IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, JA – (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 352 OF 2018 (UR 286/2018)

BETWEEN

MARY WARUGA WOKABI……..……1ST APPLICANT

GEORGE LWANGA KORONTO……2ND APPLICANT

BERNAND WOKABI WARUGA…….……..……3RD APPLICANT

JOSEPH NJUGUNA WARUGA……..……4TH APPLICANT

AND

JACOB MWANTO WANGORA….……..…...RESPONDENT

(Being an application for extension of time to file and serve a Record of Appeal out of time from the Judgment of the Environment and Land Court at Kajiado (Christine Ochieng', J.) dated 18th day of April 2018

in

ELC No. 635 of 2017 (OS)

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R U L I N G

The instant application is expressed to be brought pursuant to Rule 4 and Rule 5 (2)(b) of the Court of Appeal Rules. The applicants have further invoked Article 159 (2) (d) (e) of the Constitution and sections 3A and 3B of the Appellate Jurisdiction Act. The applicants' substantive prayer is that they be granted leave to appeal out of time against the judgment and decree of the Environment & Land Court (ELC) at Kajiado, delivered by **Christine Ochieng, J**. on 18th April 2018 in **ELC Case No. 635 of 2017** (OS).

In their affidavit in support of the application, the applicants depose that on 26th April 2018, their previous advocates, **Messrs J.O Agata & Company Advocates,** lodged a notice of appeal against the aforesaid judgment and decree. They state that they were, however, unable to pay the high fees demanded by the advocate to pursue the appeal on their behalf and so they approached Kituo cha Sheria for assistance. Kituo cha Sheria, on accepting the instructions, similarly filed a notice of appeal on 30th April 2018. It was then that they were advised that the best course of action was to seek a review of the ELC judgment instead of an appeal, on the basis that there was an error apparent on the face of the record. To the advocates, the error on the face of the record was that it was not tenable in law for a previous owner who had received full consideration from sale of land to acquire the same land back by way of adverse possession.

On that premise, the advocates formally withdrew the notice of appeal filed on 26th May 2018. Subsequently, they filed an application in the same court seeking a review of the judgment and decree on 30th May 2018. The application for review was however dismissed by the ELC court on 22nd October, 2018 on the premise that the matters raised in the application were suitable for an appeal rather than a review application.

Dissatisfied and aggrieved, the applicants now intend to appeal against the ELC judgment and decree. For clarity, the applicants are craving for extension of time within which to lodge an appeal, not of the ruling on their review application, but the judgment delivered on 18th April 2018. They allege that failure to lodge the appeal in time was due to the inadvertent mistake of their advocates who advised them to pursue a

review application instead of an appeal. It is further deposed that the intended appeal is not frivolous and high chances of success.

In his response to the application, the respondent made heavy weather of the fact that the applicants withdrew a notice of appeal filed on 26th April 2018. The respondent depones that the applicants having withdrawn the notice of appeal when they elected to pursue an application for review, they cannot now turn around and seek to appeal, thereby embroiling him in unnecessary litigation. In any event, and as it is now, there is an unexplained or inexcusable delay of 224 days from the date when the judgment sought to be challenged was delivered and when the instant application was filed. The respondent further denies that the applicants are deserving of the equitable remedy of extension of time as up to now, they are yet to apply for typed proceedings so as to prudently and timely prepare the record of appeal. The respondent furthers opposes the application on the basis that the applicants have failed to demonstrate the chances of their appeal succeeding.

During the hearing of the application, **Ms. Kavere,** learned counsel for the applicants submitted that the delay in filing the appeal was about 6 months. She submitted that the present application was filed within 30 days of the ruling on the application for review. She denied that the delay was inordinate and opined that it was excusable. She submitted further that counsel's mistakes should not be visited upon the applicants and that the intended appeal raised serious issues of law and was not frivolous as per the annexed draft grounds of appeal. Counsel denied that the respondent would be prejudiced in the event this application was allowed. In her view, it was fair and equitable and in the interest of justice that the application be allowed to enable the applicants to have their day in court.

Learned counsel for the respondent, **Mr. Ndung'u**, on his part stated that the application was incurably defective for invoking various jurisdictions of this Court. Further that the notices of appeal had been withdrawn and that in the absence of such notice, there was no appeal for which time could be extended. According to counsel, there was no proper memorandum of appeal that could be deemed as properly filed. He submitted that the delay was inordinate and no sufficient reason(s) had been given for the delay. He accused the applicants of indolence and therefore underserving of the exercise of discretion in their favour since up to now, they had not applied for typed proceedings. Contrary to the applicants' assertions that no prejudice would be occasioned to the respondent **Mr. Ndungu** submitted that the respondent stood to be prejudiced in unnecessary long litigation with attendant costs.

The application herein is opposed, firstly on the grounds that the applicants have invoked two jurisdictions of this Court. The applicants' expressed the application to be brought pursuant to rule **4** but also under rule **5 (2) (b)** of the Court of Appeal rules. Now it is settled that the jurisdiction granted to court under Rule **4** is exercised first on behalf of the Court by a single Judge and by a full bench upon reference. However, the powers of Court under rule **5 (2) (b)** are a preserve of a full bench. In effect therefore, an application invoking the two jurisdictions becomes problematic. The applicants however, subsequently clarified and abandoned all other prayers in the application in favour of the prayer for extension of time only, a preserve of a single Judge.

The application was also opposed on grounds that there is no notice of appeal on record since the applicants withdrew the one they had filed when they elected to pursue the review application. The court record however, reflects that another notice of appeal was filed on 23rd November 2018.

The delay occasioned, therefore, is from the day the judgement intended to be impugned was delivered on 18th April 2018, to when the present application was filed on 28th November 2018, a delay of about 224 days. The main reason for the delay given is that the advocates inadvertently believed that in challenging the ELC judgment on the basis of a review, as opposed to an appeal would have been more apt. They therefore, proceeded to withdraw a notice of appeal they had filed and instead pursued the application for review. They lost the application on grounds that the issues raised therein ought to have been canvassed by way of an appeal. Aggrieved, they now wish to appeal against, not the ruling dismissing the review application, but the original judgment.

The power to review a judgment and/or ruling is given under section **80** of the Civil Procedure Act. It reads as follows,

"Any person who considers himself aggrieved –

> **(a) by a decree or order form which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
>
> **(b) by a decree or order for which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such an order thereon as it thinks fit."**

See also order 45 of the Civil Procedure Rules

From a reading of the above provision, it is apparent that a party may elect to pursue either an appeal or review of a decree or order but is precluded from pursuing both. In essence, a party who opts to pursue a review is precluded from pursuing an appeal and vice versa. The Court of Appeal in **Anthony Gachara Ayub v Francis Mahinda Thinwa (2014) eKLR** stated as below;

> **"Under the provisions of Order 45 of the Civil Procedure Act, a party who chooses to proceed by way of review loses the right of appeal. In the instant case, the appellant chose the route of review of the judgment dated 14th May, 2002, and lost his right of appeal when review was declined."**

It is up to a party to decide which avenue to pursue given the circumstances of the case and after taking consideration of the strictures set down in law for each avenue. As stated in **Abasi Belinda v Frederick Kangwamu & Another (1963) E.A. 557**,

> **"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal".**

The applicants could therefore bring an application for review of the judgment dated 18th April 2018 provided that they had not preferred any appeal against the judgment and decree at the time of making the application for review. With this knowledge and having already filed a notice of appeal, which is often deemed essentially as an appeal, the applicants formally withdrew the notice of appeal and elected to instead seek a review.

The question that arises is whether having chosen the avenue of review and lost, the applicants can now turn around and pursue an appeal. Though it might be argued that in this case the applicants are seeking to appeal after their review application was heard and disposed, and that the applicants are not pursuing both avenues simultaneously, the intended appeal is still untenable in my view. It becomes a situation where the applicants want to have it both ways by filing an application for review and an appeal of the same decree or order which is tantamount to abuse of the court process. Having pursued the remedy of review and lost, the applicants have compromised their right to appeal against the said judgment and decree. Allowing the present application would also prejudice the respondent who legitimately had expectations of enjoying the fruits of his litigation after the review, which ought to have been the final recourse in law for the applicants in the absence of an appeal preferred against the review ruling. Further, though the delay has been explained, it cannot wash in the light of the foregoing.

In the circumstances of this case and as found by the High Court, the issues raised would have been apt for an appeal were it not for the erroneous advice given to the applicants by their advocates. However, ignorance of the law is not a defence and having made their bed, the applicants must now lie on it. I would also add that a counsel giving wrong legal advice to a client cannot be a ground for extension of time. On the basis of all the foregoing, I do not see how the intended appeal can be said to have chances of success.

With regard to the issue whether a lawyer's mistake should not be visited on an innocent client, I can do no better than quote the case of **Ketteman & Others v Hansel Properties Limited [1988] 1 ALL ER 38** where it was observed:

> **"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in proceedings…"**

This is one such case. The leisured age when a litigant can simply attribute his shortcomings to mistake of counsel are no longer tenable.

The upshot is that the application is dismissed with costs to the respondent.

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

ASIKE MAKHANDIA

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR