IN THE COURT OF APPEAL

AT NYERI

CIVIL APPLICATION NO. NYR. 110 OF 2017 (UR 79/17)

(CORAM: KANTAI, J.A. (IN CHAMBERS))

BETWEEN

CHRISTOPHER MAINA KIMARU.. APPLICANT

AND

JOSEPHINE WAIRIMU NGARI…..1ST RESPONDENT

DANIEL GITONGA GIKONYO…...………………...……...….2ND RESPONDENT

(Being an application for extension of time within which to file and serve records of appeal from the Ruling of the High Court of Kenya at Nyeri (Mativo, J.) dated 24th November, 2016

in

H.C. Succession Cause No. 345 of 2012)

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R U L I N G

I am asked in the Notice of Motion said to be brought under ***Section 3*** of the ***Appellate Jurisdiction Act***, ***Sections 79 G*** and ***95*** of the ***Civil Procedure Act*** and ***Order XLIX Rule 5 Civil Procedure Rules*** *made thereunder* (*the provisions of the Civil Procedure Act cited and the rules have no application to applications to this Court. That said, I choose to ignore that issue but would ask learned counsel to look at the law while drafting applications*) to grant leave to the applicant, ***Christopher Maina Kimaru***, to appeal the ruling of J. Mativo, J., delivered on 24th November, 2016 out of time. I am also asked to give an order directing the applicant to file a record of appeal within a stipulated period of time.

The background to the matter as I glean from the record is that a ruling was delivered on the said date; the applicant filed a notice of appeal on 7th December, 2016 and requested for proceedings on 13th March, 2017; typed proceedings were not received on time prompting a complaint letter to the Court Registry on 22nd May, 2017; by the time proceedings were received the time envisaged for filing an appeal had long passed. According to the applicant, it was the Registry's mistake that led to not filing appeal on time and, in any event, the respondents are unlikely to suffer any prejudice if leave is granted as prayed.

The applicant swore an affidavit in support of the motion where he deponed, in addition to the matters I have set out above, that typed proceedings were not availed by the Court Registry for a period of 175 days; that a Certificate of Delay was issued by the Deputy Registrar of the High Court on 2nd August, 2017 which was received by counsel for the applicant on 21st September, 2017; that delay in filing of an appeal is not inordinate and is excusable and that Court Registry Staff are responsible for delay in filing appeal, not the applicant.

Mr. Hillary Mshila, learned counsel for the applicant, in submissions made before me on 15th January, 2018 when the motion came up for hearing, informed me that Court Registry Staff declined to accept record of appeal and only accepted it after a Certificate of Delay issued by the High Court was produced. Learned counsel submitted that the respondents would suffer no prejudice if the prayers in the motion were granted.

Mr. Gakuhi Chege, learned counsel for the respondents, did not agree. He questioned delay by the applicant in doing various things after ruling was delivered on 24th November, 2016. Proceedings were not requested until 27th February, 2017. The letter requesting proceedings was not copied to counsel for the respondents. Learned counsel submitted that in the absence of coping that letter as required the Certificate

of Delay issued by the High Court could not assist the respondents. Learned counsel further informed me that even after receiving communication from the High Court Registry on 29th May, 2017 that typed proceedings were ready for collection, no action was taken by the applicant until 2nd August, 2017 when Certificate of Delay was collected. According to learned counsel, the applicant had a duty to offer a reasonable explanation for delay but none had been offered in this case. Finally, learned counsel informed me that the land in dispute in the case at the High Court had already changed hands by the time the application to revoke grant was being made at the High Court.

As has been said many times by this Court when it is called upon to exercise discretion to extend time for doing various things required by the Court of Appeal rules principles applicable in considering such applications are set out in the case of ***Fakir Mohamed v Joseph Mugambi & 2 Others*** ***Civil Application No. 332 of 2004 (ur)*** cited in the case of ***Wachiuri Wahome v Festus Gatheru Wahome & 6 Others*** ***[2016] eKLR*** thus:

> ***"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 delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent 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 public importance – are all relevant but not exhaustive facts: See Mutiso vs Mwangi, Civil Application No. Nai. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M'Ethare & Attorney General, Civil Application No. Nai.8 of 2000 (ur) and Murai vs Wainaina (No. 4) [1982] KLR 38".***

We now also have ***Sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** which sets out the overriding objective of civil litigation which must ensure the just, expeditious, proportionate and affordable resolution of disputes that come before the Court. The said provisions were considered in the case of ***City Chemist (Nbi) & Anor v Oriental Commercial Bank Limited*** ***Civil Application No. NAI 302 of 2008 (UR 199/2008)*** where the following passage appears:

> ***"The overriding objective thus confers on this court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective".***

It was, however, recognized in the ***City Chemist*** ***(supra***) case that rules of Court had their place and standing; parties being bound by them. It was stated:

> ***"That is not to say that the new thinking totally up-roots well established principles or precedent in the exercise of the discretion of the Court which is a Judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the Court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and un-ambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in Court. It also guides the lower Courts and maintains stability in the law and its application".***

Taking all these principles into account has the applicant made out a case to entitle me to exercise my discretion in his favour?

The following matters are salient and relevant for my consideration. The ruling proposed to be appealed was delivered on 24th November, 2016. A Notice of Appeal was lodged on 7th December, 2016 which was within the time envisaged by the rules. But that is as far as compliance with set time-lines goes.

By a letter dated 27th February, 2017 lawyers for the applicant applied to the Deputy Registrar of the High Court of Kenya at Nyeri to be supplied with typed proceedings. That letter was not copied to the lawyers of the respondents as required by ***rule 82*** of our rules. The applicant states in the affidavit in support of the motion that he instructed his lawyers on 7th December, 2016 to institute an appeal. That is the date when the said lawyers lodged a notice of appeal. On this issue I have not been told through affidavit evidence or otherwise why, after lodging notice of appeal on 7th December, 2016 it took the applicant's lawyers until 27th February, 2017, a period of about 2 ½ months, to request proceedings. And even when the proceedings were applied for the letter doing so was not copied to the respondents. In such event the applicant is not helped by the Certificate of Delay procured later as that certificate would only assist the applicant if the application bespeaking proceedings was copied to the opposite side as required by ***rule 82*** of the rules.

I am also distributed by what I see in that Certificate of Delay *(I have already found that it cannot assist the applicant)*. That certificate states amongst other things that proceedings were ready for collection on or before 29th May, 2017; that balance of court fees was paid on 31st May, 2017 and certified copies of proceedings were availed on that day. That certificate is dated 2nd August, 2017. According to the applicant as deponed at paragraph 8 of the supporting affidavit the applicant's lawyers only collected that certificate on 21st September, 2017, a period of over 1 ½ months after the certificate was issued. The applicant has not explained all these lapses – proceedings are applied for but this letter is not copied to the other side contrary to the rules. Even after proceedings are ready and collected on 31st May, 2017 a Certificate of Delay is ready on 2nd August, 2017 but it is not collected until 21st September, 2017. The present motion was filed on 16th October, 2017, yet another instance of unexplained delay.

Although the current law as set out in the Constitution of Kenya, 2010 and ***Sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** creates a new approach to jurisprudence it is still incumbent for parties to comply with procedural requirements where they are set out. This gives the adverse party proper notice of what is happening and what is expected of them. I fully agree with the holding in ***City Chemist (Nbi)*** (Supra) that the new Constitutional thinking has not uprooted well established principles in the exercise of discretion which as we know is a judicial process. I agree with Mr. Gakuhi Chege, learned counsel for the respondents, that the applicant was duty bound to give a reasonable

explanation for not complying with time – lines set out in the rules. In the absence of giving a reasonable explanation it would be remiss of me to exercise my discretion in the applicant's favour.

I am not satisfied that there is a reasonable explanation for delay in filing the proposed appeal. The application fails and I dismiss it with costs to the respondents.

Dated and delivered at Nyeri this 21st day of February, 2018.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR