2019

BETWEEN

RICHARD KOSKEI BUNEI

FREDRICK TUHOTO MAITERI

MICHAEL NDUNGU NDEGWA

JAMES NGARI KAMOTHO

WILSON WAMITI NGETHE

PRISILLA WANGARI THAIRU

GEORGE MURIUKI KAIRU

BENJAMIN KAMAU KIMANI

MURIITHI MUGO T/A GEO-ESTATE

DEVELOPMENT SERVICES..... APPLICANTS

VERSUS

LORIEN RANCHING COMPANY.....1ST RESPONDENT

WILSON ARAP BIRGEN

JOHN MURITU MAINGU

KAHIGA KAMAU

KOSKEI MARTIMU (Being sued on behalf of themselves and on behalf of alleged 795 members) .....2nd RESPONDENT

(Being an application for extension of time to file an appeal out of time against the decision of the Court of Appeal (Waki, Nambuye, Kiage, JJA) sitting at Nyeri in Civil Appeal No. 66 of 2015 and to review the Ruling of the Court of Appeal at Nyeri (Waki, Sichale, Kantai, JJA) dated 13th February 2019) in Civil Application SUP No. 3 of 2018) (UR 1/2018)161

RULING

A. INTRODUCTION

[1] This is an application by way of a Notice of Motion dated 6th March 2019 brought under Articles 10, 20(3), 25(c), 40, 50, 159(2) (a) and (d), 163(4)(b) and 259(1) of the Constitution, Section 15(1) and 16 of the Supreme Court Act, Rule 30(2) of the Supreme Court Rules, Rules 42 and 43 of the Court of Appeal Rules, and all other enabling provisions of the Law. The Application seeks the following orders:

1. ***THAT the Court be pleased to recall, review and /or set aside the decision of the Court of Appeal at Nyeri (Waki, Sichale, Kantai, JJA) ruling delivered on 13th February, 2019 in Civil Application SUP No. 3 of 2018 (UR 1/2018).***
2. ***THAT in the event the application for review is disallowed , leave be granted to the Applicant to lodge an appeal to the Supreme Court against the Court's judgment delivered on 22nd November 2017 in Nyeri Civil Appeal No. 66 of 2015 pursuant to 163 (4)(b) of the Constitution and Section 16 of the Supreme Court Act, 2011, and***
3. ***THAT the Court be pleased to extend time for giving Notice of Appeal, and for leave to appeal out of time the proposed appeal to this Court, pursuant to Rule 33 of the Supreme Court Rules, against the judgment delivered on 22nd November 2017 in Nyeri Civil Appeal No. 66 of 2015, and***
4. ***THAT the Court be at liberty to make any order in the interest of justice.***
5. ***THAT costs be awarded in favour of the Applicants.***

[2] The application is anchored on several grounds in the body of the application and the supporting affidavit of Richard Koskei Bunei sworn on 5th March, 2019.

[3] The application is vehemently opposed by the 1st Respondent through their Replying Affidavit and Supplementary Affidavit sworn by Jackson Kipkemoi Too on 26th March, 2019 and 8th May, 2019 respectively.

B. BACKGROUND

i. Proceedings at the High Court

[4] This suit can be traced to 1970 when the 1st Respondent, Lorien Ranching Company, purchased two parcels of land which it subsequently allocated to its members. The 1st Respondent's former secretary/director, William Arap Birgen, together with others collected funds from members of the public in the promise that they had land to sell to them. Later, in 1979, those members together with Willian Arap Birgen (herein referred to as the ***second Respondents***) attempted to settle in the 1st Respondent's farm but the genuine members who were already in occupation and who ejected them. Consequently, the 2nd Respondent filed a suit at the High Court at Nyeri being **HCCC No. 80 of 1983** seeking certain injunctions against the 1st Respondent. On 2nd October 1992, a consent order was recorded before Tunoi, J (*as he then was*), (*hereafter the Tunoi consent)* to not only settle the membership and control of the Company, but also provided for the sub-division of the Farm and allocation of it to various groups of people comprising the 2nd Respondent.

[5] As the sub-division was going on, the second Respondent, proceeded to the High Court in Nyeri and filed a Judicial Review Application No. Nyeri Misc. Cause **No. 253 of 1994** seeking to prohibit the Chief Land Registrar, the Land Registrar and the District Commissioner, Laikipia, from processing or issuing title deeds. The High Court issued orders prohibiting the issuance of title deeds and an order of *certiorari* quashing the subdivision of the Farm that had been made, and the respective title deeds issued.

[6] As a result of the Judicial Review orders, the 1st Respondent moved to the High Court and urged the Court to set aside orders obtained in ***HCCC 80/1983, HC MISC. 253/1994, NYERI HIGH COURT MISCELLENEOUS CIVIL APPLICATION NO. 264 OF 2008 ,*** prohibit the second Respondent from trespassing its members' property, nullify the land control board consent obtained by the second Respondent, among other orders. Before the trial commenced, a group of ten people led by Richard Koskei Bunei, and who are the Applicants herein, filed an application on 15th April 2012 seeking to be enjoined in the suit as interested

parties. They defended the impugned orders in the other suits as lawful, just and expedient for the welfare of the Company, while terming the suit as appropriate for stated reasons.

