



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome CJ & P, Mwilu; DCJ & VP, Wanjala, Lenaola & Ouko SCJJ)

APPLICATION NO. E004 OF 2025

– BETWEEN –

KAMUTHI FARMERS COOPERATIVE SOCIETY LTDAPPLICANT

-AND-

NAIROBI CITY COUNCIL & 20 OTHERSRESPONDENTS

(Being an application for extension of time within which to transmit a Notice of Appeal and file the Petition of Appeal against the decision of the Court of Appeal sitting in Nairobi (Musinga, Asike - Makhandia & Kantai JJA) dated 24th January 2025 in Civil Appeal No. E047 of 2021)

Representation

Mr. Paul Mwangi for the Applicant

(Paul Mwangi & Co. Advocates)

Ms. Muthoni Wanjiku for the 1st Respondent

(Wanjiku Maina & Co. Advocates)

N/A for the 2nd to 20th Respondents

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 25th February 2025 and filed before this court on 27th February 2025, by the applicant seeking orders *inter alia* –

- a. **THAT** *this Honourable Court grants the applicant an extension of time within which;*

i. to transmit the Notice of Appeal dated 27th January 2025 filed herein to the Registrar, Supreme Court.

ii. to serve the transmitted copy of the Notice of Appeal upon all parties involved in the Appeal and;

*iii. to institute an Appeal against the judgement of the Court of Appeal delivered on 24th January 2025 in **Civil Appeal No. E047 of 2021 Kamuthi Farmers' Cooperative Ltd vs Nairobi City Council and Archdiocese of Nairobi (Kahawa West Catholic Church) & 18 Others).***

b. Costs of the Application be provided for.

c. Any other Order that this Honourable Court may deem fit to grant.

[2] TAKING INTO ACCOUNT the affidavits in support of the Motion by Benard Kungu Maina, Paul Mwangi & Richard Macharia together with the written submissions dated 25th February 2025 and filed on 27th February 2025 and noting that the applicant, being a cooperative society with over 7000 members, submits that it filed ***Environment and Land Case No. 6898 of 1991*** at the Environment and Land Court (ELC) seeking declaratory orders of ownership over two parcels of land measuring 154.5 acres and 21.338 acres respectively, situated within L.R. No. 71/7, itself measuring approximately 415 acres. In response, the 1st respondent filed its defence and counterclaim on 6th August 1992 and amended on 9th April 2009 seeking inter-alia orders compelling the applicant to transfer the two portions of land aforesaid to be excised out of L.R. No. 71/7 to the respondents. The applicant contends that the counterclaim was time-barred by the Limitation of Actions Act Cap. 22 as the claim concerning the 154.5 acres was instituted 19 years after the alleged agreement for its sale while the claim for 21.338 acres was brought 30 years after the agreement in question. It is submitted that the trial court therefore erred in adjudicating the respondents' claims without due regard to their being statute barred. Furthermore, while the Court of Appeal addressed the jurisdiction of the ELC in passing, it is averred that it erroneously dismissed the jurisdictional

objection on the ground that it had not been specifically pleaded by the applicant;
and

[3] FURTHER NOTING the fact that the applicant, being aggrieved by the judgment of the Court of Appeal, filed a Notice of Appeal dated 27th January 2025 but the transmission of the said Notice of Appeal to the Supreme Court was not made within the 14-day period prescribed by Rule 36 of the Supreme Court Rules, 2020. The applicant in that regard attributes the delay to the Court of Appeal, specifically pointing out that the appellate court took long in signing and stamping the Notice of Appeal. The applicant asserts that it has at all times acted with due diligence and made frantic efforts to transmit the Notice as evidenced by its letter dated 11th February 2025 to the Court of Appeal as well as the affidavit by a process server, Richard. K. Macharia, all in a bid to show the effort it made to obtain a signed and stamped copy of the Notice of Appeal. These efforts culminated in the receipt of the signed and stamped Notice of Appeal via email on 19th February 2025 and notably, the endorsed copy of the Notice from the Court of Appeal indicating that it was lodged on 17th February 2025. The applicant has further contended that, in its intended appeal before this Court, it will make the case that the Court of Appeal violated various provisions of the Constitution by failing to address, in *limine*, the critical issue of jurisdiction and by failing to satisfy itself as to its own jurisdiction to determine the counterclaims raised by the respondents which were allegedly time-barred. This and other issues, it submits, makes its intended appeal credible and requiring the attention of this court.

[4] IN SUPPORT OF ITS APPLICATION, the applicant relies on this Court's decisions in *Nicholas Kiptoo Arap Korir Salat vs the Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR which set the guiding principles in extension of time applications; *Dr Wilfrida Arnodah Itolondo vs Attorney General & 9 Others* [2021] eKLR to affirm that the affidavit of the process server, Richard K. Macharia, filed in support of the Motion, adequately substantiates and validates the explanation for the delay in filing and

serving the Notice of Appeal; *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others* [2014] eKLR and *Aviation Allied Workers Union Kenya Vs Kenya Airways Limited & 3 Others* [2015] eKLR where this court recognized that delays caused by administrative processes within the Court of Appeal, such as delays in obtaining certified or signed court documents necessary for an appeal, may constitute reasonable and excusable causes of delay justifying the extension of time. The applicant, in addition, draws support from the Court of Appeal's decision in *Attorney General vs Small Wonder Limited* [2011] eKLR in urging that this court ought to consider the date the Notice was filed i.e. 27th January 2025, to be the operative date, as opposed to the later date of endorsement and lodging by the Registrar on 17th February 2025, which was outside the applicant's control; and

[5] UPON CONSIDERING the 1st respondent's replying affidavit sworn by Christine Ireri, Acting County Attorney of the 1st respondent, together with the written submissions dated 7th March 2025 and filed on 27th March 2025 wherein the 1st respondent contends that the judgment of the Court of Appeal having been delivered on 24th January 2025, the applicant was obligated under Rule 36 of the Supreme Court Rules to file and transmit its Notice of Appeal to the Registrar of this Court within fourteen (14) days i.e. by 7th February 2025. The 1st respondent further asserts that the applicant failed to comply with those mandatory timelines, as the Notice of Appeal was transmitted to the Registrar of this Court via email on 19th February 2025, well beyond the 14 days. It is the respondent's other position that the applicant's subsequent filing of this Motion constitutes an attempt to retroactively regularise an otherwise defective process. Accordingly, the 1st respondent urges the court to find that the application is an abuse of the court process and that the applicant's actions amount to an irregular transmission of the Notice of Appeal which cannot be sanctified through an extension of time application and resultant orders; and

[6] FURTHER NOTING the 1st respondent's contention that in its amended defence and counterclaim at the trial court, it had sought a declaratory relief

affirming its entitlement to 154.5 acres and 21.238 acres to be excised out of LR No. 71/7. That the trial court having heard the matter on its merits, delivered its judgment on 4th June 2020 finding that the 1st respondent had validly purchased the two parcels of land and had been placed in possession by Kahawa Farmers thereby establishing a constructive trust in favour of the 1st respondent. The 1st respondent further asserts that, neither the trial court nor the Court of Appeal engaged in interpretation or application of any constitutional provision in making their decisions and therefore the application is brought in bad faith and aimed to further delay the 1st respondent's enjoyment of the fruits of its successful litigation in a matter that has been in court for thirty-four (34) years; and

[7] FURTHERMORE NOTING that the 1st respondent relies on a series of authoritative decisions of this court to oppose the applicant's Motion and submits in that regard that this court has previously determined the legal consequences of filing documents out of time, and subsequently seeking extension of time to file them procedurally, and held such conduct to be irregular. Relying on *Kenya Hotel Properties Limited vs Attorney General & 5 Others* [2021] KESC 49 (KLR) and *Bookpoint Limited v Guardian Bank Limited & Guilders International Bank Limited* (Application 4 (E006) of 2021) KESC 73 (KLR) the 1st respondent submits that this court has always emphasized that a Notice of Appeal is the foundational document for initiating an appeal to the Supreme Court and any application for extension of time is devoid of merit in the absence of a validly filed Notice of Appeal. The 1st respondent further draws support from *County Executive of Kisumu vs County Government of Kisumu & 8 Others* [2017] KESC 16 (KLR) where the court held that filing an appeal out of time and without first seeking leave to do so rendered it a nullity and of no legal consequence. Further support is drawn from *Dr. Wilfrida Arnodah Itolondo v Attorney General & 9 Others* (Application 3 (E005) of 2021) [2021] KESC 44 (KLR), to stress the point that an applicant must justify and validate the delay from the moment he/she becomes aware that the statutory timelines for instituting an appeal and forwarding the Notice of Appeal had lapsed. In addition, *Wanga vs Republic* [2024] KESC

38 (KLR) & *Ngao v Kitheka* (Petition E006 of 2024) [2025] KESC 1 (KLR) is cited to urge the court to find that the intended appeal does not raise any issue of constitutional interpretation and application; and

[8] UPON ALSO CONSIDERING the applicant's supplementary submissions dated 28th February 2025 filed pursuant to leave granted by the court, wherein the applicant reiterates its earlier arguments and provides specific responses to the 1st respondent's submissions as follows; that this court retains discretionary power to extend time for the transmission of a Notice of Appeal as provided by Rule 15 read with Rule 37 of the Supreme Court Rules and as was held in *Dr. Wilfrida Arnodah Itolondo vs Attorney General & 9 Others* (supra), this Court recognizes its inherent jurisdiction to enlarge time where such an extension justified. It is the applicant's other position that a court fees payment receipt from the Court of Appeal confirms that the Notice of Appeal was filed on 27th January 2025 and within the prescribed 14-day timeline. The delay in transmitting the endorsed Notice of Appeal, it is argued, was therefore occasioned solely by administrative delay at the Court of Appeal and not by any omission or fault on the part of the applicant. Furthermore, the applicant contends that the filing of a certificate of delay is not a prerequisite to the grant of orders of extension of time under the Supreme Court Rules. The applicant has also opined that the issues it has raised in the intended appeal bear clear issues of constitutional interpretation and application and that such issues may be raised at any stage in the proceedings before this Court, even if not canvassed before the Court of Appeal. To support this contention, the applicant relies on *Geo Chem Middle East v Kenya Bureau of Standards* (Petition 47 of 2019) [2020] KESC 1 (KLR) in which this Court affirmed that constitutional issues, particularly those concerning jurisdiction may be entertained even where they were not previously raised, provided they are properly framed before the Supreme Court. Finally, the applicant rebuts the respondent's assertion that the intended appeal should be struck out for failure to raise constitutional issues and submits that such an assessment is premature at this stage,

a determination previously made by this court in ***Nicholas Kiptoo Korir Salat***. (Supra); and

[9] BEARING IN MIND that the primary issue before us is whether the applicant has laid a sufficient basis to warrant the exercise of this court's discretion to extend the time for transmission of its Notice of Appeal to the Registrar pursuant to Rule 15 of the Supreme Court Rules, 2020 as well as orders to file its intended appeal and noting the pleadings filed, submissions made and the authorities submitted;

[10] WE NOW OPINE AND DETERMINE as follows:

- i. We reiterate the principles set out in ***Salat v Independent Electoral and Boundaries Commission & 7 others*** [2014] KESC 12 (KLR), which are now well settled as being that; extension of time is not a matter of right but an equitable relief granted to a deserving party who demonstrates diligence and provides a satisfactory explanation for delay. An applicant in such a case must show, *inter-alia*, that the delay was not inordinate, that it acted promptly upon becoming aware of the lapse, and that no undue prejudice would be occasioned to the respondent if the extension is granted.
- ii. In the present case, the applicant filed the Notice of Appeal on 27th January 2025, within the 14-day period stipulated under Rule 36(1)(a) of the Supreme Court Rules. However, the endorsed copy of the Notice of Appeal was only transmitted to the Registrar of this Court on 19th February 2025, twelve days outside the prescribed timeframe. The applicant attributes this delay to administrative inefficiencies at the Court of Appeal in stamping and signing the Notice of Appeal, a fact supported by the affidavit of a process server, Richard K.Macharia.
- iii. In ***Dr. Wilfrida Arnodah Itolondo v Attorney General & 9 Others*** (supra), we expressed the need to present evidence that justifies the delay in filing any appeal before us. From the affidavits filed, we are

persuaded that the delay, though regrettable, was occasioned by circumstances beyond the applicant's direct control. We also take cognizance of this court's prior holdings on this subject particularly in ***Aviation Allied Workers Union Kenya v Kenya Airways Limited & 3 Others*** [2015] eKLR where we found that a delay arising from court administration and processes may constitute a reasonable excuse for any delay occasioned. In the present case, we are satisfied that the delay in contention was caused by the Court of Appeal and not the applicant.

- iv. On whether the intended appeal raises constitutional issues, the applicant submits that the jurisdictional competence of the Court of Appeal in adjudicating the counterclaims is a constitutional question under Article 162(2)(b) and Article 165(5) of the Constitution while the respondents argue that the matter was strictly civil in nature, and no constitutional issue was canvassed in the lower courts. In that regard, in ***Aviation Allied Workers Union Kenya*** (supra) we held that the court need not always inquire into the question whether constitutional issues have arisen while it determines an application for extension of time. The reason is obvious-the substance of the intended appeal would not be a matter before it at that stage-unless the matter is obvious and beyond peradventure. Without expressing ourselves with finality on the issue therefore and seeing the opposing positions on the issue as well as the circumstances of the case, we are prepared to let the determination of the jurisdictional question be raised and determined at the hearing of the appeal.
- v. We are therefore satisfied that the applicant has demonstrated a reasonable and excusable cause for delay. The application was filed without undue delay once the endorsed Notice of Appeal was obtained, and we are not persuaded that the respondent will suffer any prejudice should the extension be granted.

[11] CONSEQUENTLY and for the reasons afore-stated, we make the following Orders:

- i. The Applicant's Notice of Motion dated 25th February 2025 and filed on 27th March 2025 is hereby allowed as prayed.*
- ii. The Applicant shall transmit its Notice of Appeal afresh to the Registrar of this court within 7 days from the date of this Ruling and serve it on the respondents within 3 days of such transmission.*
- iii. The Applicant is granted thirty (30) days from the date of this Ruling to file its appeal.*
- iii. The costs of the application shall be in the cause.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of May, 2025.

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M.K. KOOME
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

.....
I.LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

