**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI. 102 OF 2018**

**TABITHA KANINI MAINGI.....1ST APPLICANT**

**CECILIA MWOTIANIA MUTHIAINE**

**(Legal representative of the Estate of Ezekiel.....2ND APPLICANT**

**Muthiaine Maingi (Deceased)**

**JUSTUS MWINJI MAINGI.....3RD APPLICANT**

**MARTIN MURIITHI MAINGI.....4TH APPLICANT**

**AND**

**ANN NKIROTE KUBAI.....1STRESPONDENT**

**JERUSHA KANARIO MWENDA.....2ND RESPONDENT**

*(Being an application for extension of time to lodge a notice of appeal*

*out of time of the entire ruling issued in the Family Division*

*at Nairobi (Farah Amin, J.) dated 7th August, 2018*

*in*

*Family Division Misc. Appl. No. 106 of 2017)*

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**R U L I N G**

By a notice of motion brought under ***Rule 4*** of the rules of this Court it is prayed that I be pleased to grant the applicants' extension of time to lodge a Notice of Appeal out of time in respect of a ruling of the High Court of Kenya, ***Family Division in Misc. Application No. 106 of 2017*** delivered by ***Farah Amin, J***., on 7th August, 2017. There are grounds in support of the motion and an affidavit in support.

The matter in the High Court appears to me to be an unfortunate fight within the family of one ***Samuel M'Imaingi M'Laaru***. If I can understand the various relationships of the parties involved the ***1st applicant, Tabitha Kanini Maingi***, is the wife of the said ***Samuel M'Imaingi M'Laaru***. The ***2nd applicant, Cecilia Mwotiania Muthiaine*** is their daughter in law being a legal representative of their deceased son, ***Ezekiel Muthiaine Maingi.*** The ***3rd*** and ***4th applicants***, ***Justus Mwinji Maingi*** and ***Martin Muriithi Maingi*** are their sons. The 1st and 2nd respondents ***Ann Nkirote Kubai*** and ***Jerusha Kanario Mwenda*** are their daughters.

The respondents moved the Family Division of the High Court in the said petition where they stated amongst other things that their said father *(hereinafter "the subject"* was suffering from mental disorder within the meaning of the ***Mental Health Act Chapter 248*** of the ***Laws of Kenya***. They asked to be appointed to manage the affairs of their father who they contended was unable to manage his own affairs. The

petition and an accompanying application were considered by Farah Amin, J., and in orders granted on 4th August, 2017 it was ordered amongst other things that the subject resides at Ongata Rongai with the 2nd respondent; the 2nd respondent was appointed interim manager and guardian of the subject; income due to the subject be paid into court; the 2nd respondent to submit an account of sums of money received to court; that other family members including the applicants are forbidden from securing and or leasing and or howsoever dissipating the assets and income of the subject without the express leave of the court.

Those orders appear to have been granted after an ex-parte hearing. There followed various applications one of which was to cite the applicants for contempt of court for disobeying the said orders. In a ruling delivered by the said Judge on 8th March, 2018 from which it is intended to appeal, it was ordered that the contemnors be produced in court to show cause why they should not be committed to jail for contempt of court. Police officers were ordered to arrest the applicants amongst others and to produce them in court. It was further ordered that the applicants were to remain in custody until the matter was heard and there were various other orders made.

The applicants intended to appeal but did not file a notice of appeal and that is the matter that is now before me.

The principles which we consider in applications for extension of time to file a notice of appeal or a record of appeal out of time were well captured 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*** 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".***

There are also overriding objectives set out in ***Sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** which command that we ensure the just, expeditious, proportionate and affordable resolution of disputes that come before the court. In the case of ***City Chemist (Nbi) & Anor***. *vs* ***Oriental Commercial Bank Ltd***. ***Civil Application No. Nai. 302 of 2008 (ur) 199 of 2008*** on consideration of overriding objectives of civil litigation, 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 objectives".***

The motion came for hearing before me on 9th May, 2018 when ***Mr. David Thangicia*** appeared for the applicants and ***Senior Counsel Dr. Kamau Kuria*** appeared for the respondents. ***Mr. Thangicia*** submitted that the orders of the High Court made the subject a fugitive. According to him the applicants had moved the High Court to set aside earlier orders but they had been blocked by orders made on the application for the applicants to be cited for contempt of court. Even an application to review the earlier orders could not be heard for the same reasons and that is why the applicants want to appeal. According to him the applicants had not been heard but warrants of arrest had been issued against them. Indeed the applicants had been detained for some time in police custody. On chances of the intended appeal succeeding, learned counsel relied on grounds ***iii, iv, v, vii, viii*** and ***ix***, set out in the grounds in support of the motion. He asked me to allow the application.

***Dr. Kamau Kuria*** in opposing the motion relied on the replying affidavit of ***Jerusha Kanario Mwenda***, the 2nd respondent and a notice of Preliminary Objection which was filed on 8th May, 2018. The Preliminary Objection states that the applicants have disobeyed orders of the High Court and have no right to be heard by this court; that this court lacks jurisdiction to entertain the application because the ***Mental Health Act*** does not confer on the applicants a right of appeal against an order made ex-parte in a petition made under that ***Act***. Finally, that the applicants have not obtained leave of either the High Court or this Court to lodge an appeal against the ruling intended to be appealed.

The said affidavit of the 2nd respondent enumerates the history of the matter and the depositions made by the applicants are denied. According to learned counsel for the respondents, the applicants have no right to be heard because they have disobeyed orders of the High Court. Learned counsel referred me to the case of ***Dr. Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 Others*** ***[2018] eKLR*** for the general proposition that a party against whom a court order has been made should obey it before they can ask for the discretion of the court. Further, that where contempt of court is alleged the court must deal with that issue first before dealing with any other issue. According to ***Dr. Kamau Kuria***, the applicants had not explained why they had not filed an appeal since 15th August, 2017 when they were served with the order that they intended to appeal. Learned counsel thought that there was no explanation either in the application or in submissions to explain delay. In further submissions it was counsel's view that since the orders of the High Court were made ex-parte, the applicants required leave to appeal which leave they have never sought nor obtained from the High Court. Counsel referred me to several authorities to show that where leave to appeal was required it had to be obtained first which the applicants had not done. For all that he asked me to reject the application.

***Mr. Thangicia*** in a brief reply informed me that their application to set aside ex-parte orders was expunged by the High Court. He referred me to ***Article 159*** of ***Constitution of Kenya, 2010*** and asked me to look at the substantive justice of the case.

I have considered the motion, the rival affidavits, the submissions made and the list of authorities filed by the respondent. As I have earlier stated in this ruling, the factors that I should consider in an application for extension of time like this one are not limited as long as they are relevant. An applicant needs to explain why there has been delay. I should look at the period of delay and I should consider the chances of

the appeal succeeding if the application is granted. Other relevant factors include degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance of time limits, the resources of the parties; whether the matter raises issues of public importance. All these are relevant factors.

The facts of this case as I have already stated were that the respondents moved to the High Court and obtained orders for protection and welfare of their father orders were granted. Those orders did not please the applicants. The orders were made on 7th August, 2017 and when I look at the motion, the grounds set out and the affidavits, I can only sympathize with the applicants for the vain attempts they made to challenge the orders of the High Court or to have them set aside. I have however not seen any reasonable explanation made where a notice of appeal was not filed on time or at all or why leave to appeal was not sought. Learned counsel for the respondents has correctly indicated that it was necessary for leave to be obtained if the applicants are to appeal which they did not do. I have therefore not been given a reasonable explanation for delay.

When I look at the whole matter there are orders of the High Court which are standing which have not been set aside. The orders include orders citing the applicants for contempt of court. On the one hand public administration demands that court orders be obeyed if they have not been set aside. On the other hand I cannot see any chance of an appeal succeeding where a party has been cited for contempt, the order has not been set aside and the contempt has not been purged. I am unable to exercise my discretion in favour of the applicants on the facts which have been set out and in the result I dismiss the notice of motion dated 29th March, 2018. All the parties here are relatives and let each one meet their own costs.

***Dated and delivered at Nairobi this 8th day of June, 2018.***

***S. ole KANTAI***

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***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***