

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
(Mwili, Ag. CJ & Ag. P; Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

APPLICATION NO. 26 OF 2020

—BETWEEN—

KENYA NATIONAL HIGHWAY AUTHORITY..... APPLICANT

—AND—

CYCAD PROPERTIES LIMITED.....1ST RESPONDENT
ELIZABETH WAMBUI GITHINJI.....2ND RESPONDENT
KEVIN KARIUKI.....3RD RESPONDENT
JOHN MWANGI.....4TH RESPONDENT
JONATHAN QUAIL.....5TH RESPONDENT
JANE WAIKENDA.....6TH RESPONDENT
GERALD MUIGAI.....7TH RESPONDENT
DAVID THIGE.....8TH RESPONDENT
AUGUSTINE AGHAULOR.....9TH RESPONDENT
SUSAN WANGECHI KANYORA.....10TH RESPONDENT
JAMES GACHARIA KIRURI.....11TH RESPONDENT
IBRAHIM THIAW.....12TH RESPONDENT
ANN NJERI NDUMU.....13TH RESPONDENT
MICHAEL NDONG'O KANYOGO.....14TH RESPONDENT
IAN FERNANDES.....15TH RESPONDENT
FRANCIS KIARIE.....16TH RESPONDENT
MICROLAND INVESTMENTS LIMITED.....17TH RESPONDENT
SAMUEL OMARI.....18TH RESPONDENT
DO IT QUALITY MANAGEMENT LIMITED.....19TH RESPONDENT

ASAKA NYANGARA.....	20 TH RESPONDENT
RAEL LUMBASI.....	21 ST RESPONDENT
DAVID MUSILA.....	22 ND RESPONDENT
RAJESH JOSHI.....	23 RD RESPONDENT
ATIF DARR.....	24 TH RESPONDENT
LEONARD ANGAINE.....	25 TH RESPONDENT
THOMAS NJUGUNA.....	26 TH RESPONDENT
PILLAMART PROPERTIES LIMITED.....	27 TH RESPONDENT
PATRICK NDIRANGU KIMEMIA.....	28 TH RESPONDENT
PETER NJENGA MUHIKA.....	29 TH RESPONDENT
TEXCAL HOUSE SERVICE STATION LIMITED...	30 TH RESPONDENT
THE HON. ATTORNEY GENERAL.....	31 ST RESPONDENT
THE MINISTER, MINISTRY OF ROADS.....	32 ND RESPONDENT
THE MINISTER, MINISTRY OF LANDS.....	33 RD RESPONDENT
KENYA URBAN ROADS AUTHORITY.....	34 TH RESPONDENT

*(Being an application for extension of time to file an appeal against the majority Judgment and Order of the Court of Appeal (**Ouko, Sichale & Odek, JJ.A**) delivered at Nairobi on 7th June, 2019 in Civil Appeal No. 156 of 2013 consolidated with Civil Appeal No. 160 of 2013.)*

RULING OF THE COURT

A. INTRODUCTION

[1] This application is dated 17th September 2020, and lodged on 21st September 2020, seeking an Order for extension of time to file a Petition and Record of

Appeal, against the majority Judgment and Order of the Court of Appeal (**Ouko, Sichale & Odek, JJ.A**) in Civil Appeal No. 156 of 2013 consolidated with Civil Appeal No. 160 of 2013. The application is brought under the provisions of Article 156 (2) of the Constitution, Sections 14 of the Supreme Court Act 2011, and Rules 3 (2) (4) & (5), 15 (2) and 65 of the Supreme Court Rules, 2020.

B. THE APPLICATION

[2] The Motion is based on the applicant's Supporting and Supplementary Affidavits sworn by **Norah Beatrice Odingo** on 17th September 2020, and 7th October 2020, respectively. The applicant avers that while the Court of Appeal Judgment was delivered on 7th June 2019, it was not until September 2019, when it managed to appoint a different advocate to pursue the intended appeal. According to the applicant, the delay in appointing the advocate was caused by procurement requirements, and a dispute between it and its original advocate, concerning the fees payable to the latter. The applicant further depones that it has not been able to obtain typed proceedings from the Court of Appeal to-date. Finally, the applicant states that the Covid-19 pandemic has disrupted the timely preparation of the appeal.

[3] In response, the 2nd to 30th respondents filed a Replying Affidavit sworn by **Elizabeth Wambui Githinji** on 30th September 2020, in which the deponent states that failure to file the Record of Appeal within the stipulated time, rendered the Notices of Appeal filed by the applicant as having been withdrawn, in accordance with Rule 37 of the Supreme Court Rules, 2012 (revoked). It is also urged that the

fourteen (14) months period of delay is not only inordinate, but the same has not been sufficiently explained. The respondents aver that to allow this application would seriously infringe upon their rights.

C. THE APPLICANT'S CASE

[4] In its written submissions dated 18th September 2020, and supplementary submissions dated 7th October 2020, the applicant reiterates the reasons for delay in filing the appeal. The applicant relies on this Court's Decision in ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral & Boundaries Commission & 7 others*** [2014] eKLR (***Nick Salat Case***), to urge that it has met the principles set for extension of time

[5] The applicant further submits that it has exercised due diligence in following up on the typed proceedings at the Appellate Court and relies on this Court's Decision in the cases of ***County Executive of Kisumu v. County Government of Kisumu & 8 others***; SC Application No. 3 of 2016, [2017] eKLR and ***Hassan Nyanje Charo v. Katiba Mwashetani & 3 others***; SC Application No. 23 of 2014, [2014] eKLR (***Hassan Nyanje Charo Case***), to urge that a delay in obtaining typed proceedings from the Court of Appeal, is a legitimate ground for extension of time.

[6] The applicant also submits that this application ought to be allowed because the intended appeal raises issues of great public interest. In this regard, the

applicant relies on this Court's decision in ***Gatirau Peter Munya v. Dickson Mwenda Githinji & 2 others***; SC Application No 5 of 2014, [2014] eKLR.

D. THE RESPONDENTS' CASE

[7] The 31st to 34th respondents filed their submissions dated 16th October, 2020 on 21st October, 2020 in support of the application. The four respondents essentially agree with the applicant's submissions filed on 21st September, 2020 and supplementary submissions filed on 8th October, 2020.

[8] The 2nd to 30th respondents filed their submissions dated 30th September, 2020, on 1st October, 2020. The respondents contend that the applicant has not given a reasonable explanation of the 14 months' delay in filing the Record of Appeal in accordance with the ***Nick Salat Case***. It is urged that the application is brought after a significant delay thus rendering the Notices of Appeal as having been withdrawn, in accordance with this Court's Decision in ***Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 others***; SC Application No 35 of 2014, [2015] eKLR. They add that the applicant has neither demonstrated that it exercised due diligence in pursuing the typed proceedings from the Court of Appeal, nor has it attached the Certificate of Delay as held in the cases of ***Hassan Nyanje Charo Case***; ***Kenya Bureau of Standards v. Centurion Engineers & Builders Limited***; CA Application No. 65 of 2019, [2019] eKLR, and ***Kenya Revenue Authority v. Krish Commodities Limited***; SC Application No. 23 of 2019, [2020] eKLR.

[9] It is further submitted that the alleged prolonged procurement process is not a reasonable excuse for the delay as the current advocates were formally instructed on 1st July 2019, which was within the timeline for filing the Record of Appeal. It is the respondents' contention that the advocate on record could have obtained copies of the file from the Court of Appeal or other government agencies on record, if the applicant was desirous of filing the appeal in time.

[10] In conclusion, the respondents submit that a grant of extension of time will greatly prejudice them since they would be unable to rent, sell or otherwise transfer their properties due to the pendency of court proceedings. They add that they have continued to live in apprehension from the date their properties were earmarked for demolition.

[11] The 1st respondent has not filed any submissions in response to the Motion despite the Court's Directions.

E. ISSUES FOR DETERMINATION

[12] The only issue that falls for this Court's consideration is *whether the applicant has laid a satisfactory basis to warrant an extension of time for it to file the intended Appeal.*

F. DETERMINATION

[13] Having considered the application and the affidavits in support thereof as well as the written submission of the parties, we find that on the basis of the principles set out by this Court for extension of time in ***Nicholas Salat Case***,

Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 others, SC Appl. 50 of 2014 and ***Hassan Nyanje Charo Case*** the applicant has not satisfactorily explained the inordinate delay in filing the Record of Appeal. The reasons given by the applicant for this delay do not provide a sufficient basis for this Court to exercise its discretion in the applicant's favour. Consequently, the application before us is one for dismissal.

G. ORDERS

- (i) ***The Notice of Motion Application dated 17th September 2020, and lodged on 21st September 2020, is hereby dismissed;***
- (ii) ***The costs of this application shall be borne by the applicant.***

Orders accordingly.

DATED and DELIVERED at NAIROBI this 17th Day of March, 2021.

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P. M. MWILU
Ag. CHIEF JUSTICE & Ag. 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

.....
ISAAC LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

**REGISTRAR
SUPREME COURT OF KENYA**

