IN THE COURT OF APPEAL

AT ELDORET

(CORAM: KIAGE, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 60 OF 2019

BETWEEN

TERESIA WANGARE KINUTHIA.....APPLICANT

AND

PAS COMMUNICATION LIMITED.....RESPONDENT

(Application for validation of notice of appeal filed out of time, extension of time to file memorandum of appeal and record of appeal from the judgment and decree of the High Court of Kenya at Eldoret (Ombwayo, J) dated 23rd November, 2018

in

E & L CASE NO. 160 OF 2013)

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RULING

By her Notice of Motion dated 4th June, 2019 brought under **Rule 4** of this **Court's Rules**, the applicant **Teresia Wangare Kinuthia,** makes the following prayers;

> ***"1. That notice of appeal dated 14th January, 2019, and lodged in this Court's sub-registry at Eldoret and endorsed by the Deputy Registrar of the court on 15th January, 2019 be ratified and be deemed to be properly filed and served;***
>
> ***2. That the period limited for filing and serving memorandum of appeal and record of appeal be extended;***
>
> ***3. That the cost of this application be borne by the respondent."***

The six grounds on which the application is founded appear on its face thus;

> ***"i. That on the 14th January, 2019 the applicant filed a notice of appeal; however the same was filled out of time;***
>
> ***ii. That the delay was an oversight and mistake on the previous advocate and not a mistake on the applicant;***
>
> ***iii. That the previous advocate did not file the notice of appeal on time and also did not follow on the proceedings to prepare record of appeal despite requesting for typed proceedings on time;***
>
> ***iv. That the applicant is aggrieved with the decision made by the honourable court on 23rd November, 2018 and she should be granted an opportunity to ventilate her appeal and not be punished for mistakes of the counsel;***
>
> ***v. That no prejudice will be suffered if the orders sought are granted and the application herein has been brought before this court without undue delay;***
>
> ***vi. That it is in the interest of justice that the prayers sought be granted."***

An affidavit in support of the application was sworn by the applicant on the same date. In it she swears that following the delivery of judgment against her on 23rd November, 2018 in Eldoret ELC No. 160 of 2014, where she had been sued by **Pas Communication Limited,** the respondent herein, she instructed her advocates **M/s. W. Kigen & Company Advocates** to file an appeal. She came to learn that a notice of appeal was filed on 15th January, 2019. She then swears as follows at paragraphs 6, 7 and 10;

> ***"6. That I sought for an explanation from my lawyers then who informed me that time during the vacation period time does not run until the vacation ends in January;***
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> ***7. That I have been waiting to be informed of the appeal status by my advocates in vain until when the respondent came to carry out eviction that I realized time for filing appeal had passed without being lodged;***
>
> ***….***
>
> ***10. That the delay to file the appeal was caused by lack of proper advice from my previous advocates who appeared not to have comprehension of the law."***

After further deposing to her former advocate's errors of omission, the applicant beseeched the Court to indulge her so that her intended appeal can be heard on merit. That was the thrust of the submissions made on her behalf by her learned counsel **Mr. Maina** who placed the length of delay at *fourteen days* and went on to say that the applicant has a meritorious appeal raising among other questions whether the respondent paid consideration for the suit land; the procedure by which it was transferred to the respondent; and the respondents' authority to file suit. Counsel filed submissions as well as a list and bundle of authorities.

The respondent is opposed to the application. In a replying affidavit sworn on its behalf on 23rd September, 2019 by **Francis Major Watunu Kibithe** one of its directors, it first challenges the competency of the firm of Mathai Maina & Company Advocates to represent the applicant. The deponent went on to swear that the time for filing a notice of appeal ran out on the applicant on 10th January, 2019 and that the applicant failed to serve the said notice, when filed out of time, upon the respondent. He deposed further that the applicant is at liberty to pursue appropriate remedies against her advocates. He concluded that the applicant was lawfully evicted from the suit premises and asked the Court to dismiss the application as the intended appeal *"is an appeal to mercy without justifiable cause which must not be allowed to waste judicial time."*

Submissions and authorities were filed on the respondent's behalf and before me, its learned counsel, **Mr. Ngigi** first contended that the applicant's present advocates are not on record as their coming on record before the court below was not in full compliance with **Order 9 rule 9(a)** and **(b)** of the **Civil Procedure Rules.** Next, he disputed the applicant's claim that the delay herein was for about 14 days and asserted that it was in fact for some *53 days*. Moreover, the delay was not the result of a mistake but of their, and the applicant's, indolence.

As to the appeal, it was counsel's submission that it stood no chance of success as the applicant was never a registered proprietor of the suit land and was only sued for refusal to give up possession when it was sold to the respondent by her mother, who was the registered owner. The applicant therefore had no capacity to question the sale or claim that consideration was not paid.

Finally, Mr. Ngigi charged that the applicant had come to court with unclean hands as she did not serve the notice of appeal on the respondent, a fact Mr. Maina conceded in reply.

I have given due consideration to the application, the response thereto and the rival submissions made by the parties. On an application such as the one before me, a single Judge is called upon to exercise his discretion. The discretion is a judicial one to be judicially and judiciously exercised to the end that justice is done between the parties. Being a judicial discretion, and much as it is free and unfettered, it is nonetheless governed by certain considerations that a Judge bears in mind, without fettering the discretion reposed in him. This Court's single Judges' approach to this subject was captured and proved by the Supreme Court (Ibrahim & Wanjale JJSC) in ***NICHOLAS KIPTOO ARAP KORIR SALAT -vs- IEBC & 7 OTHERS [2014] eKLR*** thus;

> ***"The Court of Appeal has pronounced itself on this aspect severally. Recently, in Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR, the Court of Appeal while referring to other authorities observed (at paragraph 12):***
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> ***'The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated 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 2014, 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 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 Limited [2003] KLR 486 in which this Court stated:- "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."

The learned Judges of the apex court then conducted a corporative survey before delivering themselves authoritatively as follows;

> ***"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of 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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
>
> ***5. Whether there will be any prejudice suffered by the respondents if the 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."***

Applying the reasoning and principles I have adverted to, I find that it is indisputable that the delay herein is prima facie quite long and inordinate. It should not take a litigant who intends to appeal a decision nearly two months to file the simple document that is a notice of appeal required under Rule **75(2)** of the **Court of Appeal Rules** to be lodged within fourteen days of the impugned decision.

Length of the delay does not necessarily defeat an application for extension of time, as it is open to an applicant to lay before the single Judge a plausible explanation on the basis of which a favourable decision may flow his way at the Judges' discretion. What reason does the applicant present? She swears that she was advised by her advocates, without naming the particular advocate, that time did not run until the end of the Christmas vacation. Now, that may well be so but, on the facts of this case, the explanation is of no benefit to the applicant. The decision was rendered on 23rd November, 2018 and fourteen days therefore expired on or about 7th December, 2018 which way nearly a fortnight before the vacation and the excluded days. The vacation being mentioned was therefore of absolutely no relevance in the computation of the requisite fourteen days.

What is strange is that the applicant says she was informed "*the vacation ends in January."* I find that information not only factually incorrect, but also quite incredible. I much doubt that any advocate thinks that courts in Kenya go on Christmas vacation from early December all the way to the end of January of the following year. In short, I find the explanation given to be totally implausible and probably false. That, added to the conceded fact that the applicant did not serve the notice of appeal upon the respondent, even as at the hearing of the motion months later, yet it is required to be served within seven days by dint of **Rule 77(1)** of the **Rules**, goes to show a pattern of indolence or inattention on the part of the applicant. As what is sought of me is an exercise of discretion, I cannot shut my eyes to such conduct, and it is such as disentitles the applicant to a favourable consideration.

I am not persuaded that once a litigant points a finger of blame at his legal advisers, he is thereby absolved from his own defaults and the court invariably extends favourable discretion to him. While litigants may indeed rely on their legal advisers, the latter are their agents and their deeds and misdeeds do bind the former. It may therefore be proper in appropriate circumstances to let the litigants carry the crosses they and/or their advocates have fashioned. I think this is one such case.

Finally, even though I need not consider whether the intended appeal has or has no chances of success, I note that the applicant was really a stranger to the contract of sale between the respondent and her late mother. I much doubt that it would be in the interest of justice for me to open the window for yet another round of litigation to encumber the owner of land purchased for valuable consideration at the instance of a stranger to the contract, and a dilatory one at that.

In sum, therefore, I find this application to be devoid of merit and order that the same be dismissed with costs.

DATED and delivered at Eldoret this 17th day of October, 2019.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR