

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA AT NAIROBI**  
*(Corum: Maraga (CJ&P), Ibrahim, Ojwang, Wanjala & Njoki SCJJ)*

**APPLICATION NO. 19 OF 2019**

—BETWEEN—

**LITHE PETER MUIA.....1<sup>ST</sup> APPLICANT**

**ROSE PETER MUIA.....2<sup>ND</sup> APPLICANT**

—AND—

**ZUENA NGANDO KABABU.....RESPONDENT**

---

*(Being an application for extension of time to file a Notice of Appeal and an Appeal out of time against the decision of the Court of Appeal (**Kariuki, Sichale & Kantai JJ.A**) in Civil Appeal No. 10 of 2017 delivered at Nairobi on the 20<sup>th</sup> December, 2019).*

---

**RULING OF THE COURT**

**[1] UPON** perusing the Notice of Motion Application by the Applicants dated 21<sup>st</sup> June 2019, brought under Article 163(4) (b) of the Constitution of Kenya, Section 3 (e) of the Supreme Court Act and Rules 3(2) & (5), 31, 33 and 53 of the Supreme Court Rules 2012, seeking an extension of time, to file a Notice of Appeal out of time against the Judgment and Orders of 27<sup>th</sup> May 2016, by the Court of Appeal in **Civil Appeal No. 10 of 2017**; and

**[2] UPON** reading the Applicants' grounds in support of the Application and the Supporting Affidavit sworn on 21<sup>st</sup> June 2019, by Lither Peter Muia, wherein, the Applicants aver that, the delay in filing the Notice of Appeal was occasioned by their former advocates' (Messers Nzilani Muteti) failure to file the same and commence Certification Proceedings at the Court of Appeal, notwithstanding instructions by the Applicants to do so.

**[3] UPON** considering the Applicants' written submissions dated 18<sup>th</sup> July 2019, and filed on 19<sup>th</sup> July 2019, wherein the Applicants restate the grounds and the averments in support of their Application; and further considering the Applicants' argument to the effect that the delay in filing the Notice of Appeal is solely attributable to their advocates whose dereliction of duty ought not to be visited upon them; and

**[4] UPON** reading the Respondent's Grounds of Objection dated 1<sup>st</sup> July 2019, and Replying Affidavit sworn on even date, in which she opposes the Application, arguing;

- (i) That the same is incompetent, as it offends the requirements of Rule 24(1) of this Court's Rules on Certification;
- (ii) That the delay of one and half years, since the Court of Appeal rendered its decision, is not only inordinate but also unexplained; and as such, the Court ought not to exercise its discretion in favour of the Applicants; and

**[5] UPON** considering the Respondent's written submissions dated 29<sup>th</sup> July 2019 and filed on 30<sup>th</sup> July 2019 wherein it is argued that the shifting of the blame for the delay by the Applicants to their advocates is not reason enough to warrant this Court's exercise of discretion in their favour, as there is no evidence on record, of the purported instructions; and further, that as the Application for extension of time, is intended to pave way for the commencement of Certification

Proceedings in the Court of Appeal, the same should have been filed in the Appellate Court;

**[6] WE FIND** as follows:

- (a) While we recognize the principle that the mistakes of an advocate, ought not to be visited upon his client, there is no evidence on record, to show that such instructions, as had been given by the Applicants to their advocates to file a Notice of Appeal were not acted upon by the latter. Nor is there any communication on record, to back up the claim by the Applicants, to the effect that, their advocates had all along misled them into believing that, Certification Proceedings had been commenced at the Court of Appeal.
- (b) It is clear to us that the Application for extension of time, is intended to pave the way for the commencement of Certification Proceedings in the Court of Appeal. That being the case, the appropriate forum for determining such an application, is the Appellate Court.

**[7] HAVING** considered the Application and the Affidavit in support filed in support thereof, and the Grounds of Objection and the Replying Affidavit, in opposition thereto, as well as 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**

- (i) The Application dated 21<sup>st</sup> June, 2019 and filed on 24<sup>th</sup> June, 2019 is hereby dismissed.*
- (ii) The applicants shall bear the costs of this Application.*

**Orders accordingly.**

**DATED and DELIVERED at NAIROBI this 17<sup>th</sup> Day of December, 2019.**

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

.....  
**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**J. B. OJWANG**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S. C. WANJALA**  
**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**