

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Maraga, CJ & P, Mwilu DCJ & VP, Wanjala, Njoki and Lenaola, SCJJ)*

**CIVIL APPLICATION NO.18 OF 2019**

**—BETWEEN—**

**BETH MUTHONI NJAU.....1<sup>ST</sup> PETITIONER/APPLICANT**

**EDDIE NJAU.....2<sup>ND</sup> PETITIONER/APPLICANT**

**—AND—**

**CITY FINANCE BANK LIMITED..... RESPONDENT**

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*(Being an application to file and serve a Petition of Appeal out of time from the Ruling and Order of the Court of Appeal of Kenya at Nairobi (**Ouko, P, Waki & Warsame, JJA**) delivered on the 9<sup>th</sup> day of November 2018 in Nairobi Civil Appeal (Application) No.271 of 2010)*

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**RULING OF THE COURT**

**[1] UPON** perusing the Notice of Motion application by the Applicants dated 7<sup>th</sup> June 2019 and filed on 10<sup>th</sup> June 2019 brought under Sections 3 and 31(d) of the Supreme Court Act as well as Rules 3, 26 and 53 of the Supreme Court Rules, 2012 seeking an extension of time to file an appeal out of time against the Ruling and Orders of the Court of Appeal in **Nairobi Civil (Application) No.271 of 2010**; and;

**[2] UPON** reading the Applicant's grounds in support of the Application together with the Supporting Affidavit of Beth Muthoni Njau sworn on 7<sup>th</sup> June 2019 and;

**[3] UPON** considering the Applicant's written submissions dated and filed on 28<sup>th</sup> June 2019 wherein the Applicants urge that they are seeking an extension of time to file an appeal against a Ruling delivered by the Court of Appeal on 9<sup>th</sup> November 2019; and that the delay in filing it was occasioned by the Court of Appeal's failure to supply the relevant Judges' notes until 8<sup>th</sup> May 2019, and that therefore the delay in filing an appeal on time is excusable and the grant of the orders sought will cause no prejudice to the Respondents and;

**[4] UPON** reading the Respondent's Replying Affidavit sworn and filed on 11<sup>th</sup> October 2019 in which it opposed the Application arguing that the same is totally misconceived as the intended appeal is neither one that raises constitutional questions for determination by this Court under Article 163(4)(a) of the Constitution nor was it certified as being one of general public importance under Article 163(4)(b) thereof, and;

**[5] FURTHER,** the Respondent having contended that the substantive appeal of the Court of Appeal, in which all contested issues were determined, has not been appealed from that but the intended appeal relates to a Ruling declining review of that Judgment and that therefore there is no basis for this Court to seize the intended appeal, and;

**[6] UPON** considering the Respondent's submissions filed on 11<sup>th</sup> October 2019 in which the above matters are reiterated, WE NOW OPINE as follows;

- (a) In ***Charo v Mwashetani & 3 Others*** (2014) KLR-SCK and Application No.16 of 2014, ***Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*** among other cases, this Court laid down the criteria for grant or denial of all application for extension of time to file an appeal before it.
- (b) The criteria includes the question whether the explanation given for any delay is reasonable and credible. That there must also exist extenuating circumstances to enable the Court exercise its unfettered jurisdiction in favour of an applicant. Inordinate delay cannot thus attract favourable exercise of discretion.
- (c) The above notwithstanding, the Respondent has raised a fundamental issue which we must consider in *limine*; whether in fact the intended appeal would properly be before us under Article 163(4) (a) and (b) of the Constitution.
- (d) In that context, in ***Erad Suppliers & General Contractors Limited v National Cereals & Produce Board*** SC Petition No. 5 of 2012 we stated as follows:
- “In our opinion, a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior Court of First Instance is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a***

***collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court.”***

- (e) We thus note that the substantive appeal before the Court of Appeal delivered on 16<sup>th</sup> June 2017 is not the subject of the intended appeal and so it remains unchallenged. The Ruling sought to be appealed was one of review of that Judgment on the question of interest on the decretal sum awarded to the Respondent.
- (f) It is obvious to us that such a matter cannot be the basis for an appeal as of right under Article 163(4)(a) of the Constitution and because no certification has been granted on the basis of the matter being one of great public importance, it means that any extension of time to file an appeal is a waste of this Court’s time.
- (g) It follows therefore that whatever the reasons for delay, once we have accepted the Respondent’s point on the law applicable to the intended appeal, it means that the Application before us is misconceived and the Applicants, represented by Counsel, ought to have known that it was also a non-starter.

**[7] HAVING** therefore considered the Application, the Affidavit in support and the Replying Affidavit in opposition thereof and the written submissions of the respective parties, by a unanimous decision of this Bench, we make the following Orders under Section 23(2)(b) of the Supreme Court Act, 2011 and Rules 21 and 23 of the Supreme Court Rules, 2012;

**ORDERS**

- (a) *The Application dated 7<sup>th</sup> June 2019 and filed on 10<sup>th</sup> June, 2019 is hereby dismissed.***
- (b) *The Applicants shall bear costs of the Application.***

**[8]** Orders accordingly.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of November, 2019**

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**D. K. MARAGA**  
**CHIEF JUSTICE & PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**P. M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE**  
**PRESIDENT 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**