IN THE COURT OF APPEAL

AT MOMBASA

CORAM: KARANJA, J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 57 OF 2018

BETWEEN

RUTH ANYUNGU.....APPLICANT

AND

JOSEPH NDUNG'U NJOROG.....RESPONDENT

(Being an application for extension of time for filing of the Notice of Appeal

dated 16th September, 2016 and the Record of Appeal

dated 21st December, 2017

in

E&LCCNo. 35 of 2014)

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RULING

[1] The principles that guide this Court in determining whether to extend time pursuant to **Rule 4** of the **Rules of this Court** is now old hat. These are succinctly set out in this Court's decision in **Mwangi v. Kenya Airways** [2003] KLR 486 at page 489 as follows:-

> ***"Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the rules. For instance in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported), the Court expressed itself thus:-***
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> ***"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted."***
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> ***These, in general, are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words "in general". Rule 4 gives the single Judge an unfettered discretion and so long as the discretion is exercised judicially, a Judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way."***

It is to be noted however that granting or denying extension of time is at the discretion of the Court. Such discretion though unfettered must however be exercised judicially upon reason and not capriciously or whimsically.

[2] Those are the principles I must apply in this matter to determine whether the applicant Ruth Anyungu should be granted the prayers she seeks in her Notice of Motion dated 10th May, 2018. In the said motion, filed under **Rule 4** of the **Rules of this Court**, she prays that time

be extended for filing of the Notice of Appeal dated 16th September, 2016 and the Record of Appeal dated 21st December, 2017. The two documents having been filed, albeit out of time, her request is that the two be deemed as properly filed. She also prays for costs of the application.

[3] In the grounds on the face of the application the applicant's counsel states that he originally had difficulty securing the applicant's file from her previous counsel and when he eventually received it, the certified copies of proceedings from the Environment and Land Court did not include a certified copy of the decree. He was supplied with the decree after the time required for filing the notice of appeal and the record had lapsed.

[4] In the affidavit in support of the application, Calvin Odiwur Ogado on behalf of the appellant reiterated the grounds on the face of the application and added that the appellant would be greatly prejudiced if extension is not granted as she will be condemned unheard.

[5] The application is opposed by Joseph Ndung'u, the respondent who deposes that the suit the subject of the intended appeal is an old one, it having commenced in the year 2002 before the subordinate court. He says that there must be an end to litigation. He avers further that the judgment in question was delivered on 26th February, 2016, more than 2 years ago; the notice of appeal on record was filed 7 months after the expiry of the time allowed by the Rules; and that the delay has not been explained. He urges the Court to dismiss the application for being an abuse of the Court process.

[6] In his oral submissions before Court, **Mr. Bosire** learned counsel for the applicant reiterated the contents of the application and added that on 16th September, 2016 they entered into a consent with the respondent's counsel allowing them to have the notice of appeal to be deemed as duly filed. The purported consent is not however annexed to the affidavit and in my view, that submission was merely a statement from the Bar which carries very little weight. Learned counsel blames the delay on the registrar of the superior court for failing to supply him with a copy of the decree. He urged the Court to allow the application.

[7] On his part, **Mr. Ambwere** learned counsel for the respondent urged me to dismiss the application. He conceded they had consented on the filing of the notice of appeal out of time but there was a time cap of 3 months which the appellants did not honour. Again, those were submissions from the Bar which have no bearing to this application. All I need to do now is to apply the principles I outlined earlier in this ruling to the facts and submissions by counsel and determine if the application meets the required threshold.

[8] To start with, this is a matter that has been pending for the last 16 years. I agree that justice delayed is justice denied. Litigation started at the magistrate's court. Parties cannot litigate *ad nauseum*. If indeed the matter was of such grave importance to the applicant, he should have moved with dispatch. The delay in the matter as far as the record before me is concerned is more than 2 years (i.e. since the judgment in question was delivered). That delay is in my considered view inordinate by all means. Has it been explained to the satisfaction of the Court? The excuse given is that the decree was not supplied along with the proceedings. It goes without saying that to file a notice of appeal, a party does not need any proceedings. Secondly, the applicant could still have filed the record of appeal without the certified decree and order and invoke **Rule 88** of the **Rules of this Court** to either file the decree as a supplementary record without leave within 15 days or with leave of Court thereafter.

[9 The reason given for not filing the record of appeal on time is in my view not plausible. The other criterion is the issue of the chances of the appeal succeeding. The application and supporting affidavit are totally mute on that aspect. On the other hand, from the replying affidavit, the issue at hand is a boundary dispute which had not been marked as at the time the applicant purchased the parcel of land in question not from the respondent but from a third party who was not a party before the High Court. The memorandum of intended appeal was not even annexed to the affidavit nor are the grounds even remotely alluded to in the supporting affidavit. The Court cannot therefore determine whether the applicant has good chances on appeal or not. That limb has also not been satisfied. The applicant has also not demonstrated what prejudice she is likely to suffer if the application is not allowed other than saying she will be condemned unheard. We note that she has been heard in the two courts below; she was availed opportunity to be heard in this Court if she had filed her documents in time but she failed to do so. In my view the applicant does not appear keen on having this matter concluded.

[10] I am not persuaded that the applicant deserves the favourable exercise of this Court's discretion. I find her application devoid of merit and dismiss it with costs to the respondent.

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

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR