IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 115 OF 2015

BETWEEN

RHODA NDULULU SENGETE.....1ST APPLICANT

DANIEL KASIMU GIBSON.....2ND APPLICANT

AND

TABITHA KAVENGE MATOLO.....RESPONDENT

(Being an application for extension of time to file and serve the notice and record of

appeal from the judgment and order of the High court of Kenyaat Machakos

(Charles Kariuki, J.,) delivered on 19th December, 2014

in

H.C E. L.C. No. 309 of 2005.)

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RULING

[1] **Rhoda Ndulu Sengete** and **Daniel Kasima Gibson**, (applicants) seek in this application extension of time to file and serve the Notice and Record of Appeal out of time. The application is dated 5th May 2015, although it is not clear the date of filling which may or may not be within the same time. The judgment that they intend to appeal against was delivered on 19th December, 2014 in ELC No 309 of 2005. The application is supported by the affidavit of Daniel Kasimu Gibson sworn on 5th May, 2015 and a supplementary one by the same deponent sworn on 22nd October, 2018. In the said affidavit, the applicant annexed some pleadings and elaborated on some grounds of appeal that are also contained in the draft memorandum of appeal to bolster the argument that the appeal was arguable.

[2] According to counsel for the applicants his clients were aggrieved by the said judgment and they instructed the firm of Wanyoike & Macharia Advocates to lodge an appeal. That the said advocates did not lodge the Notice of Appeal nor the Record of Appeal. The applicants therefore changed Advocates and appointed the firm of E. M Obonyo & Co Advocates who filed the instant application. Counsel for the applicants stated that failure by an advocate to file the Notice and Record of Appeal should not be visited on an innocent client. Counsel cited the case of **Belinda Murai & 9 Others vs. Amos Wainaina [1978] e KLR** where **Law, JA.** while considering whether to grant leave held that mistakes of a legal counsel may amount to a sufficient cause for purposes of an application for extension of time to file a Notice of Appeal. Further it was stated that the proposed appeal is arguable as the dispute is over a substantial parcel of land measuring some 29.9 acres and land being sensitive issue, it would be in the interest of justice to grant leave to pursue the appeal.

[3] During the plenary hearing, **Mr. Mutua** SC submitted that the delay of a period of about 4 months between the time of the delivery of the judgment and filing of the instant application was not inordinate. Counsel emphasized that the intended appeal stands an overwhelming chance of success because the Judge on one hand made a determination that the claim of adverse possession could not succeed, but yet distributed the property among the parties disregarding the other beneficiaries of the estate of the late Joshua Matolo; also having found the registration of the suit property in favour of the applicants was not fraudulent, they want to argue that the Judge was in error to invoke the doctrine of proprietary estoppel to allocate the land to the respondent. Counsel urged the motion be allowed as the respondent was not going to suffer any prejudice.

[4] This application was opposed; **Alphonce Muema Mbindyo**, advocate for the respondent swore the replying affidavit on 27th July, 2015. Counsel stated that no Notice of Appeal or Record of Appeal have been filed after a lapse of 3 months and 21 days which in his view amounts to inordinate delay. Further no justifiable reasons or explanation has been offered for such a delay, pointing out that the notice of appeal ought to have been filed after fourteen (14) days from 19th December, 2014 and the record of appeal after sixty days. Counsel argued that should leave be granted the respondent who is the mother- in law to the 1st applicant and grandmother to the 2nd applicant will greatly be prejudiced. Counsel also pointed out that by a Ruling issued on 17th November, 2016 the respondent successfully applied for the revocation of the certificate of confirmation of grant issued to the applicants. In the said Ruling, a fresh grant was issued whereby the suit land was distributed as per the judgment of the High court. Moreover the respondent is aged over 100 years and would wish to see an end to this protracted litigation during her lifetime. Counsel cited several cases **Mwazighe & Another vs. Walele & Others East Africa Law Reports [2011] 1 EA** among others.

[5] I have anxiously considered this application, the affidavits on record and submissions by counsel and the law, as this matter involves members of the same family. There is no doubt that this being a Rule 4 application, my discretion is unfettered. The Rule provides:-

> ***"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 doing any act authorized or required by these Rules, whether before or after 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."***

[6] Although the discretion is unfettered, nonetheless it should be exercised judicially, not on whim, sympathy or caprice. Guidance can be drawn from the well-established principles established in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In ***Henry***

> ***Mukora Mwangi vs. Charles Gichina Mwangi- Civil Application No. Nai. 26 of 2004***, this Court held:-
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> ***"It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi vs. Kenya Airways Ltd. [2003] KLR 486 in which this Court stated:-***
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> ***"Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus:-***
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> ***'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.' "***

[7] Under **Rule *75*** of the Court Rules, the applicant was required to lodge the Notice of Appeal within fourteen days of the date of the judgment delivered on 19th December, 2015. Therefore, the applicant herein was required to file the Notice of Appeal on or about the 26th January, 2015. The application for extension of time to file the Notice of Appeal was filed on 5th May, 2015 almost four (4) months after lapse of the requisite time frame. Any delay is a delay and in my view is unreasonable should be explained, when the delay is of several months it is what is termed inordinate and the burden of offering cogent explanation is higher.

[8] I now proceed to consider whether the explanation advanced by the applicant for the delay in lodging the Notice of Appeal was reasonable and excusable. It was the applicants' contention that the delay in filing the Notice of Appeal was occasioned to his counsel who did not follow their instructions. On the other hand, the respondent contended that the applicant did not attach any evidence to show counsel failed to take instructions therefore no mistake can be attributed to counsel. On prejudice, counsel argued that his client is advanced in age; she would wish to see the end of this protracted litigation during her life time; she is the mother and grandmother respectively of the applicants, she has been granted a confirmed grant of letters of administration over the subject suit property and she would wish to distribute it to her heirs.

[9] Ordinarily a mistake by counsel is usually excusable if it is genuine, and does not cause prejudice to the other side. See the case of:- ***Belinda Murai & others vs. Amoi Wainaina,*** *(supra)* **Madan, J.A.** *(as he then was)* was at his best legal wit when he explained what constitutes a mistake in the following words:

> ***"A mistakable is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule..."***

[10] Is the delay attributed to the applicants' advocates excusable; the applicants did not attach any evidence on their part to show that they had instructed the said firm of advocates; better still, there was not even a letter following up on the said instructions. I think it is time litigants started to bear the mistakes made by lawyers whom they have chosen. I say so because sometimes it has become almost obvious for every delay an advocate is blamed and yet no action is demonstrated to show there was due diligence on the part of the litigant.

[11] On the issue of prejudice, counsel for the respondent argued very strongly that his client octogenarian would be prejudiced. Counsel

presented a Ruling in **Succession Cause No. 823 of 2009** in which the respondent was granted a confirmed grant of letters of administration vesting the suit property as per the judgment intended to be appealed against. This contention is not farfetched and for the very reason that this appeal involves a delicate relationship of members of the same family. The applicants have taken all this into consideration and thus should have been diligent to ensure the appeal was filed on time.

For the foregoing reasons, I find no merit in this application which is dismissed with costs to the respondent.

Delivered and dated at Nairobi this 5th day of April, 2019.

M.K. KOOME

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JUDGE OF APPEAL

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