IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, OUKO & MURGOR, JJ.A)

CIVIL APPLICATION NAI NO. 246 OF 2016

BETWEEN

INTERCOUNTIES IMPORTERS AND

EXPORTERS LTD.....APPLICANT

VERSUS

TELEPOSTA PENSION SCHEME

REGISTERED TRUSTEE.....1ST RESPONDENT

COMMISSIONER FOR LANDS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUBILEE INSURANCE EXCHANGE.....4TH RESPONDENT

PARK AVENUE INVESTMENTS LIMITED.....5TH RESPONDENT

TRUST BANK LIMITED.....6TH RESPONDENT

(An Application to Strike out the Notice of Appeal dated 29th July 2016

from the Judgement and Orders of the High Court of Kenya

at Nairobi (R.E Ougo, J.) dated the 27th day of July 2016

in

HCCC No. 1400 of 2004)

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RULING OF THE COURT

Whether to extend time for the doing of any act authorized or required by the Appellate Jurisdiction Act or the Court of Appeal Rules, is a matter of absolute judicial discretion requiring the Court to be guided only by the justice of the case.

The Court may, in that regard and on such terms as it thinks just extend time for doing any act notwithstanding that the time for doing so may have already expired. See **section 7** of the Appellate Jurisdiction Act and **Rule 4** of the Court of Appeal Rules.

At the heart of this dispute is a parcel of land known as **L.R No. 209/13238** situated along Ngong Road in Nairobi County whose ownership is highly contested. The applicant claimed that it had purchased from the 6th respondent who in turn stated. That the property had been mortgaged to it by the 5th respondent. The 1st respondent, for its part, insists that the property had been alienated as public land for its benefit.

The dispute was determined by the High Court **(Ougo, J)** in HCCC No.1400 of 2004 in a judgement delivered on 27th July, 2016 declaring the applicant the *bona fide* owner of the property and the 1st respondent who was in possession at the time was ordered to vacate it within 60 days from the date of judgement with the consequence that the 1st respondent's tenants were to be evicted from the suit property, if the order was not complied with.

Being aggrieved by that decision, the 1st respondent immediately lodged a notice of appeal on 29th July, 2016 and on the same day wrote to the Deputy Registrar of the High Court requesting for typed copies of proceedings and judgment. The letter was however not copied to or served upon any of the respondents herein.

On 2nd September 2016, in the meantime, pending the lodgment and determination of the appeal, the 1st respondent filed an application (Civil Application No. NAI 203 of 2016 UR 157/2016) under **Rule 5(2) (b)** of this Court's rules for an order of stay of execution of the judgement and order of the High Court.

When the application came up for hearing on 26th September 2016, parties recorded a consent which was adopted as an order of the Court in the following terms;

> **"1. THAT the decree and order of the High Court (Honourable Lady Justice Ougo) be stayed on the following terms;-**
>
> **(a) Pending hearing and determination of the intended appeal, the applicant and 1st respondent receive rent from the suit property in a joint interest earning account in the joint names of the advocates for the applicant and the 1st respondent.**
>
> **(b) The 1st respondent is at liberty to enter any lease agreement in respect of the suit property with effect from 1st November 2016 on such terms as agreed to by the applicant's Advocates and the 1st respondent's advocates.**
>
> **2. Costs of the applicant's application abide the outcome of the intended appeal.**
>
> **3. <u>The applicant will file its appeal within 6 months from 26th September 2016.</u>"** (Our emphasis).

On 4th November, 2016 the applicant by the instant application, relying on the provisions of **Rule 82(2)** of the Court of Appeal Rules asked the Court to strike out the 1st respondent's notice of appeal dated 29th July, 2016 essentially for having been filed out of time and without leave of the Court. It was supported in that application by the 3rd and 6th respondents but opposed by, of course the 1st and 5th respondents.

The 4th respondent neither supported nor opposed the application.

It is conceded that the appeal was filed on 14th December, 2016 out of time, without leave and that the letter bespeaking the proceedings was not copied to the applicant. The 1st respondent, however, insists the present application has itself been brought out of time and ought to be struck out; that, by entering into a consent in which, among other things, the parties agreed to extend time for filing of the appeal, it is in bad faith for the applicant to seek to strike out the notice of appeal.

By **Rule 82** of the Court of Appeal Rules, an appeal to this Court is instituted by lodging the memorandum and record of appeal within sixty days from the date when the notice of appeal was filed.

The rules, however, recognize that there may be circumstances that prevent a party who intends to appeal, from lodging the record of appeal within the prescribed time, i.e. the time taken by the registry to prepare the proceedings. Therefore, where it is demonstrated that, within thirty days of the date of the decision subject of the appeal, an application was made for a copy of the proceedings in the court below, this Court, in computing the time within which an appeal is to be instituted, will exclude the time used in preparation and delivery to the appellant of the proceedings. Secondly, the party appealing can only rely on this dispensation if the application to the Deputy Registrar for a copy of proceedings is in writing and was served upon the other side.

