



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OUKO, (P), (IN CHAMBERS))**

**CIVIL APPLICATION NO. 62 OF 2020**

**BETWEEN**

**HUI COMMERCIAL ENTERPRISE (AFRICA)**

**COMPANY LIMITED aka HUI COMMERCIAL.....1<sup>ST</sup> APPLICANT**

**WRONY WANG.....2<sup>ND</sup> APPLICANT**

**AND**

**SALIF MICHAEL NGUNGULI & 13 OTHERS.....RESPONDENTS**

*(Being an application for extension of time to file and serve Notice of Appeal against the*

*Ruling from the High Court at Mombasa, (Honourable Justice Rika) dated 29<sup>th</sup> June, 2020*

*in*

*ELRC No. 394 of 2018)*

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**RULING**

The respondents' suit was determined without the participation in the proceedings of the applicants and thereafter the Environment and Land Court (Rika, J.) rendered a judgment on the 26<sup>th</sup> September, 2019 in favour of the respondents declaring the termination of their service by the respondent unfair.

On that determination the respondents were awarded compensation for unfair termination in the total sum of Kshs. 8,206,348.

Having learnt of the judgment, the applicants applied for its setting aside.

The application was rejected in a ruling dated 29<sup>th</sup> June, 2020. Because time, under the rules of this Court, for challenging the decision had lapsed and since execution was imminent, the applicants took out the present omnibus application for extension of time to file and serve notice of appeal and for an order of stay of execution.

While the power to entertain an application for extension of time is vested in a single judge, that for stay of execution can only be heard by a full bench. It serves no purpose to bring the two reliefs in one application and though by inadvertence, this application was listed before the full bench, and whereas in normal circumstances, the application would have been adjourned with directions that the application for extension of time be listed and heard first before a single Judge, the bench before which the application was listed took the view that, since the respondents have responded specifically to the latter application, and to obviate further delay, one of us could proceed to determine it. It is that application, for extension of time, that this ruling relates to.

For emphasis, the ruling rejecting the application to set aside was rendered on 29<sup>th</sup> June, 2020. It is the applicants' position that when the ruling was delivered, their erstwhile advocates did not inform them of the outcome; that the failure to lodge the notice of appeal was, as such due to the Advocate's mistake, which in all fairness, should not be visited upon them; that notwithstanding, the applicants moved with

haste, appointed new advocates and moved this Court on 18<sup>th</sup> August, 2020; and that in the circumstances, the delay was not inordinate.

They contend further that the appeal is indeed arguable as, at the heart of it is the issue of fair hearing; and that the evidence of service of the pleadings and hearing date was doubtful and incredible.

The respondents do not agree and, for their part, insist that no satisfactory explanation has been advanced by the applicants why they did not lodge the notice of appeal within the stipulated time; and that they cannot hide behind the often-relied on excuse that the mistakes of counsel cannot be visited upon the client.

The discretion donated by **Rule 4** of this Court's Rules to a single judge is wide. The single judge can extend time on such terms as the judge thinks just. Like all judicial discretionary powers, the power to extend time has to be exercised on sound principles of the law and not capriciously. Some of the considerations to be borne in mind in considering such application, include the length of the delay, the reason(s) for the delay, the possible prejudice to the parties, the conduct of the parties and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. That is for the full Court if and when the appeal is ultimately presented to it. See **Athuman Nusura Juma vs. Afa Mohamed Ramadhan**, CA No. 227 of 2015.

The delay, in my rough estimation is about 1 month. The reason advanced for the delay is not outrageous or uncommon. It is not uncommon to hear from litigants how they have been let down by their advocates who do not communicate to the every stage of their cases. While such conduct can attract disciplinary action from the professional body of advocates, for us as a court, we look at who stands to suffer most, and do justice because that is what courts exist to do.

Without being definitive, it is a cardinal principle of the Constitution and law that a party must be afforded an opportunity to be heard before an adverse decision can be taken against him or her. For this reason, the intended appeal cannot be described as frivolous.

In the result, I allow this application and order the applicants to lodge and serve both the notice and the record of appeal within thirty (30) days of the date of this ruling, failing which the leave granted herein will lapse without further orders. Costs will be in the appeal.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of January, 2021.**

**W. OUKO, (P)**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**