IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL (APPLICATION) NO. 85 OF 2017

BETWEEN

PAULINE YEBEI..... 1ST APPLICANT

SAMUEL KUTTO.....2ND APPLICANT

AND

ANDREW W. KIPRONO (Suing as the legal representative

of the Late KIPRONO ARAP LETTING)..... RESPONDENT

(Being an appeal from the ruling and order of the Environment and Land Court at Kitale (Obaga, J.) dated 25th June 2015

in

Kitale ELCC No. 9 of 2014)

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RULING

Before me is a Notice of Motion dated 1st April 2020, brought under Section 3A of the Appellate Jurisdiction Act, Section 3 of the Judicature Act, Rules 1(2), 4 and 47 of the Court of Appeal Rules, 2010, Articles 10, 20(3), 25(c), 48, 50, 159(1), 159(2)(d), 164(3), 259(1) and (3) of the Constitution of Kenya and all enabling provisions of the law. It substantially seeks extension of time for the applicants to file and serve the record of appeal to this court, pursuant to Rule 4 of the Court of Appeal Rules against the ruling delivered on 25th June 2015 in Kitale Environment and Land Court Case No. 9 of 2014 and that the record of appeal filed herein against the ruling delivered on 25th June 2015 in Kitale Environment and Land Case No. 9 of 2014 be deemed to be properly filed and

served together with an attendant order that the costs of this application be in the cause.

It is supported by grounds on its body, a supporting affidavit of **Samuel Kutto** together with annextures thereto. It has been opposed by a replying affidavit of **Andrew Kiprotich Kiprono**, the respondent deposed on 28th November 2019, and filed on 29th November 2019 together with annextures thereto. The application was canvassed by written submissions of the applicants dated 30th June 2019 and the respondent's replying affidavit.

It is the applicants' averments and submissions that: vide an order dated 15th June, 2017 the court gave them leave to file and serve the record of appeal on the respondent within 21 days from the date of the said order being 15th June 2017; issued to them on 19th June 2017. On 20th June 2017 their advocate wrote to the Deputy Registrar requesting for proceedings and which letter was received by the registry on 3rd July 2017 and which fell on a Friday. The Proceedings were delivered to their advocates on 14th July 2017 by which time the twenty-one (21) days granted on 15th June 2017 within which the record filed on 20th July 2017 ought to have been filed had long lapsed on 6th July 2017. Their advocates filed Eldoret Court of Appeal Civil Application No. 72 of 2017 dated 25th July 2017, to validate the record of appeal which was withdrawn on the advise of the court for failure to file it within the already filed record of appeal. Their advocates however inadvertently failed to diarize the need to file the application to regularize the appeal in the appeal record timeously as advised by the court, until the 1st day of April 2019 when the appliciatn under consideration was prepared and filed on 3rd April 2019.

Based on the above averments and submissions, the applicants contend that they genuinely desire to pursue their appellate rights borne out

by their conduct of filing the notice of appeal timeously, and seeking leave to appeal out of time. The record of appeal was filed as soon as they had been capacitated. The delay in filing and serving the record of appeal in the circumstances demonstrated above is not inordinate. The failure to diarize and promptly file an application to regularize the appeal following advise from the court upon the withdrawal of the application filed separately for the same purpose was due to a genuine mistake and inadvertence on the part of their advocates. The applicants should not, therefore, be punished for that genuine mistake on the part of their advocates. The respondent stands to suffer no prejudice if the application were allowed especially when they have demonstrated by grounds set out in the memorandum of appeal that the appeal has high chances of success. The default to comply with the timelines set in the rules was not intentional.

To buttress the above submissions, applicants relied on the case of **Hassan Nyanja Charo vs. Katib Mwashetani & 3 Others [2014]eKLR; Sundowner Lodge Limited vs. Kenya Tourist Development Corporation[2019]eKLR**, in support of their contention that the dates in complying with the timelines set out in rules was neither inordinate nor intentional as it was caused by a genuine inadvertence on the part of their advocates which should not be visited on the clients.

In rebuttal, the respondent averred *inter alia* that: the filing of the application under consideration is a belated afterthought especially when it is not disputed that leave to file the appeal out of time was granted to the applicants on 24th May 2017 for twenty-one (21) days which lapsed on 14th June 2017, by which time no appeal had been filed; by the 3rd of July 2017 when the applicants applied for proceedings and 14th of July 2017 when the said proceedings were supplied time for lodging the appeal had long lapsed.

The respondent concedes that indeed the applicants took steps to regularize the record of appeal filed on 24th July 2017 out of time vide their application dated 26th July 2017 seeking to validate the appeal then already filed and which was subsequently withdrawn on 23rd October 2017 with directions of the court that a similar application be filed in the already filed appeal. It was not until 3rd April 2019 when the application under consideration was filed by which time a period of 525 days had lapsed which in the respondent's opinion is inordinate. The applicants' assertion that their advocates failed to diarize the matter in order to file another proper application holds no water especially when there is a clear demonstration from the applicants own supporting documents that the delay of 525 days was not occasioned by an error of judgment or misunderstanding of some rules but by purely and simply negligent inaction and indolence on their part which in the respondent's view does not warrant the exercise of the court's discretion to extend time in favour of the applicants. It is also inconceivable that the applicants never called on their advocate to find out the progress of the matter for the entire of the 525 days. That the respondent will be seriously prejudiced if the application under consideration were granted to his detriment especially when it is not disputed that the estate of the deceased has been prevented from utilizing land to which it has a title deed. It would, therefore, be unfair in the circumstances of this application to drag the respondent into prolonged litigation occasioned by the unexplained applicants' own indolence.

My invitation to intervene on behalf of the Applicants has been invoked under the numerous provisions of law cited above but those that fall for consideration is substantive Rule 4 of the Court of Appeal Rules, **Sections 3A** and **3B** which enshrines the overriding objective of the Court, Rule 1(2) of the Court of Appeal Rules enshrining the inherent power of the court. Article 159(2)(d) of the Kenya Constitution, 2010 which unclutches the Court from subservience to technicalities. The rest of the Constitutional provisions relate to the entrenchment of the now constitutionally underpinned appellate right falling for peripheral consideration only. **Rule 4** of the Court of Appeal Rules is the substantive rule for accessing the relief sought. It 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.

(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;

(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. 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 versus 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."

Other principles that fall for consideration are those that relate to **Sections 3A** and **3B** of the Appellate Jurisdiction Act both of which enshrine the overriding objective principle of the Court. The principles of law that guide the Court in the invocation and application of these provisions have been crystalized by the case law. See the case of **City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs**. **Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008); and Kariuki Network Limited & Another vs. Daly & Figgis Advocates Civil Application No. Nai 293 of 2009**, in which it was stated *inter alia* that: the purpose of the overriding objective principle is first, to enable the court achieve fair, just, speedy, proportional, time and cost-saving disposal of cases before it. Secondly, to embolden the court to be guided by a broad sense of justice and fairness. Thirdly, to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.

Rule 1(2) of the Court of Appeal Rules on the other hand enshrines the inherent power of the court. The principles of law that guide the court in the invocation of this power have also been crystalized by case law. See the case of **Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR; Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell [2013] eKLR** for enunciations *inter alia* first that: inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. It is the natural or essential power conferred upon the Court irrespective of any conferment of discretion. Second that, inherent powers are endowments to the Court such as will enable the court to *inter alia* regulate its internal conduct and to ensure that its mode or discharge of duty is conscionable, fair and just. **Rule 47** is merely a procedural rule for urgent applications and it requires no further interrogation. I have considered the record in light of the rival pleadings of the respective parties and sole submission of the applicants. Only one issue falls for consideration namely, whether the applicants have brought themselves within the ambit of prerequisites for accessing the relief sought. On the period of delay it is not in dispute that applicants were granted twenty-one days within which to file the record of appeal out of time before they had even applied for proceedings which expired on 6th July 2017. Proceedings were subsequently applied for on 3rd July 2017 and supplied on 14th July 2017 after the lapse of the 21 days. The record of appeal was however filed on 20th July 2017 a period of fourteen (14) days from the lapse of the twenty-one days.

Application dated 25th July 2017, was filed seeking validation of the record of appeal already filed, substantively withdrawn following

directions from **Githinji, JA.,** on 23rd October 2017 that it be filed in the appeal file. It was not until the 3rd April 2019 that the application under consideration was filed. From the above sequence of events, it is evident that proceedings were supplied eight (8) days after the lapse of the twenty (21) days within which to comply. The record was nonetheless filed on 20th July 2017 fourteen (14) days after the lapse of the

21 days. Application for validation was filed five days after the filing of the record. The application for validation in the appeal file was filed one year, four months, and twelve (12) days after directions given by **Githinji, J.A** on 23rd October, 2017.

The reason for the delay is attributed to applicants advocates who have taken full responsibility for non-compliance and have pleaded that, that default which according to them is a genuine mistake on their part should not be visited on their innocent client who also according to them has a bona fide cause of action against the respondent. The error of omission and commission committed by the advocates as borne out by the undisputed facts of the record are namely failure: (i) to seek and obtain a certified copy of the proceedings before seeking leave of court to appeal out of time; (ii) to seek extension of time after the lapse of the 21 days before filing the record of appeal; (iii) to file the application for validation of the already filed record of appeal in the appeal file; (iv) to timeously file the application for validation of the appeal in the record of appeal following the orders of 23rd October 2017; (v) to diarize the need to comply with the orders of 23rd October 2017 for prompt action resulting in the delay in complying with those orders as already indicated above.

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**, in all of which cases the court declined to visit the wrongs of an advocate against his client where there was sufficient demonstration that instructions for the defaulted process had been given timeously and that it was the advocate's fault that the procedural steps resulting in the application giving rise to the above decisions had not been followed. Further on the same issue in **Catherine Njoguini Kenya & 2 other vs. Commercial Bank of Africa Ltd Civil Application No. Nai 366 of 2009** the Court made observation that clients place a lot of trust in the good workmanship of their advocates and when advocates fail them in the discharge of that trust the business of the court is to balance the interests of the defaulting advocate and the innocent client and make appropriate orders for ends of justice to be met to the client.

Guided by the above, case law, it is my finding that the advocates having exonerated their clients from blame, it would be not only unfair but also unjust to shift blame on the client notwithstanding that they take responsibility for the poor workmanship displayed by their advocates. No doubt they placed trust in the good workmanship of their advocate. He is the one who was conversant with the timelines in the appellate rules. It is therefore my finding that the reason given for delay and which applicants have pinned on to their advocate who has also accepted full responsibility for the same is plausible and therefore excusable.

As for the arguability of the appeal, the issues applicants intend to raise on appeal as contended in their memorandum of appeal are that: they were never heard on their defence as the same was dismissed at an interlocutory stage; the learned judge exercised his discretion unjudicially when he declined to grant them an opportunity to be heard on their defence by refusing to set aside the ex parte orders to reopen the matter for them to be heard on their defence on merit contrary to the overriding objective of the law whose primary objective is that the business of the court is to do justice to the parties before it. Lastly, that the entire decision of the trial court is not only unjust but also highly oppressive. In law an arguable appeal is not one that must succeed, but one that raises a bona fide issue for determination. Considering the grounds of appeal summarized above in light of the above principle, it is my view that issues raised in the applicants' grounds of appeal are all arguable notwithstanding that they need not ultimately succeed.

On the right to be accorded an opportunity to exercise their now undoubtedly constitutionally underpinned appellate right, I wish to associate myself fully with enunciations in the case of **Richard Nchapi Leiyagu vs. IEBC** & **2 others; Mbaki & Others vs. Macharia & Another [2005] 2EA 206**; and in the Tanzanian case of **Abbas Sherally and 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 also the cornerstone of the Rule of law;*
>
> *(ii) the right to be heard is a valued right; and*
>
> *(iii) 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;*

Applying the above threshold to the above assessment and reasoning, it is my finding that sufficient basis has been laid for me to accord the applicants an opportunity to be heard on their already initiated appeal albeit invalid and needs validation. My reasons are that:

> *(1) The intended appeal is arguable notwithstanding that it may not ultimately succeed.*
>
> *(2) The delay in complying with the timelines set in the rules is whole attributable to applicants advocates who have also taken full responsibility for that delay and exonerated applications from responsibility.*
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> *(3) The delay of one year four months and twelve (12) days falls short of the delay 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 for failure to explain a delay of twenty (20) days.*
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> *(4) Applicants are on the land albeit as trespassers in terms of the impugned decision;*

(5) justice would demand that the respondent be compensated for any inconvenience caused for withholding him from the enjoyment of the fruits of the judgment granted in his favour by way of costs payable personally by applicants advocates.

The upshot of the above assessment and reasoning is that, I am inclined to allow the application dated 1st April 2020 on the following terms:

(i) The appeal No. 85 of 2017 already filed be and is hereby deemed as properly filed.

(ii) The same is directed to be processed speedily for expeditious hearing in view of its age.

(iii) The respondent will have costs of the application to be paid personally by counsel for the applicants to be agreed or assessed as deemed fit.

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