Two days after the delivery of the impugned judgment, the 1st respondent lodged the notice of appeal on 29th July, 2016. Through its advocates, it also wrote to the Deputy Registrar to furnish it with a copy of proceedings to enable it file an appeal. It is conceded that, through inadvertence, this letter was not copied to the applicant and other parties as required by the rules. It is also not in doubt that the record of appeal was filed on 14th December, 2016 instead of 30th September, 2016 and therefore outside the sixty days permitted by the rules. By the time the record of appeal was filed, the instant application had been filed.

By **Rule 83,** if after lodging a notice of appeal, a party fails to institute an appeal within the appointed time, he will be deemed to have withdrawn the notice of appeal and the court may so declare. Where a party makes an application under

Rule 84, the Court may strike out the notice if it is demonstrated that no appeal lies or that some essential step in the proceedings has not been taken or has taken outside the prescribed time. An application to strike out a notice of appeal or an appeal must itself be brought within thirty days from the date of service of the notice of appeal or record of appeal as the case may be, whichever is earlier or relevant.

Generally speaking, courts' power to strike must be used sparingly and cautiously.

The applicant contends that the record of appeal ought to have been filed within 60 days of 29th July, 2016 that is by 30th September, 2016. An appeal or a notice of appeal will be struck out on two grounds, that no appeal lies or that some essential step in the proceedings has not been taken within the prescribed time. It is admitted that, although the notice of appeal was lodged just two days after the impugned decision was rendered, no appeal was filed within sixty days of the notice of appeal. That is an essential step for without the record of appeal, there is no appeal. In such a case, the party appealing would be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party declare that the notice of appeal is withdrawn. There was no certificate of delay by the Registrar. But even if there was, it would have been of no effect without copying the letter bespeaking the proceedings to the respondents. That would have been the end of the matter but for the following two reasons.

The proviso to **Rule 84** requires that an application to strike out a notice of appeal or an appeal be brought before the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be. It is conceded that the notice of appeal was served on 29th July, 2016. The present application was filed on 4th November, 2016, over one month outside the thirty days allowed for instituting an application to strike out.

Secondly, we have alluded to a consent order made on 26th September, 2016, which was on the day the 1st respondent's application for stay of execution was scheduled to be heard *inter partes*. The effect of the order was to compromise the said application for stay by allowing it pending hearing and determination of the intended appeal. It permitted the applicant and 1st respondent to continue receiving rent from the property and deposit it in a joint interest earning account in the names of their advocates.

But of immediate relevance to this appeal is Clause 3 of the order that gave the appellant 6 months from 26th September, 2016 to file its appeal.

From the authorities cited before us and our own reading of the Constitution, Appellate Jurisdiction Act and Court of Appeal Rules, it is established that, except in a few instances, like time fixed for settling electoral disputes or as prescribed under the Limitation of Actions Act, by and large, the courts have wide latitude to enlarge the time limited for the doing of certain act authorized or required by the Constitution, statute or rules; and that power to enlarge time can be exercised whether before or even after the doing of the act in question. See **Article 259(9)** and **section 7** of Appellate Jurisdiction Act.

The authorities cited are unanimous that where time can be extended, leave to do so must be obtained at any time notwithstanding that at the time leave is sought, the time may have already past, so long as the delay is not inordinate, is sufficiently explained and no prejudice is likely to be suffered by the other party. See **Ramji Devji Vekaria V Joseph Oyula** Civil Appeal (Application) No. 154 of 2010, **Githere V Kimungu** (1984) KLR 387.

Three days before the expiration of time prescribed for the lodging of the record of appeal, on 26th September, 2016 parties, including the applicant, with one accord agreed, among other things, to extend time for the filling of appeal by six months from that date. That consent has not been set aside. In any case having been adopted as an order of the Court, the consent can only be set aside on well-known principles. **Hancox JA** (as he then was) in the case of **Flora Wasike v. Destimo Wamboko** (1982 -1988)1 KAR 625, explained those principles in his judgment at

page 626 saying:

> **"It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."**

In **Brooke Bond Liebig v. Mallya** 1975 E.A. 266 the Court identified fraud,

collusion, misrepresentation and "**any reason which would enable the court to set aside an agreement."** as some of the grounds for the setting aside a consent order.

None of these grounds have been raised. Pursuant to that consent order Civil Appeal No. 293 of 2016 was listed on 18th April, 2017 for case management conference.

In the end, and for all the foregoing reasons, this application fails. It is accordingly dismissed. Costs will be in the appeal.

Dated at Nairobi this 16th Day of February, 2018.

M. WARSAME

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR