IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR. 123 OF 2017

BETWEEN

ROSE ARAKA MBECHE.....APPLICANT

AND

DAVID KIHUMBA MATHAI….....RESPONDENT

(An Application to extend the time to file and serve a Notice of Appeal from the Judgment of the High Court of Kenya at Nakuru (Mulwa, J.) dated 12th October, 2017

in

Civil Case No. 209 of 2003)

****

RULING

I am asked in the Notice of Motion said to be brought under ***Rules 4, 42 (1), 43 (1), 75 (1) & 77 (1)*** of the rules of this Court and all enabling provisions of the law to extend the time for filing and serving a Notice of Appeal in respect of the judgment of the High Court delivered on 12th October, 2017 and that should I agree to extend time, I should deem the Notice of Appeal attached to the motion as properly filed and served upon the respondent.

The background of the application is not difficult to discern from the material availed to me in the grounds set out in support of the motion and in an affidavit in support of the same by ***Ondieki Ayuka Advocate*** sworn on 26th October, 2017.

It appears to me that both sides agree that the High Court was to deliver judgment in ***Nakuru High Court Civil Case No. 209 of 2003*** on 5th day of October, 2017. On that day, Mulwa, J., the learned Judge who heard the suit did not sit at her Nakuru station as she was sitting at the High Court of Kenya at Kakamega handling election petition matters. According to the applicant no notice of delivery of the adjourned judgment was delivered to the applicant at all. Instead, the applicant's advocate received a letter dated 13th October, 2017 received on 24th October, 2017 where the advocate for the respondent forwarded a draft decree which indicated that judgment had been delivered on 12th October, 2017. It was after that information was known to the applicant that a Notice of Appeal was filed and a letter bespeaking proceedings was written to court and a copy delivered to the other side indicating the desire to appeal but

the notice was already caught by time. According to the applicant the motion has been brought timeously and does not prejudice or embarrass the respondent.

The motion is opposed through a replying affidavit of David Kihumba Mathai, the respondent, sworn at Nakuru on the 7th day of February, 2018. It is deponed amongst other things that the application is fatally defective and grossly incompetent and should not be entertained by this Court. It is also deponed that the relief sought is an equitable one; that the applicant has not disclosed all material facts to the court; that the decision whether I should extend time for doing any act is a discretionary one; that the delay is unreasonable and that the intended appeal has no chance of success.

At paragraphs 7 and 9 of that replying affidavit, it is said:

> ***"7. THAT the duty court was not sitting on 5th day of October, 2017 which led to the matter being mentioned before another court and the judgment scheduled to be delivered on 12th day of October, 2017.***
>
> ***8 ….***
>
> ***9. THAT the mistake of the Applicant's counsel to attend court on the 5th day of October, 2017 when judgment was scheduled for the 12th day of October, 2017 should not be used as a basis for the extension of time to lodge the Notice of Appeal***".

I heard the motion on 13th February, 2017 when the same was urged by Mr. Ondieki Ayuka, learned counsel for the applicant, but opposed by Mr. Kahiga Waitindi, learned counsel for the respondent. The submissions were more or less a summary of what I have already stated on grounds in support of the motion and in the rival affidavits and I do not wish to repeat them here.

The factors which I am required to consider in an application like this one for extension of time are well settled and were well set out in a ruling of a single judge of this Court which was confirmed by the full court. This was in the case of ***Fakir Mohamed v Joseph Mugambi & 2 Others in Civil Application No. 33 of 2004*** as cited in ***Wachiuri Wahome v Festus Gatheru Wahome & 6 Others [2016] eKLR*** where the factors were said to be 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 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".***

I have considered the application and the submissions and this is what I think of the same.

It is not in dispute that judgment in the High Court was scheduled to be delivered on 5th October, 2017. Both parties agree that judgment was not delivered as scheduled on that day because of the Presiding Judge in the case was away from the station attending to other official engagements at the High Court of Kenya, Kakamega. I have not been shown any evidence by the respondent that the applicant's advocate was notified of the new date for delivery of the adjourned judgment on 12th October, 2017. Notice of the date of delivery of a judgment is an important matter for the parties involved in a dispute as they are entitled to attend court during delivery and this may very well inform the steps to be taken by those parties after delivery of judgment. If a party is not formally informed of a date of delivery of judgment or

an adjourned judgment, how is that party expected to comply with timelines for filing an appeal which times are set out in the law? That information is crucial and important as parties in a litigation are entitled, if they so choose, to attend court during delivery of judgment. They would then be able to make timely decisions on the way forward – whether to accept the verdict reached by the court or challenge those findings through the laid out process where there are timelines to be met either through an appeal process or through an application for review.

I would be prepared to exercise my discretion in favour of an applicant in a case like this one where there is no information in the record to show that the applicant was notified that delivery of the judgment that had not been delivered on 5th October, 2017 was adjourned to unstated date. Judgment was delivered on 12th October, 2017 apparently without any notice to the applicant.

But there are other factors I am enjoined to consider in an application like this one. As I have already observed, the applicant was not aware that judgment had been delivered until the law firm of Marende Nyaundi Associates, Advocates received a letter from Mirugi Kariuki & Company Advocates dated 13th October, 2017 forwarding a draft decree for approval in terms of the provisions of Civil Procedure Act. According to Mr. Ondieki Ayuka, learned counsel for the applicant, that letter was received by his law firm on 24th October, 2017. I see on record that the said law firm for the applicant wrote a letter to court on 3rd November, 2017 requesting for proceedings to enable them appeal against the judgment of the High Court. That letter was copied to the lawyer for the respondent and was received as per a stamp of their office on 4th November, 2017. I also notice that there is a Notice of Appeal which was lodged on 3rd November, 2017 and was received by the said advocate on 4th November, 2017.

The application before me was filed in court on 7th November, 2017 a period of less than 2 weeks after 24th October, 2017 when I am prepared to accept that the lawyer for the applicant became aware that judgment had been delivered when they received from the respondent's lawyers a draft decree for approval. I do not agree with learned counsel for the respondent, Mr. Waitindi, either that there is unreasonable delay or that the delay is not explainable. The delay is sufficiently explained and it is reasonable in the circumstances.

On the submissions by Mr. Waitindi that the intended appeal has no chance of success, I do not have material before me to make that determination and in my view the chances of intended appeal succeeding is but one of the factors that I may consider in an application for extension of time.

Overall, I do not in any way think that there is any prejudice to be suffered by the respondent in this matter if I exercise my discretion in favour of the applicant. I allow the motion dated 6th November, 2017 to the extent that I extend time and allow the applicant to file and serve a notice of appeal within 14 days of today. The Record of Appeal will follow thereafter in accordance with our rules. If the respondent is to suffer any prejudice by my exercise of discretion in favour of the applicant the same can be compensated by an award of costs which I hereby award and assess at Kshs. 5,000/- to be paid by the applicant to the respondent within 14 days of today.

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