IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (NAMBUYE, JA - IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 106 OF 2018

GEORGE GAKIO KINOGA.....……APPLICANT

AND

ANNAH WAMAITHA GITHINJI..... RESPONDENT

(An Application seeking leave to enlarge the time within which to file and serve a Notice of Appeal in the intended Appeal arising from the Ruling of the High Court of Kenya at Nairobi (M.W. Muigai, J) delivered on 12th June, 2015

in

H.C. Succession Cause No. 972 of 2012)

****

R U L I N G

Before me is a Notice of Motion dated 6th April, 2018 and filed on the 6th November, 2018. It is expressed to be brought under **Article 159** of the Constitution of Kenya, **section 3A** and **3B** of the Appellate Jurisdiction Act, **section 76** of the law of Succession Act and **Rule 44 (1)** & **(2)** of the Probate and Administration Rules. A total of six prayers are sought. Prayer 1 is spent. Prayer 2 and 3 are misplaced as they do not fall for consideration by a single Judge. That leaves prayers 4 and 5 for consideration together with an attendant prayer for costs. These read:

> ***"4. That this Honourable Court be pleased to enlarge the time within which the applicant herein may file and serve a Notice of Appeal.***
>
> ***5. That this Honourale Court be pleased to enlarge the time within which the Applicant's herein may file and serve a Record of Appeal.***
>
> ***6. That the Costs of this Application be provided for."***

The application is grounded on the ground in its body, a supporting affidavit deposed by **Monica Oweya** an advocate in the firm of Bench and Company Advocates, together with the annextures thereto. It has not been opposed.

The application was canvased by way of oral submissions. Learned counsel **Miss Ochieng** holding brief for **Mr. Bench** appeared for the applicant. There was no appearance for the respondent and being satisfied that they had notice of the hearing date, I allowed **Miss Ochieng** to prosecute the application.

Supporting the application, **Miss Ochieng** submitted that the intended impugned ruling was delivered on 10th November, 2017 dismissing the applicant's application which sought a review, setting a side and staying orders made in a Ruling of 12th June, 2015; that the advocate then on record for him never notified him of the delivery of the same; that he was only notified of the delivery of the said ruling on 15th March, 2018 through a letter addressed to him by the advocate on record for the respondent; that by the time the applicant became aware of the intended impugned ruling, appreciated its contents and gave instructions to another advocate to appeal against the said ruling, time for initiating the appellate process had lapsed, hence the application under consideration.

That the application under consideration was dated on 6th April, 2018 filed on the 6th November, 2018 and served on the respondent on the 21st November, 2018 at 10.00 a.m.; that the application is not opposed; that the intended impugned ruling has serious and adverse consequences against the applicant's proprietary interest in LR. No. Dagoretti/Kangemi/776. It is therefore necessary for time to be enlarged

to enable the applicant initiate the appellate process out of time as he is likely to suffer irreparable loss and damage through no fault of his own; that the failure to notify him of the decision of the intended impugned ruling lay with his advocate then on record for him; that he should not therefore be punished for any inadvertence on the part of his advocate then on record for him; that no prejudice will be suffered by the respondent if the applicant were to be granted the relief sought; that there has been no in ordinate delay in seeking the court's intervention; that the intended appeal is also arguable and a likelihood of success and that the Court has an unfettered discretion to grant the relief sought.

My jurisdiction to intervene on behalf of the applicant has been invoked under the provision of law indicated above. *Article 159* of the *Constitution* provides *inter alia* as follows:-

> (***d) Justice shall be administered without undue regard to procedural technicalities.***

The principles that guide the invocation of the above provision set out in the case of **Jaldesa Tuke Dabelo versus IEBC & Another** [2015] eKLR wherein, the Court held *inter alia* that:

> ***"rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prescribed by an Act of Parliament that procedure should strictly be followed as Article 159 of the Constitution was neither aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action."***

In **Raila Odinga and 5 others versus IEBC & 3 Others** [2013] eKLR, the Supreme Court stated that, the essence of **Article 159** of the Constitution is that, 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. In **Lemaken Arata versus Harum Meita Lempaka & 2 others eKLR**, it was stated that 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. Lastly in **Patricia Cherotich Saw versus IEBC & 4 others [2015] eKLR,** it was stated that **Article 159 (2) (d)** of the Constitution is not a panacea for all procedural short fall as not all procedural deficiencies can be remedied by it.

Section 3A and **3B** of the appellate jurisdiction Act, enshrine the overriding objective principles of the Court. These provide as follows:-

> ***3A.(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.***
>
> ***(1) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).***
>
> ***(2) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.***
>
> ***3B. (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-***
>
> > ***(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***
> >
> > ***(d) the use of suitable technology."***

The principles that guide the invocation of this principle have been crystallized by case law. **See the case of City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008)**, which states that the aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it; the case of **Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009)**; that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness; that the principle aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.

Section 76 of the law of *Succession Act Cap 160* laws of Kenya and Rule **44(1) & 2** of the Probate and Administration Rules deal with applications for revocation of grants. These are of no relevance to the application under consideration. They are misplaced. There is therefore no need for me to interrogate them. The relevant rule the applicant ought to have cited to access the relief sought is **Rule 4** of the Court of Appeal Rules (CAR). The failure to so cite this provision is not *per se* a ground for rejecting the application. That defect is curable under **Article 159(2) (d)**. I will therefore proceed to consider the application on merit and in light of the principles that guide the exercise of my jurisdiction under **Rule 4**. 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 guiding the exercise of this jurisdiction are now well settled. I will highlight a few by way of illustration. In **Edith Gichugu Koine versus Stephen Njagi Thoithi [2014] eKLR, Odek, J.A**. held the view that the mandate under Rule 4 is discretionary, which discretion is unfettered and does not require establishment of "*sufficient reasons"*. Neither is it limited to the period for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance.

In **Nyaigwa Farmers' Co-operative Society Limited versus Ibrahim Nyambare & 3 Others** [2016] eKLR, **Musinga, J.A.** stated that the principle that guide this Court in considering an application of this nature are, the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and lastly, the degree of prejudice to the respondent if the application is allowed. In **Hon. John Njoroge Michuki & Another versus Kentazuga Hardware Limited [1998] eKLR**, **G.S. Pall JA** (as he then was) added *inter alia* that an appellant has a right to apply for extension of time to file the notice and record of appeal under rule 4 of the CAR; that this order should be granted liberally 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 appeal; that the discretion granted under rule 4 of the CAR to extend time for lodging an appeal is, as well known, unfettered and is only subject to it being granted on terms as the court may think just and also that the intended appeal is an arguable one; and lastly that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it.

In **Cargil Kenya Limited Nawal Versus National Agricultural Export Development Board [2015] eKLR**, **K. M'Inoti J.A,** made observations *inter alia* that to extend the time prescribed by the CAR for the doing of any act is subject only to the requirement that it must be exercised judicially as the discretion conferred by that rule is wide and unfettered. Quoting with approval the holding

in **Fakir Mohamed versus Joseph Mugambi & 2 Others CA Nai. 332 of 2004** the learned Judge added that being unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. For example, the period for the delay, the reason for the delay (possibly) 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 the delay on public administration and the importance of compliance with time limits; the responses of the parties and also whether the matter raises issues of public importance which in the Judge's view are all relevant but not exhaustive factors.

There is also **Paul Wanjohi Mathenge versus Duncan Gichane Mathenge [2013] eKLR** in which **Odek, J.A.** held that 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 proceedings relied upon by such an applicant that the intended appeal is safe. In **Joseph Wanjohi Njau versus Benson Maina Kabau-Civil Application No.97 of 2012**, it was observed that an arguable appeal is not one that must necessarily succeed but

is one which ought to be argued fully before court; and lastly, in **Richard Nchapi Leiyagu versus IEBC & 2 Others Civil Appeal No.18 of 2013** it was stated that the right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, the power to do so is itself exercised sparingly and this should be done in circumstances that protect the integrity of the court process from abuse and in the process acting as a shield against actions that would amount to an injustice to litigants and also play a secondary role for ensuring that at the end of the day there should be proportionality.

I have given due consideration to the above principles in light of the above single submissions. It is not in dispute that there is a ruling in place having been delivered by the **Hon. Lady Justice M.W. Muigai, J.** on the 10th day of November, 2017, in favour of the respondent. The applicant says he was aggrieved by the said ruling and has now given instructions to his advocate currently on record for him to initiate the appellate process. Under the Court of Appeal Rules an appellate process is initiated by the lodging of a Notice of Appeal. Rule 75 of the Court of Appeal Rules requires such a notice of appeal to be lodged within fourteen (14) days of the date of the judgment, of which the applicant acknowledges not to have complied with, hence the application under consideration. *Rule 75* of the Rules of the *Court of Appeal Rules* provides *inter alia* as follows:

> ***"75.(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.***
>
> ***(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.***
>
> ***(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.***
>
> ***(6) A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant***".

The position in law as crystalized by the case law assessed above is that non-compliance with the above rule does not *per se* shut out a litigant from the seat of justice, hence the mandate donated to the court by Rule 4 of the Court of Appeal Rules. In addition to the principles in the case law assessed above, I also have to bear in mind that where ends of justice dictates so in an application of this nature, it will be prudent for a court of law to allow such an application to enable parties ventilate their respective positions on merit because the right to a hearing has not only been a well-protected right in our Constitution but also acts as the cornerstone of the rule of law. See **Julius Kamau Kathekea vs. Weruguru Katheka Ayaga and 2 others [2013] eKLR;** that the extension of time is not a right of a party but a discretionary remedy that is available to a deserving party who has discharged the burden of laying a basis to the satisfaction of the court, that the court should exercise its discretion to extend time in his or her favour. See **Paul Wanjohi versus Dancan Gichane Mathenge [2013] eKLR**; that a court is also entitled to consider other factors outside those envisaged under the Rule 4 procedures. See **Gachuhi Muithanji versus Mary**

Njuguna [2014] eKLR; lastly, that the merits of the intended appeal are also a relevant factor for consideration. See Dominic **Mutei Kombo and 2 others versus Kyule Makau [2015) eKLR.**

Starting with the period of delay, it is not disputed that the Ruling intended to be impugned was delivered on 10th November, 2017. The applicant therefore had fourteen (14) days from the date of delivery to file a notice of appeal. Fourteen (14) days lapsed on the 24th November, 2017. It therefore follows that by the time the applicant came to learn of the delivery of the said ruling on the 15th March, 2018, time for filing the notice of appeal had already lapsed. There was therefore need for the applicant to initiate the procedure to regularize that process. The application seeking the courts intervention was dated 6th April, 2018, that is a period of twenty one (21) days from the date the applicant was notified of the delivery of the ruling by the respondents advocate. It was however not until the 6th November, 2018 when the same was filed, a period of seven (7) months and twenty days from the date the contents of the intended impugned ruling was brought to his attention and six (6) months from the date it was dated.

In George Mwende Muthoni vs Mama Day Nursery and Primary School, Nyeri CA NO. 4 OF 2014, (UR), extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months. In Aviation **Cargo Support Limited vs. St Marks Freight Services Limited [2014] eKLR**, the relief for extension of time was declined for the applicant's failure to explain why the appeal was not filed within the sixty days stipulated within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply. In **Christopher Mugo Kamotho vs. the Hon. Attorney General [2009] eKLR,** the relief was withheld for the failure to explain why it took thirteen (13) days to apply for a certified copy of the proceedings on the one hand, and seeking extension of time soon upon being capacitated with a certificate of delay. In light of the above case law, it is my considered view that a delay of two days cannot in the circumstances be said to be such an inordinate delay that would justify the withholding of the relief sought of extension of time within which to validate the initiated appellate process.

The uncontroverted reason given for the delay is inadvertence on the part of the advocate then on record for the applicant who allegedly failed to bring to the applicant's attention the delivery of the said ruling. Although no proof for such inadvertence was sourced from the said former advocate, such an allegation is not alien in any litigation as born out by case law assessed here below; In **Lee G. Muthoga versus Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nai 236 of 2009** the Court ruled that it is a widely accepted principle of law that a litigant should not suffer because of his advocates' oversight. In **CFC Stanbic Limited vs. John Maina Githaiga & another [2013] eKLR**, wherein a litigant had given instructions to his advocate in good time to enter appearance, the court ruled that the default being clearly a mistake on the part of the advocate, the same should not be visited upon the litigant. See also **National Bank of Kenya Ltd & 2 others vs. Kisumu Papermills Limited [2006) eKLR**, where the court approved the observations of **Madan, J, in Murai vs. Wainaina (No.4) [1982] KLR, 38** *inter alia* that the door of Justice is not closed because a mistake has been made by a person of experience who ought to have known better. In light of the above case law, I am satisfied that the delay in complying with the prerequisites in Rule 75 of the CAR was occasioned by the applicant's advocate, then on record for him. The applicant should not therefore be penalized for the mistakes of his advocate then on record for him. Although it took the applicant seven months and twenty days to seek the court's intervention after dating the application only 21 days after the content of the ruling was brought to his attention, that delay has been sufficiently explained that he had to source funds and then engage another advocate to appraise the record and then file the application under consideration. It is therefore excusable in the interest of justice.

As for the chances of the intended appeal succeeding, the draft memorandum of appeal indicates that the applicant intends to contend that the judge failed to appreciate the case in totality; gave undue weight to the respondent's case, upheld the certificate of confirmation notwithstanding the court's own acknowledgement that there was context as to whether the respondent was a wife to the deceased or not; in shifting the burden of proof to the applicant to prove that the respondent was not a wife to the deceased; in failing to properly appreciate the applicants case and lastly for ignoring judicial precedents relevant to the matter. In law, an arguable appeal need not be one that must ultimately succeed. See **Joseph Wanjohi Njau versus Benson Maina Kabau- Civil Application No.97 of 2012**. Going by the content of the draft memorandum of appeal highlighted above, I do find that the intended appeal is arguable notwithstanding that it may not ultimately succeed.

As for prejudice to be suffered by the respondent if any, none has been pointed out as the respondent neither filed a replying affidavit to the application nor attended court to oppose the same.

As for the other factors that also need consideration, it is sufficient for me to stress that the right of appeal or the right to be heard which is a constitutionally entrenched right can only be withheld in exceptional circumstances. See **Richard Nchapi Leiyagu versus IEBC & 2 Others** (supra). In the instant application, the matter involves succession. It is only fair that the applicant be capacitated to ventilate his grievances against the intended impugned ruling on appeal especially in circumstances where his request is not being contested by the opposite party.

I therefore find merit in the application. I proceed make orders as follows:

The applicant has fourteen (14) days of the date of the ruling to file and serve a notice of appeal and thereafter to proceed according to law.

Dated & Delivered at Nairobi this 8th Day of March, 2019.

R.N. NAMBUYE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR