IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 54 OF 2020

BETWEEN

MARTIN W. NGURU..APPLICANT

AND

THE HON. ATTORNEY GENERAL...RESPONDENT

(Being an application for extension of time to file an appeal out of time to the decision

of Hon. Lady Justice Maureen Onyango dated 12th day of July 2019

in

Milimani Nairobi ELRC No. 63 of 2014)

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RULING

Before me is a Notice of Motion dated 26th February 2020, brought under Rule 4 of the Court of Appeal Rules, substantively seeking extension of time to file an appeal against the ruling and orders of **Hon. Justice Maureen Onyango** of 12th July 2019, in ELRC No. 63 of 2014, out of time, together with an attendant prayer that costs of the application do abide in the appeal.

The same is supported by grounds on its body and a supporting affidavit. It has not been opposed. The application was canvassed by the sole pleadings and written submissions filed by the applicant dated 26th June 2020 without oral highlighting. The applicant in his averments and submissions contends that he unsuccessfully filed ELRC No. 63 of 2014, seeking compensation for wrongful termination, dismissed by **Lady Justice Maureen Onyango** on 12th July 2019, with an attendant order that each party to bear own costs. A notice of appeal and letter bespeaking proceedings were simultaneously filed on 29th July 2019. Certified copies of the proceedings were supplied on 15th October 2019. Counsel compiled the record of appeal and tasked an unnamed clerk in their office to file the record of appeal, but the said clerk failed to do so. Upon reopening offices after Christmas holidays, counsel carried out a review of pending files. That is when he discovered that the record of appeal had not been filed as earlier instructed prompting the filing of the application under consideration.

Counsel relied on Article 159(2)(d) of the Constitution which unclutches the court from subservience to technicalities; the case of **Donald O. Raballa vs. Judicial Service Commission & Another [2020]eKLR;** in which the decision of the court in **Fahim Yasin Twaha vs. Timamy Issa Abdalla & 2 Others [2015] eKLR,** was approved; the case of **Murai vs. Wainaina No. 3 [1982] KLR** on the principles that guide the court in the exercise of its mandate under Rule 4 of the Rules of the court, and submitted that on the basis of the supportive facts put forth, the applicant has satisfied the threshold for exercise of discretion under Rule 4 of the rules of the court to warrant granting the relief sought in favour of the applicant.

My invitation to intervene on behalf of the Applicant has been invoked under **Rule 4** of the Court of Appeal Rules, which provides as follows:

> **"4. 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 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."**

The principles that guide the exercise of jurisdiction under the Rule 4 of the CAR procedures are now well settled by numerous enunciations

in case law both binding and persuasive. I take it from the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231**, **Fakir Mohamed vs. Joseph Mugambi & 2 Others; [2005]eKLR**; **Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees [2020]eKLR**; **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018]eKLR** and **Athuman Nusura Juma vs. Afwa Mohamed Ramathan CA No. 227 of 2015**.

See also **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR**; **Nyaigwa Farmers' Co-operative Society Limited vs. Ibrahim Nyambare & 3 Others [2016] eKLR; Hon. John Njoroge Michuki & Another vs. Kentazuga Hardware Limited [1998] eKLR; Cargil Kenya Limited Nawal vs. National Agricultural Export Development Board [2015] eKLR; Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge [2013] eKLR;** and **Richard Nchapi Leiyagu vs. IEBC & 2 Others Civil Appeal No.18 of 2013,** among numerous others. The principles distilled from the above case law may be enumerated *inter alia* as follows:

> *(i) The mandate under Rule 4 is discretionary, unfettered and does not require establishment of "sufficient reasons". Neither are the factors for exercise of the courts unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application was granted; the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.*
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> *(ii) Orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and in ordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one.*
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> *(iii) The discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered.*
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> *(iv) As the jurisdiction is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant.*
>
> *(v) The degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension against the prejudice to the respondent in granting an extension.*
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> *(vi) The conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity;*
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> *(vii) Whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word*
>
> ***"possibly"****;*
>
> *(viii) The law does not set out any minimum or maximum period of delay.*
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> *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 power. There has to be valid and clear reason upon which discretion can be favourably exercised.*
>
> *(ix) Failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable.*
>
> *(x) An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court;*
>
> *(xi) The right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.*

The above principles were restated by the Supreme Court of Kenya (M**.K. Ibrahim & S.C. Wanjala SCJJ)** in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others** (supra) as follows:-

> **"(1)** ***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.***
>
> ***(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.***
>
> ***(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.***
>
> ***(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.***
>
> ***(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.***
>
> ***(6) Whether the application has been brought without undue delay; and***

(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

I have given due consideration of the record in light of the sole pleading, submissions of the applicant set out above, and the principles that guide the court in the exercise of jurisdiction under **Rule 4** of the CAR. The issue that falls for determination is whether the applicant has satisfied the prerequisites for granting relief under Rule 4 of the CAR. On the period of delay in seeking the Court’s intervention the threshold to be applied is that set out in the case of **George Mwende Muthoni vs. Mama Day Nursery and Primary School, Nyeri CA No. 4 of 2014, (UR)**, in which extension of time was declined on account of the applicant’s failure to explain a delay of twenty (20) months.

Rule **75** of the CAR makes provision for the filing of a Notice of Appeal, while Rule 82 of the Court of Appeal Rules is the substantive Rule that provides for the mandatory requirement that a certified copy of the proceedings be applied for within thirty (30) days of the delivery of the decision appealed against, while the record of appeal is required to be filed within sixty (60) days from the date of the filing of the notice of appeal, unless there is demonstration that the circumstances under consideration in an application of this nature fall within the proviso to the said **Rule 82** which provides for exclusion from computation of the sixty days for filing of the record of appeal, time taken by the registry for preparation and supply of a certified copy of the proceedings.

The Applicant’s Notice of Appeal and application for certified copies of proceedings ought to have been filed within fourteen (14) and thirty (30) days from 12th July 2019, the date of the judgment. The fourteen (14) days fell on 26th July 2019, while the notice of appeal on record was filed on 29th July 2019, a period of three days outside the timeline stipulated for in the rules. It is therefore incompetent and unless regularized, it cannot form basis for the granting of the order prayed for leave to file the record of appeal out of time.

Thirty (30) days on the other hand fell on 11th August 2019. The record is however silent as to when the letter bespeaking proceedings subsequently supplied on 15th October 2019 was filed. It is however evident from the record that although the applicant obtained a certified copy of the proceedings on 15th October 2019, the application for capacitation is dated 26th February 2020, a period of seven (7) months and fourteen (14) days from 12th July 2019, the date of the judgment and three months and eleven (11) days from 15th October 2019, the date of capacitation. As already indicated above, counsel for the applicant has accepted full responsibility for noncompliance with the prerequisites in the rules.

In **Owino Ger vs. Marmanet Forest Co-Operative Credit Society Ltd [1987] eKLR**; **CFC Stanbic Limited vs. John Maina Githaiga & another [2013] eKLR**; **Lee G. Muthoga vs. Habib Zurick Finance (K) Ltd & Another Civil Application No. Nai 236 of 2009**, and **Catherine Njoguini Kenya & 2 other vs. Commercial Bank of Africa Ltd Civil Application No. Nai 366 of 2009**, the court variously declined to visit wrongs committed by advocates and their staff on innocent clients where it had been sufficiently demonstrated that clients were not to blame for such default.

In the circumstances of this application since counsel has taken full responsibility for noncompliance with the rules, it is my view that it would be not only unfair but unjust to pin responsibility on the client for noncompliance with the prerequisite in the appellant rules and use this as basis for withholding the exercise of discretion in the applicant’s favour. Second, the period of delay under consideration is seven (7) months and twenty days from the date of the judgment and four (4) months, thirteen (13) days from the date of capacitation, which in my view is not so an inordinate delay so as to warrant withholding of the exercise of discretion in favour of the applicant.

On the request to exercise the appellate right the positon in law is as was crystalized by the case of **Richard Nchapi Leiyagu vs. IEBC & 2 Others** (supra); **Mbaki & Others vs. Macharia & Another [2005] 2EA 206;** and the Tanzanian case of **Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003;** for the holding *inter alia* that:

(i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;

(ii) the right to be heard is a valued right; and

(iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;

It is appreciated no draft memorandum of appeal is annexed. That default notwithstanding the principle of law set out above on this issue indicates clearly that in the absence of a draft memorandum of appeal the court can gauge the arguability of an intended appeal from other supportive evidence. Herein the applicant intends to challenge the dismissals of his claim for unlawful dismissal from his employment. In my view, that in itself is arguable notwithstanding that it may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the court.

In my view, issue of whetherdismissal of applicant’s claim against his dismissal from his employment was meritorious or otherwise is arguable notwithstanding that it may not succeed.

The above findings lead me to the determination of appropriate orders to make in the disposal of this application bearing in mind the fact that there is no prayer in the application under consideration for the validation of the incompetent notice of appeal without which granting an order for extension of time to file the record of appeal out of time would be superfluous. The default to make provision for such a prayer lay with counsel on record. The failure of counsel to include a prayer for validation of the incompetent notice of appeal is no justification for failure to grant the relief sought. The court has mandate to invoke both the inherent power of the court enshrined in Rule 1(2) of the Court of Appeal Rules and Article 159 (2)(d) of the Constitution to cure that default for ends of justice to be met in the matter.

The principles that guide the court on the invocation of Article 159(2)(d) of the Constitution and the inherent power of the Court have been crystalized by case laws in the case of **Jaldesa Tuke Dabelo vs. IEBC & Another [2015] eKLR;**

Raila Odinga and 5 Others vs. IEBC & 3 Others [2013] eKLR; Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others eKLR; Patricia Cherotich Sawe vs. IEBC & 4 Others [2015] eKLR wherein the court held *inter alia* that:

(i) Rules of procedure are hand maidens of justice;

(ii) A court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case;

(iii) The exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice;

As for the inherent power of the court in the case of **Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR;** and **Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell [2013] eKLR** and it was stated *inter alia* that:

(i) Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute.

(ii) Inherent powers are endowments to the Court such as will enable it to regulate its internal conduct, to safeguard itself against contemptuous or disruptive intrusions from elsewhere, and to ensure that its mode or discharge or duty is conscionable, fair and just.

In light of the above assessment and reasoning, the application dated 26th February 2020 is allowed on the following terms:

(1) The applicant has fourteen (14) days from the date of the ruling to file and serve a proper notice of appeal.

(2) The applicant has sixty (60) days from the date of the lodging of the notice of appeal in item 1 above to file and serve the record of appeal.

(3) Costs of the application to abide the outcome of the intended appeal.

(4) In default of either item 1 or 2, the leave granted herein to stand lapsed.

Dated and Delivered at Nairobi this 7th day of August, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR