IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. E316 OF 2020

BETWEEN

MARAGARET GACIGI GECAGA.....APPLICANT

AND

UDI MAREKA GECAGA.....1ST RESPONDENT

QUINVEST LIMITED.....2ND RESPONDENT

(Being an application for extension of time to file and serve a notice of appeal out of time and/or for leave to have the Notice of Motion filed out of time deemed as duly served on time, in respect of an intended appeal from the ruling of the High Court of Kenya (G. Nzioka, J.) dated 28th July, 2020 in Nairobi HC Misc. No. E087 of 2018)

****

RULING OF THE COURT

Before me as a single Judge, is a Notice of Motion dated 8th October, 2020, under **Rule 4** of the **Court of Appeal Rules**, **section 3A** of the **Appellate**

Jurisdiction Act, Cap 9 Laws of Kenya and **all other enabling provisions of the law** seeking orders as follows:

"1. THAT the applicant be granted leave to file a Notice of Appeal out of time against the Superior Court's Ruling delivered on 28th July, 2020.

2. THAT in the alternative, the Notice of Appeal filed and served on 26th August, 2020 against the Superior Court's Ruling delivered on 28th July, 2020 be deemed as duly filed and served within time.

3. THAT the costs of this application be provided for."

It is supported by grounds on its body and a supporting and supplementary affidavits of **Victoria Radoli** together with annextures thereto. It has been opposed by the 1st and 2nd respondent's grounds of opposition dated 1st December, 2020 and a replying affidavit of **Udi Mareka Gecaga** sworn on 25th September, 2020. It was canvassed virtually via Go-To-Meeting platform due to the current Covid-19 pandemic challenges through rival pleadings and sole respondents written submissions together with legal authorities relied upon by the respondents in support of their opposition to the application.

In support of the application, the applicant both in her supporting averments and those in rebuttal of the respondents replying affidavit avers cumulatively that the intended impugned ruling was delivered electronically on 28th July, 2020 due to the current Covid-19 pandemic challenges, without reading all the entire ruling as what was read to the respective parties verbatim was only portions of the ruling which were being summarized to the parties with a promise that a full text of the ruling would be sent to the advocates for the respective parties via their emails. Thereafter counsel on record for the applicant kept on making inquiries with the registry clerk regarding the release of the

ruling, a position confirmed by the respondents own correspondences addressed to the registry for the same purpose. Notable of those highlighted by the applicant and not rebutted by the respondents are those dated 3rd, 17th and 23rd August, 2020 respectively. It was not until the 26th August, 2020 that they accessed a copy of the said ruling and by which time, time for lodging an appeal as of right had lapsed. It is common ground that it was also applicant's position that without her advocate accessing the entire ruling, it was practically impossible for her advocate to give a considered legal opinion with regard to the extent of the applicant's exercise of her intended appellate right.

It is on the basis of the totality of the above summary that the applicant contends that the delay in seeking the Court's intervention to accord her an opportunity to exercise her intended appellate rights is not inordinate. Neither was it occasioned by her own default. It was entirely occasioned by circumstances beyond her control as already explained above. She should not therefore be penalized for that default notwithstanding her appreciation that timelines stipulated in the Rules of procedure ought to be respected. There are however exceptions to the above general rule giving rise to instances when such default is excusable and according to her this is one such instance in which it would be unjust to shut her out of the seat of the intended appellate justice on account of default in complying with the timelines within the Rules which is not of her own making but due to factors beyond her control as already explained above and on that account prayed for the application to be allowed as prayed.

In rebuttal, the respondents aver and also submit that they concede the intended impugned ruling was delivered on 28th July, 2020 in the presence of advocates for the respective parties; that the learned Judge read out only salient portions of the ruling. The entire ruling was not released to the parties in a week's time, as had been intimated to the parties by the learned Judge but on 26th August, 2020. They wrote severally to the registry seeking information of the release of the full text of the ruling. Upon release of the ruling, they observed that it had an error on the date of delivery indicated as 14th August, 2020 instead of 28th July, 2020 which was promptly corrected. They are aware the applicant accessed the same ruling on the same date of 26th August, 2020 as them, pursuant to which the applicant purported to file a notice of appeal on 26th August, 2020 outside the timelines stipulated in the **Rules** for lodging a notice of appeal as of right and without leave of the Court. It is this action on the part of the applicant that prompted them to file Nai Civil Application Number E298 of 2020 pending disposal. These were matters within applicant's knowledge and which she elected not to disclose considering that the application under consideration was filed thirteen (13) days after the filing and service on the applicant's advocates of E298 of 2020. The applicant is therefore guilty of nondisclosure of material particulars and therefore undeserving of the exercise of the Court's discretion in her favour asserted the respondent, and prayed for the application to be dismissed.

The respondent cited the case of **Mutiso vs. Mwangi [1999] 2 E. A 231**, **Attorney General vs. Justus Mike Kitivo [2017] eKLR**; **Gerald Kithu Muchanje vs. Catherine Muthoni Ngarwe & Another [2020] eKLR**, all on the threshold for granting relief under **Rule 4** of the **Court of Appeal Rules** in support of their submission.