[7] The case proceeded to full hearing and after receiving submissions from the respective parties, *Ombwayo J* by a considered judgment signed and dated 27th March 2015 and read on his behalf by *Waithaka J* on 22nd April 2015, found the 1st Respondent's case proved and granted the prayers sought. The Applicants were condemned to pay the costs of the suit.

ii. Proceedings before the Court of Appeal

[8] In determining the appeal on 22nd November, 2017, the Court of Appeal listed the following as issues for determination:

1. Whether the suit was competent and properly before the Court?

2. Who are the members of the plaintiff Company?

3. Whether the orders obtained in Nyeri HCCC No. 80 of 1983, 253 of 1994 and 264 of 2008 were fraudulent?

[9] On the first issue, the Court found that there was sufficient evidence to establish on a balance of probabilities that Jackson Kipkemboi Too was a director at the inception and continuation of the suit by the Company, and was therefore both qualified and, from the record, also authorized to represent and act on behalf of the Company. The Form 203A lodged with the Registrar of Companies giving notice of change of directors and secretaries was clear in its terms and efficacious in its effect. It stipulated that Jackson Kipkemboi Too was appointed with effect from 8th March 2008 as Chairman and Director to replace Richard Chumo Too who died. The notification was paid for. The Court also found that the suit against the 800 defendants was proper. As to who comprised the 1st Respondent Company, the Court found that the 1st Respondent Company comprised of 613 members.

[10] As to whether the orders obtained in HCCC 80 OF 1983 as well as in 252 of 1994 and 264 of 2008 were fraudulent, the Court found that the consent orders, that were made against the interest and to the prejudice of the Company and its *bona fide* members numbering 613, were fraudulent through. Consequently, the Court found the appeal devoid of merit and proceeded to dismiss it with costs.

[11] Being dissatisfied by the decision of the Court of Appeal, the Applicants filed an application before the same Court seeking leave to appeal to the Supreme Court of Kenya against the Court of Appeal's Judgment of 22nd November, 2017. They also sought stay orders pending the hearing and determination of that application. On 13th February, 2019, the Court of Appeal dismissed the application and noted that none of the issues for determination before it amounted to cardinal issues of law or of jurisprudential moment, and that there was no uncertainty to be resolved by the apex Court.

iii. Proceedings before the Supreme Court

PARTIES SUBMISSIONS

The Applicants

[12] The Applicant filed written submissions on 3rd July, 2018. It is the Applicants' submission that the decision of the Court of Appeal has occasioned injustice to a large population by depriving them their land, which deprivation, constitutes a matter of great public importance.

[13] The Applicants urge that an order of the Court of Appeal stating that the returns filed by Jackson Kipkemei Too were valid, were unprocedurally obtained as due process in obtaining them was not followed.

[14] While citing the ***Article 163 (4)(b) of the Constitution***, ***Shabbir Ali Jusab vs Anaar Osman Gamrai & another, Court of Appeal Civil App. No. Sup 1 of 2012***, ***Hermanus Phillipus Steyn v Giovani Gnecchi-Ruscone [2013] eKLR,*** the applicants submit that they have fully satisfied the laid down

principles for certification of their appeal as that of general public importance. On this, they contend, a section of the 1st Respondent's members were discriminated, the land rights of a large section of the company's members were disregarded, a small section of the members were found to have superior land rights over others, though they had equally contributed to the share capital and locked out of the distribution of their land.

[15] They submit further that this Court needs to determine the legality of the titles issued before the surrender of the mother title, taking into account the fact that the trial Court and the Court of Appeal ordered that the titles issued before surrender on 11th September 1991 be distributed to the 613 members. The applicants also want this Court to determine if a Court can be moved in a different suit to set aside proceedings and orders of a court of equal rank in another totally different suit. They also want this Court to determine the role of public officers with regard to the public information in their custody.

[16] On extension of time, the applicants submit a notice of appeal is to be lodged before the Notice of Appeal is filed. On this, they urge that their right to file an appeal directly and within 14 days has been compromised. They urge this Court to exercise its discretion and extend time to file a notice of appeal and grant them leave to appeal on the ground that there was failure of procedural and substantive justice. They cite this Court's decision in ***Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR(the Nick Salat Case)*** and the case of ***Hassan Nyanje Charo v Khatib Mwashetani & 3 others [2014]*** to support this submission.

The 1st Respondent

[17] In addition to the replying affidavit and supplementary affidavit, the 1st Respondent filed their written submissions on 14th July 2019 to oppose the application. The 1st Respondent submits that the application is incompetent, incomplete and intended to mislead the Court. On this, they urge that the Applicants'

application is premised on the Court of Appeal rules which are not binding on this Court. They urge that the instant application has been filed outside the stipulated time of 14 days, and no leave has been sought to extend the time within which to lodge the application for review, thereby making the application incompetent and improper.

[18] The 1st Respondent submits that this Court lacks jurisdiction to entertain the prayers sought for the reason that certification has not been obtained, the application is time barred and that the Applicant has not moved the Court in the prescribed manner.

[19] Further, the 1st Respondent submits that the Applicants have ignored important milestones pertaining the suit. They also argue that this matter involves private rights with no iota of public importance capable of being entertained by this Court. They maintain that there is inordinate delay on the part of the Applicants and no satisfactory explanation as regards to filing of this application, that there are no uncertainties worth the attention of this Court and that the applicable law has been previously settled.

C.ISSUES FOR DETERMINATION.

[20] Having carefully considered the grounds in support of the application, the submission of the parties, the authorities in support thereof, it is apparent to us that there are two issues for determination by this Court, namely:

1. *Whether this Court should extend time for the Applicant to file its appeal*? *Has the Applicant laid a satisfactory basis to warrant this Court to extend time to file the appeal*?

2. *Whether this Court Should review the decision of the Court of Appeal declining to certify this matter under Article 163(4)(b)*?

C. ANALYSIS

[21] The Court of Appeal Judgement was delivered on *22nd November, 2017* yet no notice of Appeal was filed. The Notice of Appeal ought to have been filed on or before *6th December, 2017*. The Applicant submits that the Notice of Appeal is only due once the Court has certified that a mater of general public importance is involved. The 1st Respondent urge that the instant application is time barred and that the Applicants have not sought extension of time to file the same thereby making it incompetent before the Court. The Applicant waited for more than a year to seek for an extension to file a Notice of appeal.

[22] In ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others;*** Appl. No. 16 of 2014, [2014] eKLR, this Court made it clear that a Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.

[23] Rule 53 of the Supreme Court Rules provides that the Court may extend the time limited by its Rules, or by any other decision of the Court. This Court's inherent power to extend time does not operate in a vacuum, that is why this Court set the guiding principles 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"*** [emphasis supplied]

[25] In the case of ***County Executive of Kisumu v County Government of Kisumu & 8 others,*** SC. Civil Appl. No. 3 of 2016; [2017] eKLR**,** 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. Without a satisfactory explanation, we are not able to exercise our discretion to extend time to file the Notice of Appeal.

[26] In the present case, we note there is no plausible explanation why the Notice of Appeal was not filed on time. Even if this Court has inherent jurisdiction to extend time in order to sustain the ends of justice, we can only do so when an Applicant presents a reasonable ground for doing so and justifying the delay.

Does the intended appeal raise matters of general public importance?

[27] At the High Court, we note, the Learned Judge was asked to prohibit the second Respondent from trespassing the 1st Respondent's members' property, nullify the land control board consent obtained by the second Respondent among other orders. At the Court of Appeal, three issues arose for determination, namely, *w*hether the suit was properly before the Court? Who were the members of the plaintiff Company? and

whether the orders obtained in Nyeri HCCC No. 80 of 1983, 253 of 1994 and 264 of 2008 were fraudulent?

[28] In the case of ***Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone,Civil Appl. No. Sup.4 of 2012 (UR3/2012), [2013] eKLR*** (Par. 60), we emphasized that to succeed in an application for certification under **Article 163(4)(b)** of the Constitution, an applicant has to demonstrate that the issue to be raised in the intended appeal involves a matter of general public importance;

> ***"the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest; ...where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest....; mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court." [Emphasis supplied].***

[29] Having perused the application before us, the supporting affidavit, the replying affidavit, supplementary replying affidavit, and the parties' submissions, we agree with the Court of Appeal that intended appeal does not meet these criteria to warrant a review of the Court of Appeal's decision. We need to note that *the question as to whether a Court of law can set aside proceedings of another court of equal* rank was never an issue for determination at the Court of Appeal and is being raised in this Court for the first time. We therefore cannot entertain this issue at this stage for the first time. This Court has in previous decision emphasized the significance of respecting the hierarchy of the judicial system. For instance, in the ***Peter Oduor Ngoge v Francis Ole Kaparo & others*** *[2012] eKLR* case we stated thus:

> ***"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."***

[30] Accordingly, we are inclined to disallow the application in entirety with costs to the 1st Respondents. We make the following final Orders:

i. ***The Notice of Motion dated 6th March 2019 be and is hereby disallowed.***
ii. ***The Applicants shall bear the costs of the 1st Respondents.***

[31] Orders accordingly.

DATED and DELIVERED at NAIROBI this 26th Day of November 2019.

.....	.....
D.K. MARAGA	**P.M. MWILU**
CHIEF JUSTICE & PRESIDENT	**DEPUTY CHIEF JUSTICE & DEPUTY**
SUPREME COURT OF KENYA	**PRESIDENT OF SUPREME COURT**
.....	.....
M. IBRAHIM	**S. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a
true copy of the original

REGISTRAR
SUPREME COURT OF KENYA