

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
[CORAM: MARAGA, CJ &P, MWILU DCJ &VP, IBRAHIM, WANJALA
& LENAOLA SCJJ]

CIVIL APPLICATION NO. 16 OF 2018

MOI TEACHING & REFERRAL HOSPITAL BOARD.....APPLICANT

AND

UASIN GISHU MEMORIAL HOSPITAL LTD..... 1ST RESPONDENT

THE MINISTER FOR HEALTH.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

CONSOLIDATED WITH CIVIL APPLICATION NO. 25 OF 2018

HON. ATTORNEY GENERAL.....1ST APPLICANT

THE MINISTER FOR HEALTH2ND APPLICANT

AND

UASIN GISHU MEMORIAL HOSPITAL LTD..... 1ST RESPONDENT

MOI TEACHING & REFERRAL HOSPITAL BOARD...2ND RESPONDENT

(Being an appeal from the judgement of the Honourable Justice

Asike Makhandia, W. Ouko, and A.K Murgor JJAs delivered in

Nairobi on the 6th October, 2017)

R U L I N G

[1] By its Notice of Motion dated 18th June 2018, Moi Teaching and Referral Hospital Board (the 1st Applicant) seeks orders under Articles 159 and 163(4) of the Constitution, Sections 3, 14(5), 19, 21 (3), 31 (d) and (g) of the Supreme Court Act, Rules 17(3), 23, 31, 32, 33, 34 and 53 of the Supreme Court Rules 2013 (sic) and all other enabling provisions of law, for an extension of time to file a Notice of Appeal against the judgment of the Court of Appeal delivered on 6th October 2017.

[2] By their Notice of Motion dated 26th July 2018 (the 2nd application), the Minister for Health and the Attorney General also seek more or less the same orders.

[3] The subject matter of the suit giving rise to this application are ***Title Nos. Eldoret Municipality Block 7/125 & 126*** (the suit property) (Original L.R. No. 2958 Eldoret Municipality) over which there has been an ownership tussle since 1998 pitying the applicants against the 1st respondent.

[4] The 1st application is based on the ground that the Applicant had no notice of delivery of the Court of Appeal's judgment on 6th October 2017. The 1st applicant argues that it came to know of the entry of judgment against the applicants on 20th March 2018, when the 1st respondent sought compensation from it of Kshs. 1, 738, 630,267.00. Between that date and 18th June 2018 when it filed this application, the 1st applicant claims that it was involved in consultation with the 2nd and 3rd applicants. In the supporting affidavit of Silvia Nyariki, it made reference to the 3rd applicant's letter of 25th May 2018 advising the 1st applicant to appeal as proof of the said consultations.

[5] On their part, the 2nd and 3rd applicants argue that though they were served with notice a day before delivery of judgment, the delivery notice was inadvertently filed away and the 2nd and 3rd applicants did not get to know of the judgment until 23rd February 2018, when the 1st respondent forwarded a copy the judgement to them seeking compensation in the sum of Kshs 1, 738, 630,267.00 by which time the period for filing a Notice of Appeal had lapsed. They filed a notice of appeal on 13th June 2018.

[6] As the ownership of the suit property is highly contested, they contend that allowing the compensation ordered in this matter to stand will be tantamount to rewarding fraud. In the circumstances, the applicants contend that on the authority of the cases of ***Oshwal Academy [Nairobi], & Another vs Induvishwanath [2017]***, *eKLR*, and ***Velos Enterprises Limited Vs Paragon Electronics Limited [2018]*** *eKLR*, where the courts held that it is against the rules of natural justice and procedural fairness to deliver judgment without notice or adequate notice to the parties, this application should be allowed. The applicants also rely on Section 19 of the Supreme Court Act and Rule 53 of the Supreme Court Rules as well as the case of case ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 others [2014]*** *eKLR*, and urge us to grant these applications and direct that the costs of the applications do abide the outcome of the appeal.

[7] Opposing the application, the 1st respondent argues that contrary to the principles set out in the **Nick Salat Case** (supra), the applicants have not explained the delay between the time they learnt of the judgment and when they filed these applications. In the circumstances, the 1st respondent sees these applications as the applicants' gimmick to continue denying it compensation for the suit property that the 1st applicant has unlawfully occupied for now over 20 years.

[8] It appears to be common ground that the 1st applicant was not given notice and the 2nd and 3rd applicants were given a day's notice of the delivery of the impugned judgment of the Court of Appeal. As was stated in the cases of ***Paul Mungai Kimani & 20 others v Attorney General & 2 others [2018]*** *eKLR*,

Application No. 17 of 2017 and Hassan Nyanje Charo v Khatib Mwashetani & 3 Others SC Application No. 15 of 2014; [2014] eKLR, an applicant cannot be blamed for the lower courts' failures or omissions. In this case, we are satisfied by the explanation given that the delay between the date when the applicants learnt of the judgment and when they filed these applications was taken by consultations between the applicants.

[9] For these reasons, we find merit in this application and we accordingly allow it. The applicants shall file and serve fresh notices of appeal within 14 days of the date hereof failing which these applications shall stand dismissed with costs. The costs of this application shall abide the outcome of the appeal.

It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of April, 2019.

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D.K. MARAGA
CHIEF JUSTICE & PRESIDENT
SUPREME COURT OF KENYA

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P.M. MWILU
DEPUTY CHIEF JUSTICE & DEPUTY
PRESIDENT OF SUPREME COURT

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

.....
S. WANJALA
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