My invitation to intervene has been invoked under the provisions of law cited above. The substantive provision of access is **Rule 4** of the **Court of Appeal Rules** it provides:

> **"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."**

Principles that guide the Court in the exercise of its mandate under the said Rules have now been crystallized by case. I take it from **M.K. Ibrahim & S.C. Wanjala SCJJ.)** in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2013] eKLR** in which the principles that guide the applicable threshold and which I fully adopt were restated 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.*

Section 3A of the **Appellate Jurisdiction Act Cap 9, Law of Kenya** on the other hand enshrines the overriding objective principle of the Court. The threshold for invocation and application of the above section have also been crystallized by case law. I take it from **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** for the principle/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.

In light of the above threshold, factors I am enjoined to take into consideration when deciding either way are the length of the delay, the reasons for the delay, possibly arguability of the intended appeal and any prejudice likely to be suffered by the respondent if the relief sought were granted.

On the period of delay, it is common ground that although the intended impugned ruling was delivered on 28th July, 2020, it was not until the 26th August, 2020 when the full text of the decision was released to the parties. The applicant filed a notice of appeal against the said decision of 28th July 2020 on that same date of 26th August, 2020 long after the fourteen (14) days period stipulated in **Rule 75(2**) of the **Court of Appeal Rules** for lodging a notice of appeal as of right had long lapsed. From 26th August, 2020 when the full text of the ruling was accessed to 8th October, 2020 when the application under consideration was dated and filed is a period of one (1) month and about twelve (12) days.

In **George Mwende Muthoni vs. Mama Day Nursery and Primary School, Nyeri C.A No. 4 of 2014 (UR)**, extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months, while in **Aviation Cargo Support Limited vs. St.**

Marks Freight Services Limited [2014]eKLR, the relief for extension of time was declined for the applicant's failure to explain why the appeal was not filed within sixty (60) days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six (6) months to seek extension of time within which to comply.

In light of the above case law, it is my finding that the delay involved herein is not so inordinate so as to disentitle the applicant to the relief sought. Success on this ground is not however perse sufficient to guarantee the applicant the relief sought. It has to be considered cumulatively with findings on the other relevant factors falling for consideration in an application of this nature before I can draw out conclusions either way.

Falling for consideration next are the reasons for the delay. As already highlighted above, the applicant contends that the ruling was not read out in full. Only certain salient aspects of it were read to the parties, a position confirmed by the respondents. It was, therefore, necessary for her advocate to await the supply of the full text of the ruling to peruse, analyze it, in order to form an informed decision on the same and advise the client accordingly. Contrary to the respondents' assertion that the applicant did not need the full text of the ruling before forming an informed decision to appeal or otherwise, **Rule 75(3)** of the **Court of Appeal Rules** is explicit that a party filing a notice of appeal has to indicate whether he or she is appealing against the entire ruling or a portion of it. It provides:

> **"75(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice."**

My take on the above **Rule** is that applicant's advocate's explanation that they had to await for the perusal of the full text of the ruling before making an informed decision on whether or not to pursue their intended appellate right and to what extend is not only plausible but also reasonable in the circumstances. It is therefore sustainable.

As for the arguability of the intended appeal, the applicant has not annexed a draft memorandum of appeal. The position in law however is that failure to annex a draft memorandum of appeal is not fatal to either the application or satisfaction of this factor. These can be discerned from other supporting facts relied upon by the applicant in support of the application. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008**.

Paragraph 9 of the supplementary affidavit indicates clearly that one of the issues intended to be raised on appeal is that touching on the fraudulent transfer of eight (8) properties situated in old Muthaiga i.e **LR No. 217/719 – 726** with the applicant's matrimonial home being situated on **LR No. 217/721**.

In law, it is not necessary to set out a plethora of arguable points for an appeal to qualify as an arguable appeal. One arguable point is sufficient. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**.

In light of the above position, I am satisfied that the intended appeal is arguable.

As for prejudice to be suffered by the opposite party if the relief sought by the applicant were granted, I find none in the respondents supporting documents.

Turning to the respondents' assertion that the applicant is disentitled to the relief sought for nondisclosure of material facts that the application under consideration was triggered by their application in E298 of 2020 seeking to strike out the incompetent notice of appeal lodged by the applicant on 26th August, 2020, it is on record that the applicant has an advocate representing her. It is a common position that it is the advocate who received the said process. This is the same advocate who has sworn both the supporting and supplementary affidavits in support of the application under consideration. It is this same advocate who should have disclosed this fact to the court.

Issue is whether that default on the part of the advocate on record for the applicant can be visited against the applicant. The approach I take in resolving this issue is that taken by the Court in **Owino Ger vs. Marmanet Forest Co-Operative Credit Society Ltd [1987]eKLR**; among numerous others, in which the Court variously 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 cured had occurred.

The above being the correct position in law, it is my finding that it will be highly too punitive to visit that default on the applicant who in my view is an innocent client who has entrusted the conduct of the intended appellate process to her advocates, especially when it is now trite that an appellate right is constitutionally entrenched and can only be withheld in exceptional circumstances. See **Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013] eKLR**; **Mbaki & Others vs. Macharia & Another [2005] 2EA 206** among numerous others.

I find no exceptional circumstances herein to warrant withholding the exercise of the applicant's intended appellate right.

In the result and on the basis of the totality of the above assessment and reasoning, I make orders as follows:

> **1) The applicant has fourteen (14) days of the delivery of this ruling to lodge and serve a notice of appeal and thereafter proceed according to law.**

2) Costs of the application in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST OF MAY, 2021.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR