IN THE COURT OF APPEAL

AT NAKURU

(CORAM: ASIKE MAKHANDIA, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 119 OF 2017

BETWEEN

NAOMI WAMBUI GACHIENGO.....APPLICANT

AND

ISAAC MAINA KAMAU.....1ST RESPONDENT

RAHAB WANGARE GACHIENGO.....2ND RESPONDENT

(An application for extension of time to file and serve record of appeal from the

decision of the Environment and Land Court at Nakuru (**L. N.Waithaka, J.)**

dated 9th *May, 2014)* in **ELC CASE NO. 34 OF 2013**)

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RULING

Before me is an application dated 25th October, 2017 by the applicant seeking to extend the order given by court on 21st November, 2014 which allowed the applicant to file her record of appeal against the judgment of the Environment and Land Court, **(L. N.Waithaka, J.)** dated 9th May, 2014 within 7 days. By the said order the applicant was directed to file her record of appeal within 7 days. She was unable to comply hence the instant application. It premised on Rules 4 and 82 of the Court of Appeal Rules and Rules 3A and 3B of the Appellate Jurisdiction Act. The grounds in support thereof are that; the applicant was aggrieved and dissatisfied with the impugned judgment and intends to appeal; through her then advocates on record, **Messrs Machage & Co. Advocates**, and on application, she was granted an order to file and serve the notice and record of appeal within 7 days on 21st November, 2014. That being an ignorant, the applicant did not understand the order and her then advocates did not explain to her the terms of the order; the said advocates did not also take the necessary action to file the notice and record of appeal; it was after a long period of time that the applicant went to inquire the position of the appeal and the advocate asked her to pay professional fees of Kshs. 30,000/-. She did not have the money and was handed back her file. She could not afford to engage another counsel due to financial constraints. She then approached Kituo cha Sheria for assistance. That the intended appeal is arguable with chances of success and the respondents will not be prejudiced in any way. The application was further supported by the applicant's supporting affidavit of the same date in which he reiterated and expounded on the above grounds.

The application was opposed. The 1st respondent raised a preliminary objection on the grounds that: the application was incompetent, incurably defective in law and an abuse of the court process and should be struck off with costs; the application was filed by a stranger in total disregard of the law; the applicant has never applied for certified copies of proceedings and judgment and the application has not been filed within the stipulated legal time lines; and that the judgment of the trial court has been fully executed and the 1st respondent has already obtained a title deed in line with the impugned judgment.

In her replying affidavit, the 2nd respondent stated that this was a second application for extension of time the applicant is making having failed to comply with the conditional orders of extension of time granted to her on of 21st November, 2014. That the applicant's blame against her previous advocates does not amount to mistake but inaction after receiving instructions to act for her and that the applicant had also failed to seek an affidavit from the said advocates to explain their failure to request for typed proceedings and file the appeal. That despite seeking the assistance of her current advocates on 30th June, 2014 the applicant has not explained why she then instructed him in October 2017 when the present application was filed. She avers that the applicant is not truthful in her claim of financial constraints because by dint of being co-wives she knows for a fact that the applicant has been collecting rent from tenants occupying land parcel **No. Nakuru**

Municipality Block 2/309 amounting to Kshs. 150,000/- monthly and has continuously undertaken construction of rental houses on the said land despite numerous warnings due to a pending succession cause. That the sole reason the applicant approached Kituo cha Sheria was to hoodwink the court in a well- choreographed scheme to hide the obvious latent delays and draw the sympathy of the court. That the applicant was ready to deposit security for costs previously and was therefore in a good financial position and has not explained how her fortunes changed all of a sudden. That it has been over 6 years since judgment was delivered and 3 years since the order for extension of time was made hence the period for delay is grossly inordinate. That the applicant has not given any satisfactory explanation for the said delay. That the present application was an afterthought after they instructed advocates to commence execution proceedings to recover costs awarded in the trial court and also to frustrate distribution of assets of her deceased husband. That she was 93 years old and sickly and had been in court for a long time and also wishes that the court proceedings should come to an end and allow her to peacefully enjoy the remaining days of her life. That the applicant's current advocate is not properly on record as he has not filed a notice of change of advocates hence the application is incompetent. That the decree in the impugned judgment has since been fully executed. That she will be prejudiced should the order sought be granted for the reasons that she is old and sickly and has been struggling to raise legal fees and this will further postpone the enjoyment of the fruits of costs granted to her in the judgment.

The application was dispensed with by way of written submissions on 1st July, 2020.

In the written submissions filed by her advocate on record, **John Mwariri learned counsel**, the applicant reiterated the contents of her supporting affidavit and further submitted that this being a new proceeding distinct from the original suit there was no need to file a notice of change of advocates. That Order 9 Rule 9 of the Civil Procedure Rules applies to representations in an ongoing or concluded suit and not an appeal. (See: **Minister for Internal Security and Provincial Administration v Centre for Rights, Education and Awareness (CREAW) & 8 Others [2013] eKLR** and **Ezekiel Kiprono Lamai v Lawrence Kibor Ngamai [2020] eKLR).** On whether that delay has been satisfactorily explained, the applicant reiterated that the she was not informed when judgment was delivered as her advocates did not attend court on the said date. She emphasized that the delay was occasioned by her financial incapacity and her being semi- illiterate and incapable of understanding the court process. That the 2nd respondent was in charge of the properties and she was a house wife thus it is not true that she had income from any of the properties. She argued that the application was meritorious and will not prejudice the respondents in any way since execution has already been stayed.

In his written submissions filed by **Messrs D. K. Kaburu & Co. Advocates**, the 1st respondent reiterated that the present application was filed by a stranger and that as far as he is concerned the firm of **Messrs** Machage & Co. Advocates have never ceased acting for the applicant. He stated that the delay in filing and prosecuting the application is unreasonable, unexplained and unconscionable. That the said application has been filed too late in the day and it would be against the interests of justice to allow it. Judgment was delivered 6 years ago and to date the applicant has never applied for typed proceedings and judgment. That upon being granted extension of time by consent, the applicant never filed and served the notice of appeal or record of appeal hence extension cannot be extended by court unless it is done so by consent of the parties. Lastly, he submitted that the deputy registrar had executed the decree in his favour and the impugned judgment fully satisfied hence there is no issue pending deliberation and urged the court to dissuade parties from litigating forever by rejecting the instant application.

The 2nd respondent in her written submissions filed by **Messrs Wachira Mbuthia & Co. Advocates** relied on the case of **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others [2015] eKLR** on the guiding principles for extension of time. It was reiterated that it was not a mistake on the part of the applicant's counsel but rather inaction after receiving instructions and therefore the applicant was equally under duty to pursue her matter. (See: **Donald O. Raballa v Judicial Service Commission & Ano. [2018] eKLR**). That no evidence was tendered to show that there was a letter requesting for typed proceedings copied to the respondents as required by Rule 82(2) of this Court's Rules. That the laxity in instructiing counsel who further did not take action was not explained and extension of time being an equitable remedy, equity aids the vigilant and not the indolent. Relying on the case of **M'mugambi Thiringi v Frasiah Wangui Gicheru [2015] eKLR, it** was submitted that I should not exercise my discretion in favour of the applicant since the reason for delay was not satisfactorily explained. While referring to the case of **Nicholas Omondo v A. Rocha Limited [2016] eKLR** counsel submitted that the applicant's advocate was improperly on record having failed to file a notice of change of advocates in compliance with Rule 23(1) of the Court of Appeal Rules. She further submitted that the applicant did not provide information of the prejudice she was likely to suffer and reiterated that this application was frustrating the distribution of the estate of their deceased husband, she was old and sickly and also struggling to pay legal fees. She urged me to dismiss the application with costs.

I have considered the application, grounds in support thereof, the respondents replying affidavits, the submissions by counsel as well as the law. The issue for determination is whether the application has met the threshold for enlargement of time.

Rule 4 of the Court of Appeal Rules does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. The case of **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231** which is the *locus classicus*, laid down the parameters as follows:

> **"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 issues I am called upon to consider are both discretionary and non-exhaustive as was explained in the case of **Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR** where the court rendered itself thus:

> **"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path…….. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor."**

There is no maximum or minimum period of delay set out under the law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** as was cited by the applicant, this Court stated:

> **"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 delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."**

The delay in filing the instant application and intended appeal was approximately 6 years. This is a considerably long time such that I would consider it to be inordinate delay in the circumstances of this case. The applicant has not taken any steps to prosecute the intended appeal such as requesting for typed proceedings and judgment or filing a notice of appeal. She does not seem keen on prosecuting the intended appeal. The applicant cited the inaction by previous counsel and financial constraint as the reason for the delay. I note that despite inaction by her counsel, the applicant was indolent in not complying with the conditions to the orders of extension of time issued by court on 21st November, 2014. The reason for the said delay has not been sufficiently explained. In the case of **Francis Mwai Karani vs. Robert Mwai Karani Civil Application No. NAI. 246 of 2006** Omolo, J.A held:

> **"That lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. Such a situation is already provided for in our laws by way of Rule 112 of this Courts Rules. I do not accept the applicants' explanation for delay of one year eleven months in filing the appeal on this matter. I reject it."**

So that the applicant's assertion that she could not file the Notice of Appeal on account of lack of monetary resources cannot sell.

As regards the chances of success of the intended appeal, it is not my role to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. In **Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015** 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."**

On the degree of prejudice to the respondents, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondent in granting an extension. The applicant was aggrieved by the judgment of the High Court and is desirous of appealing against the said judgment. However, the time for her to exercise her right of appeal has since lapsed hence the present application while the 1st respondent states that the decree has already been executed and the 2nd respondent cites old age, sickness and strained finances in legal fees to be paid to the advocates acting for her. No doubt this will cause prejudice to the respondents.

From the circumstances of the application before me, the applicant has not demonstrated the existence of the parameters set out in **Leo Sila Mutiso** (supra) and other decisions with regard to extension of time.

In the result, I decline to exercise my discretion to grant the prayer to extend time and accordingly dismiss the application with costs to the respondents.

Dated and delivered at Nairobi this 24th day of July, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR