REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, JA (IN CHAMBERS)

CIVIL APPLICATION NO. 36 OF 2018

BETWEEN

BEATRICE OKOTH.....APPLICANT

VERSUS

FRANCIS PIUS OMWERI NYABERI & REBECCA NYABOKE OMWERI T/A

TOPLAND MOTORS AND GENERAL AGENCIES.....RESPONDENTS

(Application for leave to file and serve a Record of Appeal out of time against the Judgment of the Environment and Land Court of Kenya at Machakos (O.A. Angote, J.) dated 23rd *November, 2017* in Machakos Environment and Land Court Case No. 19 of 2017)

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RULING

Before me is a Notice of Motion dated the 7th day of February, 2018 and lodged in the Courts' centrol Registry at Nairobi on the 14th day of February, 2018, through the firm of Ayieko Kangethe & Co. Advocates. The following reliefs are sought, namely:

> "**(1) That this Honourable Court be pleased to grant the *applicant leave to file and serve the record of appeal out of time.***
>
> **(2)That the attached draft memorandum of intended appeal be deemed as duly filed upon payment of the requisite filing fee.**

It is erroneously expressed to be brought under Order 50 Rule 6 of the Civil Procedure Rules, and Rule 4 of the Court of Appeal Rules, and all other enabling provisions of the law. It is grounded on the grounds in its body and a supporting affidavit. It has been resisted by two replying affidavits deposed separately on the 11th day of May, 2018 by **Francis Omweri Nyaberi** and **Rebecca Nyaboke Omweri** respectively, but simultaneously lodged in the Courts centrol Registry at Nairobi on the 14th day of May, 2018.

The application was disposed of by way of oral submissions by learned counsel **Mr. Kangethe,** instructed by the firm of **Ayieko Kangethe & Co. Advocates** for the applicant, and learned counsel **Mr. Elijah Momanyi,** instructed by the firm of **Anassi Momanyi & Co. Advocates** for the respondents.

In support of the application, learned counsel **Mr. Kangethe** reiterated the contents of the grounds in the body of the application and the supporting affidavit that at the conclusion of the trial on the 20th day of June, 2017, Judgment was reserved for delivery on the 10th day of October, 2017, but on which day it was not delivered but rescheduled for delivery on notice. It was not until the 18th day of January, 2018 when the applicant's counsel, learned that Judgment had been delivered on the 23rd day of November, 2017 in the absence of both parties and without notice; that upon accessing a copy and perusing the same, she was aggrieved and gave instructions to her advocate to initiate the appellate process, by promptly applying for a certified copy of the court proceedings for purposes of appeal on the 24th day of January, 2018 and the lodging of a Notice of Appeal on the 25th day of January, 2018; that the intended appeal is meritorious as borne out by the content of the issues raised in the annexed intended memorandum of appeal; that the delay in seeking the courts' intervention is neither inordinate nor inexcusable; that no prejudice will be suffered by the respondents if the application is allowed.

In opposition to the application, learned counsel **Mr. Elijah Momanyi** while also reiterating the deposition in both replying affidavits,

submitted that the intended appeal is unmerited as the applicant's claim was based on an unforceable agreement of sale; that the applicant did not file and serve a Notice of Appeal within the time stipulated in the Rules; that the application is incompetent as an application to the Court of Appeal cannot be brought pursuant to the Civil Procedure Rules; that no competent record of appeal can be filed in the absence of the filing and service of a competent Notice of Appeal on the opposing party; that no reasonable explanation has been given for the applicant's failure to serve on the respondent the Notice of Appeal purportedly filed out of time on the 25th day of January, 2018, nor the delay between 18th January, 2018 and the 14th day of February, 2018 when she learned of the delivery of the Judgment and when the application under review was filed in court; and lastly that the respondents stand to suffer prejudice if the orders sought are granted.

In reply to the respondent's submissions, learned counsel **Mr. Kangethe** reiterated his earlier submissions that they have given a reasonable explanation for the delay; that the law was misconstrued by the trial Court, hence the desire to appeal against the intended impugned Judgment; that the Notice of Appeal lodged on the 25th day of January, 2018 was duly served on the respondent by way of registered post, and lastly reiterated that the application is merited.

I have given due consideration to the respective parties pleadings and oral submissions. My invitation to intervene on behalf of the applicant was erronously also invoked under order **50** rule **6** of the Civil Procedure Rules which have no application to the appellate process before this Court. These are severable and are accordingly severed and discounted, leaving Rule 4 of the Court of Appeal Rules standing as the sole correct provision for access for the reliefs sought.

It provides:

> **"R.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 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 principles that guide the exercise of jurisdiction under this rule have long been settled by a wealth of case law. I find it prudent to distil a few of these as follows:

i. In **Edith Gichugu Koine versus Stephen Njagi Thoithi (supra) Odek, J.A. [2014] eKLR** stated that the exercise of the mandate under Rule 4 is discretionary which discretion is unfettered and does not require establishment of "sufficient reasons", save that it has to be guided by factors not limited to the period for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance. Second, the Court has to ensure that the factors considered are consonant with the overriding objective of civil litigation.

ii. In **Nyaigwa Farmers Co-operative Society Limited versus Ibrahim Nyambare & 3 Others** [2015] eKLR Musinga, J.A. gave the factors for consideration as the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and lastly, the degree of prejudice to the respondent if the application is allowed.

iii. In **Hon. John Njoroge Michuki & Another versus Kentazuga Hardware Limited [1998**] **eKLR G.S. Pall JA** (as he then was) stated *inter alia* that orders sought under Rule 4 of the Rules of the Court should liberally be granted unless the applicant is guilty of unexplained and in ordinate delay in seeking the indulgence of the court; or that the court is otherwise satisfied beyond para adventure, that his intended appeal is not an arguable appeal.

iv. In **Cargil Kenya Limited Nawal Versus National Agricultural Export Development Board** [**2015] eKLR**, K.M'Inoti J.A, added that the discretion conferred by ***Rule 4*** of the Rules of Court is wide and unfettered save that it must be exercised judicially.

v. In **Fakir Mohamed versus Joseph Mugambi & 2 Others CA Nai.332 of 2004,** K. MI'noti, JA again added that since the exercise of the Courts discretion under rule 4 is unfettered, there is no limit to the number of factors the court should consider so long as they are relevant. The period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding; the degree of prejudice to the respondent and the effect of the delay on public administration and the importance of compliance with time limits by the parties; and, also whether the matter raises issues of public importance are all relevant but not exhaustive factors.

vi. In **Paul Wanjohi Mathenge versus Duncan Gichane Mathenge [2013] eKLR** Odek, J.A. held that failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other proceedings relied upon by such an applicant the applicant has an arguable appeal. Second, that an arguable appeal is not one that must necessarily succeed, save that it should be one which ought to be argued fully before the court.

vii. In **Richard Nchapi Leiyagu versus IEBC & 2 Others Civil Appeal No.18 of 2013** the Court stated that the right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law.

I have applied the above distilled principles to the rival submission before me, and it is my finding that the respondent does not dispute the applicant's contention that the Judgment intended to be impugned was delivered on the 23rd day of November, 2017 in the absence of both parties and without notice to the respective parties. That is why the respondents have not complained about the applicant's inaction from that date. They have confined their complaint on the alleged perceived in action from 18th of January, 2018 when the applicant allegedly learned of the delivery of the Judgment and the 14th day of February, 2018 when the application under review was filed. The above being the position, the applicant is therefore absolved from blame for her failure to comply with rules **75(2)** and **77(1)** of the Rules of the Court which obligated her to lodge the Notice of Appeal within fourteen (14) days of the delivery of the decision appealed against, and serve the same on the opposite party within seven days of such lodging.

By reason of the above holding, the purported Notice of appeal allegedly lodged by the applicant on the 25th day of January, 2018 and allegedly served on to the respondent's by way of registered post was incompetent and void *ab initio* because upon the expiry of fourteen (14) days from the 23rd day of November, 2017 when the Judgments was delivered, no competent Notice of Appeal could validly be filed without leave of court.

It is common ground that in order for the applicant to succeed on the application under review, she is obligated to explain the delay for her failure to comply with the aforesaid mandatory Rules. As already held above, there has been sufficient uncontroverted explanation for her failure to comply with the provisions of Rules **75(2)** and **77(1)** of the Rules of the Court, effective 23rd November, 2017. That leaves the delay from the 18th January, 2018 and 14th February, 2018 which is about twenty seven (27) days, which is less than a month. In my view, a delay of twenty seven days is not such an inordinate or inexcusable delay that can warrant the withholding of the exercise of judicial discretion in favour of the applicant. See **Peter Gatahi Kamatha versus the Secretary Public Service Commission and 2 others** Nyeri Civil Application No. 312 of 2010, in which Odek, JA excused a nine months delay which had been sufficiently explained; **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwansa** (deceased) **versus Kiarie Shoe Stores Limited** Nyeri Civil Application No. 36 of 2013 in which Odek, JA also excused a delay of 140 days which had been sufficiently explained. Second, twenty seven (27) days delay in my view, would not, justify the withholding of a right of appeal which is constitutionally entrenched. See **Richard Nchapi Leiyagu** (supra)

The above finding that the applicant has given sufficient explanation for her failure to timeously comply with **Rules 75(2**) and **77(1)** of the Rules of Court now leads me to determine whether the reliefs as framed are available to the applicant. This arises from the respondent's arguments and correctly so that prayer 1, if granted as framed would not serve the applicant's cause in the pursuit of her request to initiate the intended appellate process out of time for her failure to include a prayer for leave either to file a fresh Notice of Appeal or to have the one already incompetently filed to be deemed as properly filed and served. As correctly submitted by the respondents, an appellate process will have no legs on which to stand in the absence of proof that it is properly anchored on a valid Notice of Appeal, either validly filed or as validated through a court process. This is the first procedural step in the appellate process as rule **75(2)** of the Rules of the Court obligates any party aggrieved by a Judgment, Ruling and or order of the Court to file a Notice of Appeal within fourteen (14) days of the delivery of such a Judgment/Ruling or the making of an order as the case may be.

The failure to make provisions for this lay with the advocate who drafted those prayers. The general rule is that a party should not be made to suffer on account of the mistakes of his advocate. See **Lee Muthoga versus Habib Zurich Finance (K) Ltd another Civil Application No. Nai. 236 of 2009**; and **Belinda Murai versus Wainaina (No.4) [1982] KLR 38**. Second, the concern of the Court in any litigation before it should be to do justice to the parties and not to impose conditions on itself to fetter its own Judicial discretion to do so. See **Chemwolo & another versus Kubende [1986] KLR 492**.

Being guided as above, I do not think prayer 1 as framed is incapable of being reframed to include a provision for the filing of an appropriate Notice of Appeal and it will be so ordered at the conclusion of the ruling.

Turning to the issue as to whether the intended appeal is arguable or not, it is sufficient for the applicant to show that she has a serious question of law or fact to take up on appeal. Herein the applicant relies on the issue as to whether the law was correctly and or properly construed and applied to deny her the relief she sought from the Court. In my view, and as argued by the applicant this is a valid argument to take up on appeal, irrespective of its ultimate success or otherwise.

As for matters of prejudice to be suffered by the opposite party, indeed the respondents deposed that they would suffer prejudice without specifying the nature of the prejudice likely to be suffered by them. In the absence of such specification, I am not in a position to say that any prejudice will be suffered by the respondents, incapable of compensation by way of costs if the application is granted.

Turning to prayer 2, I find this relief misplaced as no provision exists for it in the Rules of the Court. It is accordingly disallowed.

In the result and for the reasons given in the assessment, I find merit in the application under review. I am inclined to allow it on the following terms:-

1. The applicant has 14 days from the date of the ruling to file and serve a Notice of Appeal.

2. Thereafter parties to proceed according to law.

3. Prayer 2 is disallowed for the reason given.

4. The respondents' will have costs of the application to be agreed or taxed as the case may be.

Dated and Delivered at Nairobi this 18th day of May, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR