IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, KIAGE & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NAI. 47 OF 2017

BETWEEN

MICHAEL NJUGUNA NJOROGE..APPLICANT

AND

RUTH WANJIKU KAMAU...1st RESPONDENT

CYRUS KOMU CHEGE..2nd RESPONDENT

LAND REGISTRAR KIAMBU.......................................3rd RESPONDENT

(A reference from the Ruling of Githinji JA delivered on 18th May 2018

*in an application for leave to file a Notice of Appeal and the Record of Appeal out of time, from the order of the High Court of Kenya at Nairobi (**Mugo. J**), delivered on the 27th of October 2005).*

in

H.C.C.C No. 912 of 1975

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Consolidated with

HCCC No 1702 of 1976

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AND

HCCC No. 781 of 1975

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RULING OF THE COURT

[1] By a Notice of Motion dated 13th March 2017, **Michael Njuguna Njoroge** the applicant herein, moved the Court under Rule 4 of the Court of Appeal Rules (the Court Rules) for leave to file a notice of appeal and a record of appeal out of time, against the order made in HCCC No 912 of 1975 by **Mugo J**, dismissing the applicant's suit. In accordance with Rule 53(1) of the Court Rules, the applicant's motion was heard by a single Judge (**Githinji JA**). In a considered Ruling delivered on 18th May 2018, the single Judge dismissed the applicant's

motion.

[2] The applicant who is dissatisfied with the ruling of the single Judge has sought the intervention of a 3 Judge Bench under Rule 55(1)(b) of the Court Rules. In urging the full Bench to allow his motion and set aside the orders made by the single Judge, the applicant through his counsel **Mr. Mwangi JT**, submitted that by dismissing the motion the single Judge failed to appreciate the gravity of the matter, and that in effect he had removed the applicant from the seat of justice. He pointed out that there was a certificate of delay which was exhibited, and which taken into account, showed that the application was filed in time.

[3] Learned Counsel **Mr. Rakoro** who appeared for **Njuguna Gachohi** an interested party, supported the applicant's motion urging that the single Judge had unfettered discretion to extend time upon being satisfied that there was a reasonable explanation for the delay; and that the single Judge was wrong in finding that there was no reason for the delay in filing the appeal when the applicant had actually given an explanation for the delay. This was the explanation that an appeal had earlier been filed in the name of the applicant's deceased father and that the mistake in filing the appeal in the name of the deceased was made by the applicant's counsel who was then on record. Counsel urged that the mistake should not be visited on the applicant. In addition, that the respondent would not be prejudiced by the delay as the matter has never been heard on merit.

[4] Learned counsel Ms. Waweru, who appeared for the 2nd respondent urged the Court to uphold the ruling of the single Judge contending that the applicant was merely relying on technicalities. As for the 3rd respondent he did not attend Court nor instruct counsel despite service of a hearing notice having been effected upon him.

[5] What is before us is a reference from the Ruling of a single Judge. Thus we must consider the Ruling of the single Judge in light of the motion which was before the single Judge, and also take note of the submissions that were made before the Judge, and the submissions made before us.

[6] Section 4 of the Court of Appeal Rules states that:

> **"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"**

[7] The use of the word "may' gives the single Judge discretionary powers in dealing with an application under Rule 4. In **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)***;* this Court had this to say regarding how an application for extension of time should be dealt with:

> ***"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted".***

[8] The Supreme Court in addressing the issue of the exercise of the court's discretion in extension of time, set the following principles in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others (SC. Application no. 16 of 2014) [2014] eKLR;** which guidelines the Supreme Court recently reiterated in **Kenya Revenue Authority vs Krish Commodities Limited** [2020] eKLR that:

> ***"1. extension of time was not a right of a party, it was an equitable remedy that was only available to a deserving party, at the discretion of the court;***
>
> ***2. a party who sought extension of time had the burden of laying a basis, to the satisfaction of the court;***
>
> ***3. whether the court should exercise the discretion to extend time, was a consideration to be made on a case- to- case basis;***
>
> ***4. where there was a reasonable cause for the delay, the same should be expressed to the satisfaction of the court;***
>
> ***5. whether there would be any prejudice suffered by the respondents, if extension was granted;***
>
> ***6. whether the application was brought without undue delay; and***
>
> ***7. whether in certain cases, like election petitions, public interest should be a consideration for extending time."***

[9] Our duty in a reference of this nature is not to sit on appeal against the Ruling of the single Judge, but purely to determine whether the single Judge properly exercised his discretionary powers in rejecting the applicant's motion for extension of time. As was held by this Court in **Abraham Tenoi Kimala v Job Kipsang**

Suter [2002] eKLR:

> ***"The Court of Appeal will not disturb the decision of a judge in the exercise of his discretion except where he has misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that he was clearly wrong in the exercise of his discretion and that as a result there has been injustice."***

[10] In **Abraham Tenoi Kimala v Job Kipsang Suter** (supra), although the Court did not specifically refer to **Mbogo & Another vs Shah [1968] E.A. 93**, it is evident that the Court was reiterating the principle set out by the former Eastern Africa Court of Appeal at page 96 of that decision where the Court stated that:-

> ***"An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate***
>
> ***Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice"***

[11] In the reference before us the reasoning of the single Judge in dismissing the applicant's motion is contained in the following extract of the Ruling:

> ***"An applicant should demonstrate inter alia, that the appeal or intended appeal has merit, that the extension of time would not cause undue prejudice to the respondents and that the delay has not been inordinate. In my view, the Court in deciding whether or not to exercise judicial discretion in favour of the applicant in this application should have regard to all the relevant surrounding circumstances.***
>
> ***[9] As regards the merits of the intended appeal, the applicant states that the withdrawn appeal had merit and has annexed the memorandum of appeal filed in the previous appeal. In the supporting affidavit, the 2nd respondent depones, amongst other things, that the intended appeal has been overtaken by events as the suit property has been subdivided and sold to third parties.***
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> ………………
>
> ***Those proprietors were not parties in the amended plaint or in the intended appeal. It is apparent from the foregoing that an appeal from the order of Mugo, J. which related to the amended plaint; <u>the parties therein and the parcels of land mentioned therein is not capable of giving an effective relief to the applicant due to subsequent events.</u>***
>
> ***[10] Although the delay in filing the application is only two weeks from the date the appeal was withdrawn, the decision that the applicant intends to appeal against was made more than 12 years ago. <u>No reasonable explanation why the applicant, who was all along represented by a counsel, filed the appeal in the name of his deceased father and persisted for several years in maintaining an appeal which was defective.</u> The withdrawn appeal was itself filed 9 years from the date of the impugned order. In dismissing the application for injunction pending appeal already referred to, the Court said in part;***
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> *"We impress upon learned counsel for the applicant to have this matter laid to rest. It is almost a decade since the notice of appeal was filed and the appeal itself has yet to be filed. No plausible reasons were given for this lack of promptitude."*
>
> ***All in all, <u>the cumulative delay in pursuing a right of appeal is unconscionable which disentitles the applicant to favourable exercise of discretion by the Court</u>.***
>
> ***[11] The prejudice to the 1st and 2nd respondent is manifest from the history of the dispute. The dispute has been weighing on the 1st and 2nd respondents for several years thus affecting their affairs.***
>
> ***[12] For the foregoing reasons, the application is hereby dismissed with costs to 2nd respondent. I make no orders as to costs for the 1st and 3rd respondents who did not appear in the application."*** (Underlining added)

[12] The above extract shows that the learned Judge properly directed himself on the principle applicable, and that in exercising his discretion he took into account the circumstances leading to the intended appeal and weighed the ostensible merit of the intended appeal. The learned Judge also took into account what he considered the cumulative delay in pursuing a right of appeal against a judgment which was delivered about 12 years ago.

[13] We concur with the single judge that it was necessary for him to take into account the circumstances leading to the application before him as these were relevant factors. However the single Judge appeared to have gone deeper than necessary by evaluating the intended appeal and coming to a conclusion that it was not capable of giving the applicant an effective relief due to subsequent events. The facts as highlighted by the Judge appear to be convoluted and the specific issues relating to the relief sought not having been argued before the Court, the learned Judge could only conclude that it was "arguable" whether the appeal would be successful. This did not necessarily mean that it had no merit.

[14] Another issue which is of concern is the Judge directing himself that there was:

> ***"No reasonable explanation why the applicant, who was all along represented by a counsel, filed the appeal in the name of his deceased father and persisted for several years in maintaining an appeal which was defective."***

[15] Apparently the single Judge did not take into account the applicant's explanation that the mistake in filing the appeal in the name of the applicant's deceased father was made by the applicant's counsel, and that the applicant was not aware of the error until the matter was raised in the Court. The applicant having engaged counsel, it was reasonable that he would entrust the counsel with the preparation of the appeal. The explanation that the mistake was that of the applicant's counsel is one that cannot be ignored or dismissed because the suit had actually been initiated by the deceased and the applicant was substituted in the deceased's place after his death. The applicant had a counsel who was responsible for preparing and filing the appeal, and it was not unreasonable that the applicant would trust his counsel to properly prepare the appeal. We find therefore that the learned Judge failed to take into account the plausible explanation given by the applicant for the delay.

[16] Be that as it may, as was stated by the Supreme Court, extension of time is not a right but is an equitable remedy that is only available to a deserving party. Therefore the conduct of the applicant is important. Secondly, the concern of the court is to do justice and this must be weighed equally between both parties. In this regard the learned Judge considered the cumulative delay of 12 years noting that the order subject of the intended appeal was made on 27th October 2005. The learned Judge also took into account the Ruling of this Court dated 3rd October 2014 in which the Court having considered the circumstances of an intended appeal against the same order made on 27th October 2005 made the following remarks:

> ***"We also note that this is an embarrassingly old matter weaving its thread from one court to another for the last almost 46 (forty-six) years. We impress upon learned counsel for the applicant the need to have this matter laid to rest. It is almost a decade since the notice of appeal was filed and the appeal itself has yet to be filed. No plausible reasons were given for this lack of promptitude."***

[17] Even if the mistake of counsel in filing the appeal in the name of the deceased was to be excused, no reason was given for the further delay of 14 days that was taken to file the applicant's motion for extension of time to file the appeal, after the defective appeal was withdrawn. The general delay and indolence by the applicant in ensuring that this matter is brought to conclusion, and the persistent lackluster manner in which the applicant and his counsel have dealt with the matter is inexcusable. We concur with the single judge that the prejudice to the respondents in having to deal with an appeal originating from a matter filed 46 years ago, is manifest from the history of this matter as well as the litigant attrition that has already taken place.

[18] In the circumstances we find that the single Judge came to the correct conclusion in declining to exercise his discretion in favour of the applicant. We uphold the order dismissing the applicant's motion dated 13th March 2007.

Dated and Delivered at Nairobi this 22nd day of May, 2020.

HANNAH OKWENGU

....

JUDGE OF APPEAL

P.O. KIAGE

....

JUDGE OF APPEAL

J. MOHAMMED

....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR