IN THE COURT OF APPEAL

AT MOMBASA

CORAM: KOOME J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 80 OF 2018

BETWEEN

KARNY ZAHRYA .....1ST APPLICANT

ROSE WANJA MUREGE ..... 2ND APPLICANT

AND

SHALOM LEVI .....RESPONDENT

(Being an application for extension of time within which to file the record of appeal against the Judgment and Decree of the Environmental and Land Court at Mombasa (Omollo J.) delivered on 11th March, 2016

in

E&LC Case No. 460 of 2010)

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RULING

[1] The application for determination herein is dated 15th February, 2018; in which the applicants pray for leave to file their record of appeal out of time. The intended appeal seeks to impugn the judgment delivered on 11th March, 2016 by **Omollo, J**. According to the applicants, the delay in instituting their appeal was occasioned by their absence from the country. They also contend that an anticipated compromise between the parties partly inspired their lack of haste in lodging the appeal. Nonetheless, they urged that they are keen on prosecuting their appeal and have even filed an application for stay of execution of judgment, which application is still pending before the trial court.

[2] During the hearing and in his address, learned counsel for the applicants **Mr. Magiya,** submitted that the certificate of delay was issued on 25th November, 2016 and even though the applicants had filed an application for extension of time on 9th March, 2017, they had to withdraw it owing to a mistake on the face of it; hence the present application. He argued that the applicants' intended appeal has merit; it also has overwhelming chances of success and that the respondent would suffer no prejudice if it was allowed. Counsel pressed the Court to exercise its inherent discretion favourably in line with the provisions of **Article 159** of the **Constitution** and grant the applicants the orders as prayed in the interest of substantive justice.

[3] On her part, Shalom Levi, (respondent) strenuously opposed the application vide her replying affidavit sworn on 24th May, 2018; wherein she deposed that the suit before the trial court was for dissolution of a dispute over the ownership of land held in common and described as L.R No.MN/I/930. In the impugned judgment, the same was ordered to be so divided and the respondent awarded Kshs.700,000/- in general damages for intentional denial of access to the land by the applicants.

[4] The respondent averred that contrary to the applicants' assertions, there is no application for stay of execution that is pending before the trial court; adding that not even a Notice of Appeal and the letter bespeaking proceedings were filed or served within the requisite time. On the same note, she stated that there have been no negotiations as claimed by the applicants and that in any event, any negotiations after Judgment do not constitute a stay of execution.

[5] With regard to the arguability of the intended appeal, the respondent asserted that it is readily apparent that the applicants have no valid claim to the respondent's share of the land that emanates from the legal principle of common ownership thereby rendering the intended appeal devoid of merit. In the same spirit, she contended that the instant application is equally unmerited as the reasons advanced to explain

the delay in lodging appeal are insufficient and do not warrant the exercise of the court's discretion.

[6] Augmenting on the foregoing, learned counsel for the respondent **Mr. Kiarie,** submitted that the non service of the Notice of Appeal offended the provisions of **Rule 77(1)** of the **Court of Appeal Rules**; which requires such notice to be served within 7 days of the impugned decision. Similarly, he went on to state that non- service of the letter bespeaking proceedings within the time provided for under **Rule 82(2)** of the Rules constituted noncompliance and a default which even **Article 159** cannot cure. He concluded that even though the Judgment herein required the restoration of the respondent onto her share of the suit land, the applicants have failed to comply and that the application herein is meant to perpetuate a status quo that denies the respondent of her rightful share of a property held in common.

[7] The discretion of a single Judge under **Rule 4** is wide and unfettered. (See ***Leo Sila Mutiso v. Rose Wangari Mwangi, CA No. Nai. 255 of 1997)***. However, it must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment (See ***Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 Others, CA. No. 14 of 2013)***. Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity.

[8] In taking into account the last consideration, it must be born in mind that it is not the role of a single Judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal. In ***Athuman Nusura Juma v. Afwa Mohamed Ramadhan, CA No 227 of 2015,*** this Court stated thus, on that issue:

> ***"This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word "possibly".***

[9] That said, the applicants' contention in this case is simply that owing to their absence from the country and the talks that ensued between the parties with a view to possible compromise, they were unable to lodge their appeal in time. The respondent has vigorously rebutted these assertions.

[10] At the outset even before the merits of the application can be considered, the question that arises for determination is whether or not there is a valid Notice of Appeal on record. According to **Mr. Kiarie,** the Notice of Appeal on record having been belatedly filed without leave of Court is invalid; and by extension, the application for extension of time to file the Record of Appeal has no feet to stand on and should automatically fail. However, this Court has in the past held that it would be remiss of a single Judge to declare a Notice of Appeal invalid. In ***Dolphin Palms Ltd v. Al-Nasibh Trading Co. Ltd & Others, CA No. 112 of 1999; Omollo JA***, sitting as a single Judge stated as follows-

> ***"The prayer is that I should extend time to enable the applicant to file a fresh notice of appeal. There is, in fact a notice of appeal on record. Whether or not that notice is a valid one cannot be a decision to be made by a single Judge; that is the province of a full bench."*** **(Emphasis added).**

[11] Consequently, the argument pertaining to the validity of the Notice of Appeal is premature and can only be determined during the hearing of the appeal; should this application be allowed. Closely related to the foregoing, is the effect the belated service of the letter bespeaking proceedings has on this application.

The proviso to **Rule 82(1)** is illuminating in this regard as it states:

> ***"Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy."***

The purpose of this letter can be gleaned from sub rule (2) thereof which states:

> ***"An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent."***

[12] Whether or not a party complies with the aforesaid provisions only impacts on the computation of the time within which their appeal is to be lodged. In this case, it is common ground that *though* judgment was delivered on 11th March, 2016, service of the letter bespeaking proceedings was effected on 8th June, 2016. Even though from the face of the copy of the letter it is unclear when it was lodged in court, the annexed certificate of delay clarifies that the letter was timeously lodged in 23rd March, 2016. The certificate of delay was issued on 25th October, 2016. Factoring in the time lapse prior to the request for proceedings, public holidays and the court's Christmas vacation; this meant that the applicants had until 27th January, 2017 to lodge their appeal. This they failed to do.

[13] They only appear to have awoken from their slumber on 20th March, 2018 when they filed the present application. While they contend that this was occasioned by their absence from the country, no proof of such absence was availed. In addition and as rightly pointed out by the respondent's counsel, it is not necessary for a party to be present in the country for his/her appeal to be successfully lodged on time. If

anything, by the applicants' own admission, they instructed their present counsel solely for purposes of pursuing the appeal herein. Indeed, by an application filed on 30th March, 2016, the said counsel sought leave to come on record and by a consent dated 26th May, 2016, he was allowed to come on board. A valid question that ensues is if as at 26th May, 2016 counsel had been duly instructed to pursue the appeal, what other explanation obtains for the delay?

[14] The long and short of it is that the applicants have been unable to explain their tardiness. This application therefore fails with the result that it is dismissed with costs to the respondent.

Dated and delivered at Mombasa this 20th day of September, 2018.

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M.K. KOOME

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR