IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 90 OF 2017

BETWEEN

KARUCHI WAIGI ..... APPLICANT

VERSUS

RACHEL WANJIKU WAIGI ..... RESPONDENT

(Being an application for extension of time to file notice of appeal against the judgment of the High Court of Kenya at Nairobi (W. Korir, J.) delivered on 23rd October, 2015

in

Judicial Review No. 382 of 2014)

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RULING

I am asked in the motion dated 21st April, 2017 brought under **Section 7** of the **Appellate Jurisdiction Act** and **Rule 4** of the **rules** of this Court to extend time for filing of a notice of appeal against the ruling of the High Court made on 23rd October, 2015. There is also a prayer under **rule 5(2)** of the **rules** but that cannot lie because an application for stay of execution pending appeal is a matter for the full court, not of a single judge.

In the grounds in support of the motion it is said that time for filing of notice of appeal had lapsed; that there was administrative mix-up at the offices of the applicants advocates leading to non-filing of notice of appeal; that the applicant is aggrieved by the ruling of the High Court and wishes to appeal; that the intended appeal is arguable with high probability of success; that substantial loss will result if the orders prayed are not granted and, finally, that no prejudice will be suffered by the respondent if the prayers made are granted.

The supporting affidavit of the applicant, **Karuchi Waigi**, repeats the matters stated in the grounds in support of the motion.

In a replying affidavit in opposition to the application **Stanley Kingara**, advocate for the respondent, depones that the respondent died on 13th January,2015, a fact he says is known to the applicant; that it is for the reason that his client died that it is he who is making the affidavit; that there is inordinate delay in bringing the application; that no letter bespeaking proceedings has been served on him; that there is no merit in the application as the judgment sought to be impeached through judicial review proceedings had long been executed; that the applicant had long been evicted from suit property and paid costs of the suit and that it would be an exercise in futility to continue with the litigation where, according to the deponent, there would be nothing to demonstrate any merit in the intended appeal in the face of unexplained delay on the part of the applicant.

The application came up for hearing before me on 10th May, 2018 when **Mr. Mungania**, learned counsel for the applicant, applied for adjournment which application was opposed by Mr. Kingara, learned counsel for the respondent. I declined the application for adjournment for reasons stated in a ruling I made on that day. I ordered that the motion proceed for hearing. Mr. Mungania was not able to prosecute the motion. In opposing the motion Mr. Kingara relied on his replying affidavit which I have summarized in this ruling. He submitted that the respondent, who was a sister of the applicant, had died on 13th January, 2015 and that the applicant had not applied for substitution as required by the rules of this Court. Learned counsel stated that when the motion was called for hearing on 26th September, 2017 the applicant had been given time to apply for substitution of the respondent but had not done so on the hearing of the motion before me.

According to learned counsel, ruling of the High Court was made on 23rd October, 2015; the motion was filed on 24th April, 2017 but the

applicant had not explained why it had taken long to file the application. In further submissions Mr. Kingara stated that judgment against which it was proposed to appeal had long been executed and titles to land had been issued and an appeal would in the premises be an exercise in futility.

The principles that govern exercise of discretion in an application like this one for extension of time to file a notice of appeal or appeal out of time were well captured in the case of ***Wachiuri Wahome v Festus Gatheru Wahome & 6 others*** **[2016] eKLR** where it was held:

> ***"The exercise of this Court's discretion under rule 4 has followed a well-beaten path since the stricture "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 v Mwangi Civil Application No. NAI 255 of 1997 (UR), Mwangi v Kenya Airways Limited [2003] KLR 486, Major Joseph Mwereri Igweta v Murika M'Ithare and Attorney-General Civil Application No. NAI 8 of 2000 (UR) and Murai v Wainaina (No. 4) 1982 KLR 38."***

I have considered the motion, the grounds in support thereof and the rival affidavits. I have also considered the submissions made by Mr. Kingara, learned counsel for the respondent, in opposition to the motion.

According to the applicant the reason why notice of appeal was not filed as required by the rules of this Court was that there was an administrative mix-up on the part of the offices of the applicant's advocates.

I note that ruling of the High Court against which it is proposed to appeal was delivered on 23rd October, 2015. The motion before me was filed on 24th April, 2017, almost 1½ years later. That period is long – the lawyers of the applicant have not given a reasonable explanation for that delay which I consider inordinate.

I have perused the ruling of the High Court. The applicant had applied for judicial review for an order of certiorari to remove into the High Court and quash and set aside orders made by a Lands Dispute Tribunal and orders of the Senior Principal Magistrate, Kiambu, made respectively on 4th May, 2000 and 15th August, 2001. It was also prayed that an order of prohibition and mandamus do issue prohibiting the magistrate and compel the magistrate to terminate proceedings. **W. Korir, J,** upon consideration of the judicial review proceedings before him held at paragraphs 26 and 27 of the ruling delivered on 23rd October, 2015:

> ***"26. A perusal of the papers filed in court by the Interested Party shows that the Applicant only filed JR No. 110 of 2010 after his request for leave to appeal out of time was rejected in Misc. Case no. 750 of 2009. Instead of seeking a review or appealing against the decision to dismiss his case for want of prosecution in JR No. 100of 2010, he has instead filed a fresh matter. There is an identifiable pattern of abuse of the court process by the Applicant. Failure to disclose previous litigation is also a good ground for denying an applicant leave to commence judicial review proceedings.***
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> ***27. In view of what I have stated above, I decline to grant leave to the Applicant to apply for judicial review orders as prayed in the chamber summons application dated 3rd October, 2014. The application is therefore dismissed."***

In view of the findings of the High Court I take the view that the intended appeal would have no chance of success.

Being my finding that delay in bringing the motion is inordinate and unexplained and having found that the intended appeal has no chance of success I take the view that the applicant has not presented before me any material on which I can exercise my discretion in his favour. The motion fails and is hereby dismissed with costs to the respondent.

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

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR