IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, (P) (IN CHAMBERS)

CIVIL APPLICATION NO. 249 OF 2019

BETWEEN

NORAH CHELANGAT..APPLICANT

AND

CHELANGAT NASES NJAKAI................................ 1 ST RESPONDENT

TELEPOSTA PENSION SCHEME............................2ND RESPONDENT

KALE, MAINA & BUNDOTICH ADVOCATES......3RD RESPONDENT

(Being an application for extension of time to file and serve the Notice of Appeal and for extension of time to file and serve the Memorandum of Appeal and the Record of Appeal out of time in an intended appeal against the judgment of the Environment and Land Court of Kenya at Nairobi (K. Bor, J) dated 10th October 2017 in **ELC Case No. 531 of 2010 as consolidated with ELC Case No. 25 of 2018.)**

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RULING

1. Before me is a Notice of Motion dated 25th July 2019 brought under ***rule 4*** of the ***Court of Appeal Rules, 2010*** and ***Articles 25 (c), 48, 50 (1)*** and ***159*** of the ***Constitution of Kenya, 2010*** seeking leave to file a notice of appeal out of time to enable the applicant lodge an appeal against the judgment of ***Bor, J.*** delivered on 10th October 2017.

2. The application is premised on the grounds that upon delivery of judgment by the trial court, the applicant instructed the advocate who was on record for her before the trial court to file an appeal before this Court against the whole of the decision of the trial court. However, and unbeknown to the applicant, the said advocate did not act on the applicant's instructions. The applicant instructed a new advocate to pursue the appeal but save for filing a Notice of Appeal dated 24th October 2017 and lodged in court on 8th November 2017, the advocate did not pursue any other aspect of the intended appeal to the prejudice of the applicant.

3. According to the affidavit sworn by the applicant in support of this application, the delay and/or the failure to file the notice of appeal in good time is solely attributable to the different advocates whom the applicant had instructed to pursue the intended appeal and who failed to take up and execute the instructions by the applicant.

4. The applicant believes that she has a meritorious appeal, and has filed a draft memorandum of appeal which sets out 11 grounds of appeal. The applicant has filed written submissions in which she urges the Court not to penalize her for the faults of her former advocates. She argues that it is in the interest of justice that she be given an opportunity to pursue her intended appeal so that substantive justice is achieved and that the respondents will not suffer any prejudice if the orders sought are granted.

5. The application was not opposed as there was no replying affidavit from any of the respondents. The 2nd respondent indicated to this Court that it would not be opposing the instant application.

6. I have considered the application, the grounds in support thereof, the submissions as well as the law. The principles upon which this Court

determines an application for extension of time under rule 4 are well settled. The Court considers the length of the delay; the reason for the delay; the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See ***Leo Sila Mutiso v Rose Hellen Wangari*** ***[1999] 2EA 231;*** ***Fakir Mohammed v Joseph Mugambi & 2 others*** ***[2005] eKLR***; and ***Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees***, ***Civil Application No. 190 of 2019***.

7. In **Njuguna v Magichu & 73 Others** **[2003] KLR 507**, ***Waki J.A*** expressed himself thus:

> **"The discretion exercisable under Rule 4 of this Court's Rules is unfettered. The main concern of the Court is to do justice between the parties. Nevertheless, discretion has to be exercised judicially, that is on sound factual and legal basis."**

8. There is definitely inordinate delay in bringing this application. However, I believe that the applicant has explained the reason for the delay in her affidavit and I find her explanation plausible. If the various advocates appointed by the applicant had acted on her instructions or in the alternative if they had communicated to her their inability to take up or act on her instructions to finality, then I believe the applicant could have taken the requisite steps to remedy the situation as indeed she is attempting now through the instant application.

9. Taking from the above, it is my view that it would not only be unfair but also unjust to pin the responsibility on the applicant for non-compliance with the Rules of this Court and use this as the basis for withholding the exercise of discretion in her favour. The Court has on several occasions declined to visit the wrongs committed by advocates on innocent clients where it is sufficiently demonstrated that the client was not to blame. See ***Lee G. Muthoga v Habib Zurich Finance (K) Ltd & Another***, ***Civil Application No. Nai 236 of 2009***; and ***CFC Stanbic Limited v John Maina Githaiga & Another*** ***[2013] eKLR***.

10. On the aspect of the chances of success of the intended appeal, it is not my role at this stage to determine definitively the merits of the intended appeal. That is the duty of the full court when it is ultimately presented with the intended appeal. In this regard I am guided by the case of ***Athuman Nusura Juma v Afwa Mohamed Ramadhan*** **[2016] eKLR** where this Court stated as follows:

> **"This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word "possibly. "**

11. Having perused the impugned judgment and the grounds raised in the applicant's draft memorandum of appeal, it is my opinion that the applicant raises bona fide issues for determination by way of appeal, effectively meaning that the applicant has an arguable appeal.

12. On the issue of the degree of prejudice to be occasioned on the respondent if the application is allowed, the applicant argues that the respondents will not suffer any prejudice. I disagree. The parties herein have been litigating for over 10 years now and it is definitely in the interest of parties and more so the 1st respondent that these legal proceedings come to an end. On the other hand, the applicant is exercising her constitutional right of appeal, having been dissatisfied with the judgment of the trial court.

13. The applicant argues that she and her family have lived on the suit property for over 36 years and that they do not have any other place to call home; and that the 1st respondent has never at any time had possession of the suit property.

14. Taking from the above, it is my opinion that the degree of prejudice that the respondent stands to suffer if this application is allowed is outweighed by the prejudice that the applicant will suffer if this application is not allowed.

15. Under the overriding objective too, I would lean towards exercising my discretion in favour of the applicant. The aim of the overriding objective is to enable the Court to achieve fair, just, speedy, proportionate, time and cost saving disposal of cases. (See ***Kariuki Network Ltd & Another v. Daly & Figgis Advocates***, ***CA No. Nai 293 of 2009***). As this Court stated, albeit in a different context, the general trend following the adoption of the overriding objective and Article 159 of the Constitution is that courts now strive, as much as possible, to hear and determine disputes on merit, without being unduly constrained by procedural lapses. (See ***Nicholas Salat v. IEBC & 6 Others***, ***CA No. 228 of 2013***).

16. Consequently, I allow the application and direct the applicant to file a proper notice of appeal within fourteen (14) days from the date of this ruling. The applicant shall also bear costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021

D.K. MUSINGA, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR