IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 78 OF 2019

BETWEEN

ROBERT CIAVOLELLA.....1ST APPLICANT

MARIANGELA BELTRAMI.....2ND APPLICANT

AND

GIULIO D'ERME.....RESPONDENT

(Being an Application for extension of time to file an Appeal out of time from the Judgment and Decree of the High Court at Nairobi (Ngetich, J) dated 25th October 2018

In

H.C.C.C No. 406 of 2017)

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RULING

In a ruling rendered on the 25th day of October, 2018 the High Court (Ngetich, J), found merit in the respondent's application for entry of summary judgment against the applicants in the sum of €35,000 upon being satisfied that the defence filed by the latter was an **"afterthought aimed at delaying payment of the debt".**

The applicants intend to challenge the ruling but have not done so because time within which they ought to have filed the appeal has elapsed. It is their explanation that after the entry of summary judgment their erstwhile advocate failed to communicate this fact to them; that upon learning of it, they timeously filed this application to have the time for filing the appeal enlarged; that the intended appeal is arguable; that the court below ought to have excused the error of their advocate who had failed to file their defence even after the court below had extended time for him to do so.

In reply, the respondent opposed the application contending that the intended appeal has no chance of success as the learned Judge correctly applied the law; that the applicants had on several occasions admitted liability; that the explanation that the applicants' erstwhile advocate was to blame for the delay is not plausible; that the applicants had failed to enter appearance and to file their defence within the required period; that after time was extended they still did not file the defence within the time granted; and that their application to deem the defence as duly filed within time was not prosecuted giving rise to the respondent's application for its striking out as being an afterthought.

By **Rule 75** of the Court of Appeal Rules, a person wishing to appeal a decision of any superior court below to this Court must start by giving notice of that intention by lodging such a notice with the registrar of the superior court below within 14 days of the date of the decision against which it is desired to appeal. Within sixty days of the date when the notice of appeal was lodged an appeal must be instituted.

But because it is recognized that there may well be justifiable reasons that may prevent a party from taking the requisite steps to file an appeal within those timelines, **Rule 4** gives any such party a lifeline thus;

> **"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". (My emphasis).

The words 'such terms as it thinks just' emphasized in **Rule 4** above signify that the single Judge on behalf of the whole Court in considering whether or not to enlarge time exercises a judicial discretion in order to achieve justice in the circumstances of each case. The rule does not express the specific considerations which the court may take into account in determining whether it is just to extend time. In fact, no limit is placed by the rule on the factors, which the court may consider in the exercise of its discretion. It has been left to the courts to determine the appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. For example on a reference to a full bench, this Court in **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi**, (1999) 2 EA 231, the *locus classicus* in this area, laid the following parameters;

> **" 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".**

The ruling, the subject matter in this application, was delivered on 25th October, 2018. While the notice of appeal was lodged the next day, on 26th October 2018, well within time. No record of appeal was, however filed at all.

Instead, on 12th March, 2019 this application was taken out. It is today almost one year and a half since the impugned decision was made and nearly 5 years since the respondent allegedly advanced to the applicants €35,000. Though the delay between 25th October, 2018 and 12th March, 2019 was only 4 months, given the history of the dispute, it appears to me that the applicant has not proceeded with the matter with the diligence, enthusiasm and dispatch called for under the present atmosphere of litigation in this country. The statement in the respondent's affidavit in reply that the applicants entered appearance outside the period stipulated in the rules, filed their statement of defence way out of time has not been controverted. That conduct coupled with the failure to file the record of appeal within time, shows a pattern of indolence and lethargy.

Again, the applicants have not denied that indeed on the day the ruling was read to the parties' counsel, the applicants' counsel applied for copies of the proceedings and even obtained an order to stay the execution of the orders for 30 days. The applicants then filed a notice of appeal and went to sleep.

Article **159(2)(b)** of the Constitution enjoins everyone to ensure that **"justice shall not be delayed".** As the Supreme Court in the case of **Teachers Service Commission V. Simon P. Kamau & 19 others** (2015) eKLR correctly explained;

> **"[67] ……the standpoint of the Constitution is that, delayed justice amounts to injustice: and the Courts, which are the dedicated mechanism for the delivery of justice, have an obligation to see to a steady pace of litigation, terminating within a reasonable time-frame".**

One of the overriding objectives of the Appellate Jurisdiction Act, an Act of Parliament which confers on the Court of Appeal jurisdiction to hear appeals **" is to facilitate the just, expeditious….. resolution of the appeals"**, and the Court is enjoined to ensure;

> **(a) the just determination of the proceedings;**
>
> **(b) the efficient use of the available judicial and administrative resources;**
>
> **(c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**
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> **(d) the use of suitable technology."**

See **sections 3A and 3B** of the Act.

The delay was inordinate and the explanation not plausible.

What are the chances of the appeal succeeding if I was to allow the application? This Court in **Athuman Nusura Juma V. Afwa Mohamed Ramadhan,** Civil Appeal No 227 of 2015, warned that this question cannot be determined definitively by a single Judge. The Court stated that:

> **"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"**

Without being conclusive, but only noting from the record that the debt was acknowledged and cheques issued towards settlement but dishoured, *ex facie* the chances of success of the intended appeal, in my respectful view are remote and bleak.

The respondent will be prejudiced by any order extending time to file the appeal, as this will spell further postponement of his right to enjoy

the fruits of orders issued by the High Court. There must always be finality to litigation. For the applicants that time has come.

The application has no merit and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 8th day of May, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR