IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, JA - IN CHAMBERS)

CIVIL APPLICATION NO. NAI 344 OF 2018 (UR 279/2018)

BETWEEN

THE ATTORNEY GENERAL.....1ST APPLICANT

INSPECTOR GENERAL OF POLICE.....2ND APPLICANT

AND

LAW SOCIETY OF KENYA.....1ST RESPONDENT

BRIAN NZENZE.....2ND RESPONDENT

ERICKSON ALUDA MAMBO.....3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....4TH RESPONDENT

(Being an application for extension of time to lodge and serve the Notice of Appeal and the record of Appeal out of time from the Judgment and Decree of the High Court of Kenya at Nairobi (Muriithi, J.) dated 13th April 2018

in

Constitutional Petition No. 311 of 2016)

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R U L I N G

On 26th February 2019 when this application was called out in court for the hearing *inter partes*, only **Ms Odhiambo** for the applicants appeared. Upon establishing that all the respondents had been duly served with the hearing notice for the day, and with no explanation for the respondents' absence, I allowed counsel for the applicants to prosecute the application, the absence of the respondents notwithstanding.

Learned counsel pointed out that the application was unopposed as none of the respondents had filed any documents or papers in opposition thereto, nor were they present in Court. She therefore urged to grant the application as prayed.

The application is by way of a motion on notice dated 26th October 2018 expressed to be brought pursuant to **rule 4** of this Court's rules. It seeks enlargement of time within which the applicants should lodge and serve a notice of appeal. Should the application be successful, the applicants intend to appeal to this Court against the judgment and decree of the High Court (**Muriithi, J**.) dated 13th April 2018 and rendered in **Nairobi Constitutional Petition No. 311 of 2016**. The applicants also pray that the notice of appeal filed on 16th May, 2018 he deemed as properly filed and served.

The application is predicated on grounds set out in its body and further by affidavit of **Mitchelle Omuom**, State Counsel, sworn on 26th October 2018. In the affidavit, Omuom depones that upon delivery of the judgment, the counsel handling the matter inadvertently failed to inform the 2nd applicant regarding the judgment. That on 16th May 2018 her attention was drawn to the judgment by a colleague who saw it on social media. It was then that she immediately wrote to the Deputy Registrar, High Court, seeking certified copies of the judgment. She also wrote to the 2nd applicant for further instructions. By a letter dated 23rd October 2018 from the 2nd applicant, she was given a go ahead

to appeal the High Court's decision. Besides the excuse that counsel delayed in informing the 2nd applicant of the outcome of the petition, she attributes further delay to the late receipt of instructions from the 2nd applicant who she explains needed to consult widely before making a decision on the way forward in the matter. She depones further that the intended appeal has high chances of success going by the annexed a draft of the intended memorandum of appeal.

In determining an application brought pursuant to rule 4 of this Court's rules, I am called upon to exercise unfettered discretion. In **Fakir Mohammed v Joseph Mugambi & 2 Others (Nyr. 32/04)**, it was held as follows;

> **"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. 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 effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of importance-are all relevant but not exhaustive factor."**

The same factors are elucidated and echoed in the case of **Mwangi v Kenya Airways Ltd (2003) KLR 486** and **Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No. NAI. 251 of 1997.** In the latter case**,** this Court stated;

> **"It is now 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."** (Emphasis added)

The applicants have stated that the delay occasioned was not inordinate. They have submitted that the notice of appeal was filed immediately the oversight was discovered which they state was about one month after the judgment was rendered. Considering the judgment was rendered on 13th April 2018, and without belabouring the point, the delay cannot be said to be inordinate in the circumstances.

The applicants have attached a draft memorandum of appeal in bid to show that the intended appeal is not frivolous. They have also cited the case of **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet (2018) eKLR,** where it was held as follows;

> **"The applicants contend that they have an arguable appeal. I have perused the Draft Memorandum of Appeal and find that the appeal is arguable as it raises issues for determination inter alia, whether the waiver of the minimum age requirement was sufficient to enable the applicant to be employed as the Chief of Sengwer Location. An arguable appeal does not necessarily mean one which will succeed."**

Similarly, in **Muchugi Kiragu v James Muchugi Kiragu & Another (1998) eKLR**, this Court expressed itself as follows;

> **"…. the discretion granted under Rule 4 of the Rules of this Court to extend the time for lodging an appeal, is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and 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 that his opponent was prejudiced by it.** (Emphasis put)

A perusal of the probable grounds of appeal the applicants intend to rely on, show that they are not frivolous, at the very least, I think they are arguable. Arguable grounds are not necessarily those that must succeed at the hearing of the appeal. Further, it cannot be said that the applicants' conduct or the reasons given for the delay were entirely inexcusable. In my view, they were excusable.

The respondents did not file any papers in opposition to the application, nor did they appear at the *inter partes* hearing of the application to orally oppose it. As it were, the application was uncontested. Failure to respond to the application further means that the respondents are unable to demonstrate any prejudice they stood to suffer if the application was allowed.

In light of the above, the application dated 26th October, 2018 is allowed in terms of prayers 1 and 2. Costs shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 24th day of May, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR