IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, J.A IN CHAMBERS)

CIVIL APPLICATION NO. 73 OF 2020

BETWEEN

PAUL KORIR SAWE.....................................1ST APPLICANT

HARRON KIPKOECH SAWE.....................2ND APPLICANT

AND

SALINA C. SAWE..RESPONDENT

(Being an appeal against the judgment and decree of the High Court of Kenya (Hon. H. A. Omondi, J.) dated 14th August 2019

in

Eldoret HC Succession Cause No. 369 of 2004

****

RULING OF THE COURT

Before me is a Notice of Motion dated 16th July, 2020 under **Rules 4, 41, 42, 43, 87** and **88** of the **Court of Appeal Rules** substantively seeking leave of the Court to extend time within which to serve a record of appeal, dated 27th February, 2020 and lodged on 28th February, 2020; deem the said record duly filed and properly served; leave to file and serve a supplementary record of appeal with an attendant order that costs be in the cause.

It is supported by grounds on its body, a supporting affidavit sworn by **Paul Korir Sawe** together with annextures thereto and a supplementary affidavit sworn jointly by **Paul Korir Sawe** and **Haron Kipkoech Sawe** on 10th November, 2020. It has been opposed by a replying affidavit sworn by **Salina Sawe** on a date not indicated thereon together with annextures thereto.

The application was canvassed through rival pleadings, submissions and legal authorities relied upon by the respective parties in support of their opposing positions without oral highlighting.

It is applicants' submission that they were aggrieved by the learned Judge's judgment (**Hon. H. A. Omondi, J**.) dated 14th August, 2019 and timeously filed a notice of appeal on 21st August, 2019 intending to appeal against the whole of the said judgment. Their advocate timeously applied for certified copies of proceedings for appellate purposes, supplied to their advocate on 10th December, 2019 together with a certificate of delay but without a certified copy of the decree. Their advocate expeditiously prepared and filed a record of appeal on 28th February, 2020 but was unable to serve it on the respondent on account of his bereavement (the said advocate). It was not until the 28th May, 2020 when the record of appeal was served hence the plea that the record of appeal be treated as properly filed as no prejudice will be suffered by the respondent if the record of appeal were validated to pave way for the merit consideration of the appeal.

It is also the applicants' contention that **Rules 4** and **41** of the **Court of Appeal Rules** allow this Court to extend time within which to comply with timeline set in the **Rules** while **Rule 88** allows the Deputy Registrar of the Court to grant leave to file a supplementary record of appeal where a document referred to in **rule 87(1)(4**) is inadvertently omitted from the record. They concede the record of appeal was not served on the respondent within the timeline stipulated in the **rules** and also concede that a certified copy of the decree which is a primary document for purposes of filing a record of appeal was also in advertently omitted from the record. On the totality of the above assertions, the applicants contend that they have given sufficient reasons in their supporting documents to warrant exercise of the Court's discretion in their favour.

To buttress the above submissions, applicants rely on overriding objective principle enshrined under **sections 3A** and **3B** of the **Appellate Jurisdiction Act** (the Act) and **Article 159(2)(d)** of the Constitution of Kenya 2010 enshrining the nontechnicality principle, the case of **Imperial Bank Limited (In Receivership) & Kanother vs. Alnashir Popat & 18 Others [2018] eKLR** and **Autoports Freight Terminal Limited vs. Kenya Ports Authority** [**2019**] **eKLR** both for propositions/principles that guide the Court in the exercise of its discretionary mandate under **Rule 4** of the **Court of Appeal Rules**.

In rebuttal, the respondent submits that no genuine or justifiable reason has been given to warrant the relief sought for leave to extend time within which to serve the record of appeal herein as there is nothing put forth by the applicants to show that their advocate was bereaved nor that his office remained closed for three months, the period taken from the date of the lodging of the record of appeal to the period it was ultimately served on her, which in her opinion is inordinate. Neither has it been sufficiently explained. In her opinion, applicants are, therefore, guilty of latches and the desire to pursue the appeal is purely an afterthought.

Further, that pendency of the appeal will derail the enjoyment of the portion of land shared out to them by the High Court. Second, the appeal is not merited considering that the substratum of the appeal namely, land parcel No. **Nandi Cheptil/138** has mutually been shared between the rival parties herein to the ratio of thirteen (13) acres to the first house represented by applicants; and twenty-four (24) acres to the junior house, represented by herself.

Relying on the case of **Daniel Nkirimpa Monirei vs. Sayialel Ole Koilel & 4 Others [2016] eKLR** the respondent submitted that the applicants have not demonstrated any sufficient reason to warrant the exercise of the Court's discretion in their favour and on that account prayed for the dismissal of the application.

In reply to the respondent's submissions, the applicants relied on their supplementary affidavit and maintained that they have furnished sufficient reasons for the belated serving of the record of appeal on the respondent. The delay involved is therefore not inordinate. They are ready and willing to expedite the prosecution of the appeal once validated. The appeal has merit as demonstrated by grounds of appeal set out in the memorandum of appeal. Denied entering into any mutual arrangement with the respondent with a view to compromising the appeal.

My invitation to intervene on behalf of the applicants has been invoked under the provisions of law cited in the heading of the application. **Rules 41, 42** and **43** are merely procedural and require no interrogation. Similarly **Rule 87** is also merely procedural. Applicants purpose for citing **Rule 87** was simply to demonstrate that the said **Rule** provides explicitly that a certified copy of the decree appealed from should be part of the primary documents an appellant is obligated to include in a record of appeal. This was meant to support of prayer 2 of the application.

The substantive rules for my interrogation in the disposal of this application are therefore **Rules 4** and **88** of the **Court of Appeal Rules**. **Rule 4** provides as follows:

> **"The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."**

While **Rule 88** on the other hand provides as follows:

> **"Where a document referred to in rule 87(1) and (2) is omitted from the record of appeal the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 92(3) and thereafter with leave of the deputy registrar on application."**

As it is evident from the construction of **Rule 88** set out above, the jurisdiction to grant relief under **Rule 88** is donated to the deputy registrar. Prayer 2 is therefore misplaced and is accordingly struck out. That leaves prayer 1 for consideration.

The principles of law that applicants have invited me to apply in the determination of prayer 1 are those guiding the Court in the exercise of its discretionary mandate under **Rule 4** of the Courts' **Rules**, the invocation and application of the overriding objective principle enshrined in **sections 3A** and **3B** of the **Appellate Jurisdiction Act**; and the nontechnicality principle enshrined in **Article 159(2)(d)** of the Constitution of Kenya 2010, all of which have now been crystallized by case law. For those that guide the exercise of the Court's mandate under **Rule 4**, of the Court's **Rules**. See **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231**, among numerous others and **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014]eKLR**; also among numerous others. The principles distilled from the above case law may be enumerated *inter alia* as follows: *The mandate under Rule 4 is discretionary, unfettered, and does not require establishment of "sufficient reasons". Neither are the factors for exercise of the Court's unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application was granted; the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance; orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one; the discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered; as the jurisdiction is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant; the degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension against the prejudice to the respondent in granting an extension; the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity; whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word* ***"possibly"****; the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for a delay is the key that unlocks the court's flow of discretionary power.*

There has to be valid and clear reason upon which discretion can be favourably exercised; failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable; an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court; the right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.

The above principles were restated by the Supreme Court of Kenya **(M.K. Ibrahim & S.C. Wanjala SCJJ)** in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2013]eKLR** as follows:- *extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.*

For **sections 3A** and **3B**, see the cases of **City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008); and Kariuki Network Limited & Another vs. Daly & Figgis Advocates Civil Application No. Nai 293 of 2009**, all of which support the proposition that the purpose of the overriding objective principle is first, to enable the court achieve fair, just, speedy, proportional, time and cost-saving disposal of cases before it. Secondly, to embolden the court to be guided by a broad sense of justice and fairness. Thirdly, to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.

For the nontechnicality principle in **Article 159(2)(d)** of the Constitution of Kenya, see **Jaldesa Tuke Dabelo vs. IEBC & Another [2015]eKLR; Raila Odinga and 5 Others vs. IEBC & 3 Others [2013] eKLR; Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others [2014]eKLR; Patricia Cherotich Sawe vs. IEBC & 4 Others [2015]eKLR**.

In addition to the above, there is also now crystallized principle of the right of access to justice which can only be denied in exceptional circumstances. See **Richard Nchapi Leiyagu vs. IEBC & 2 Others** (supra); **Mbaki & Others vs. Macharia & Another [2005] 2EA 206;** and the Tanzanian case of **Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003;** on the right to be heard for principles *inter alia* that: *the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.*

I have considered the record in light of all the above crystallized principles/ propositions and applying the thresholds therein to the rival position herein, I proceed to draw out conclusions thereon as follows: the factors I am obligated in law to take into consideration when determining an application of this nature are but not limited to the length of delay, reasons for the delay, arguability of the appeal, any prejudice likely to be suffered by the respondents were the relief sought granted

It is evident from the record that the applicants timeously filed the Notice of Appeal and also applied for and were supplied with certified copies of proceedings pursuant to **Rule 82** of the **Court of Appeal Rules**. The proviso to **Rule 82(1)** of the **Court of Appeal Rules** provides as follows:

> **"Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy."**

Existence of a certificate of delay brings the applicants application within the ambit of the proviso to **Rule 82(1)** of the Court's **Rule**s. It is evident from the record that the record of appeal was filed on 28th February, 2020 and served on the respondent on 28th May, 2020. The unconfirmed explanation proferred by the applicants for the said delay was their advocate's bereavement. The record of appeal was filed by **Magut & Sang Associates Advocate**s on behalf of the applicants. It is this advocate who was conversant with timelines set by the rules with regard to service of the record on the respondent. Applicants plead that they should not be penalized for that default. When similarly confronted, the Court in the case of **Owino Ger vs. Marmanet Forest Co-Operative Credit Society Ltd [1987]eKLR**; among numerous others, declined to visit wrongs of advocates against their clients where there was sufficient demonstration that instructions for the defaulted process had timeously been given to the advocate and that it was the advocate's fault that the procedural steps sought to be remedied had occurred.

Applying the proposition in **Owino Ger** case [supra] to the rival positon herein, I find it prudent not to visit the default to file and timeously serve the record of appeal on the respondent on applicants because it is the advocate who was conversant with timelines set by the Rules who should have complied with timelines set in **Rule 82(1)** of the **Court of Appeal Rules.** If he was bereaved as contended by applicants, it is him who should have made arrangements for the continued smooth running of his office in his absence. Blame having been placed on the applicants advocates for the above default, penalizing applicants would be highly punitive. It is therefore excused.

On arguability of appeal, a copy of the memorandum of appeal has not been annexed. I however take judicial notice that the appeal is already filed. In light of the principles crystallized above, an arguable appeal is one that warrants, firstly, a response thereto from the opposite party and interrogation by the Court. Respondents response to applicants' assertion is that the appeal will be an academic exercise based on alleged existence of a mutual consent compromising the appeal and not an assertion that the appeal is frivolous and does not therefore warrant any argument. I am, therefore, satisfied that the appeal already filed is arguable.

On prejudice to be suffered by the respondent if the relief sought were granted, none was put forth by her as according to her the issue has been settled mutually.

On the right of access to justice, Applicants have already filed their appeal. All they seek from the Court is validation. Issues in controversy herein are succession in nature. Parties have taken opposite positions in the matter with the respondent saying the issue has been settled mutually while applicants claim the issue is still alive and falls for interrogation on appeal. As was observed by the Court in the case of **Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja and Another** **[2014]eKLR**, family issues are among the most acrimonious litigations in history. It is, therefore prudent to allow the rival parties herein ventilate their grievances raised in the appeal on merit.

Bearing all the above in mind, it is my view that ends of justice would demand that the appeal already filed be validated for merit disposal. The application is, therefore, allowed on the following terms: -

1) Leave be and is hereby granted to the applicants to serve the record of appeal out of time.

2) The time extended is to include the 28th May, 2020 when the record of appeal was served on the respondent.

3)The record of appeal is therefore deemed to be properly filed.

4) Costs of the application in the main appeal.

DATED and DELIVERED at NAIROBI this 19th day of February, 2021.

R. N. NAMBUYE

…………………………………..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR