IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 382 OF 2018

BETWEEN

CAPITAL MARKETS AUTHORITY.....APPLICANT

AND

INSTITUTE OF CERTIFIED PUBLIC

ACCOUNTANTS OF KENYA.....1ST RESPONDENT

SOBAKCHAND SHAH.....2ND RESPONDENT

ANNE MURAYA.....3RD RESPONDENT

HARVEEN GADHOKE, DOREEN MBOGO,ANNE MURAYA &

WAMAE KIARIE MUGO T/A DELOITTE & TOUCHE.....4TH RESPONDENT

(An application for enlargement of time to file and serve an application to reinstate the Notice of Motion dated 28th August 2018 which sought extension of time to file and serve the Notice of Appeal out of time against the judgment of the High Court at Nairobi (J.K. Sergon, J) dated 28th June 2017)

in HC Civil Appeal No. 1 of 2015

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RULING

The applicant has filed this application pursuant to **Article 159(2)(d)** and **(e)** of the Constitution, **section 3A** and **3B** of the Appellate Jurisdiction Act and **Rules 4, 47** and **56** of the Court of Appeal Rules for the enlargement of time to file and serve an application to set aside an order of this Court issued on 23rd October, 2018 and to reinstate for determination on merit the Notice of Motion dated 28th August, 2018 which was dismissed under **Rule 56(1)** of the Court of Appeal Rules for non- appearance. In the dismissed application, the applicant had applied for the enlargement of time within which to file and serve the notice of appeal.

It is common factor that the hearing notice for the original application served on all parties indicated that the application would be heard on 23rd October 2018 at 12.00 noon. However, on that date, a few minutes before noon, both the applicant's and respondents' counsel were in court. Upon enquiry at the registry, they were informed that the application had been placed before the Judge in Chambers at 9.30 am and all the parties and their counsel being absent, it had been dismissed for non-attendance. There is no controversy upto this point. However, parties part ways at the point the applicant ought to have brought an application for reinstatement of the dismissed application. In terms of **Rule 56(4)** it ought to have done so within thirty days. Instead, that period passed necessitating the taking out of the instant motion.

Mr. Githendu learned counsel for the applicant explained that he was not able to promptly apply for reinstatement due to the large workload at his office occasioned by the shortage of lawyers in his chambers; that as soon as the situation improved this application was filed; that the length of delay being only 28 days is not inordinate but excusable.

Mr. Shah, learned counsel for the 2nd respondent was of the view that this application was filed 58 days after the dismissal even though it

was ready and signed on 13th December, 2018 but was not filed until 21st December, 2018 which was a further 7 days of delay which has not been explained; that the explanation for delay was not sufficient as it was a simple application and shortage of staff cannot be a good reason. Counsel stressed that litigation must come to an end and timelines set by court or rules must be obeyed to assist in the dispensation of justice; and that **Article 159** is not a panacea for all.

Learned counsel, Mr. Ngondo holding brief for Ms. Kirimi, counsel for the 3rd and 4th respondent did not oppose this application.

From a lengthy list of authorities including Leo **Sila Mutiso V. Rose Hellen Wangari Mwangi**, Civil Application Nai. 251 of 1997 a single Judge has unfettered discretion to consider an application for extension of time and generally the matters to be taken into account are **"the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted"**.

The aforesaid factors are not exhaustive as the Supreme Court explained in the case of **Fahim Yasin Twaha vs Timamy Issa Abdalla & 2 Others** Civil Application No. 35 of 2014, thus:

> **"As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:**
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> **"... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.**
>
> **"... we derive the following as the underlying principles that a Court should consider in exercising such discretion:**
>
> **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 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. where there is a reasonable cause for the delay, the same should be expressed to the satisfaction of the Court;**
>
> **5. whether there will be any prejudice suffered by the respondents, if extension is granted;**
>
> **6. whether the application has been brought without undue delay; and**
>
> **7. whether in certain cases, like election petitions, public interest should be a consideration for extending time".**

Bearing the aforementioned principles in mind, and going into the background, the judgment the applicants intend to appeal was delivered on 28th June, 2017 and the last day for filing the notice of appeal was 12th July, 2017 being 14 days. Given that the applicant was out of time, it filed an application dated 28th August, 2017 for the enlargement of time which was 47 days late. The fate of that application now depends on the outcome of this one, it having been dismissed.

By **Rule 56** of the Court of Appeal Rules

> **"(1) If on any day fixed for the hearing of an application, the applicant does not appear, the application may be dismissed, unless the Court sees fit to adjourn the hearing.**
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> **.....**
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> **3) Where an application has been dismissed under sub-rule (1) or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing.**
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> **(4) An application made under sub-rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who would have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision".**

Four things stand out from the above rule; first, the Court has discretion either to dismiss or to adjourn the hearing. Secondly, the party in whose absence the application was dismissed is permitted to apply to the Court to restore the application for hearing. Thirdly, that party must show that he was prevented by sufficient cause from appearing when the application came up for hearing. Finally, an application for reinstatement must be made within thirty days of the decision of the Court. Because this application was not brought within the stipulated time, the correct procedure was for the applicant to, in the first place, get time extended to bring an application for reinstatement which ought to have been brought within thirty days of the dismissal. But this application was brought and argued in an omnibus manner. To save time

and expense, I have considered and determined both the enlargement of time and reinstatement of the dismissed application.

Though this application was filed outside the thirty days prescribed by the above rule, by the provisions of **Rule 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 or 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 58 days delay involved was not inordinate in the circumstances. The applicant has all through demonstrated its keenness in prosecuting the original application but for the confusion brought about by the registry in placing the application before the single Judge at 9.30 am instead of the time communicated to the parties.

I reiterate, for these reasons that the explanation proffered regarding the immense workload due to shortage of advocates are plausible. It was not only candid but sensible and cogent. Annexed to the application are documents showing the hiring process of additional staff justifying that there was indeed a shortage of staff that led to the late filing of the application.

Accordingly, this application succeeds. The orders issued on 23rd October, 2018 are set aside, the notice of motion dated 28th August, 2017 is restored to be heard on merit and the 2nd respondent shall have the costs of this application.

Dated and delivered at Nairobi this 6th day of August, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR