IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, JA (IN CHAMBERS]

CIVIL APPLICATION NO. 179 OF 2018

BETWEEN

FIT-TIGHT FASTENERS LIMITED.....APPLICANT

VERSUS

AKIBA BANK LIMITED .....RESPONDENT

(Being an Application for extension of time to file Notice of Appeal and record of appeal in an intended appeal against the Judgment and decree of the High Court of Kenya at Nairobi (Tuiyott, J.) Dated 10th May, 2018

in

H.C. C.C. No. 466 of 2005)

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RULING

Before me is a Notice of Motion dated 14th June, 2018, brought under Rule **4** of the Court of Appeal Rules, 2010, it seeks orders as follows:

> ***"(1) That time be extended to lodge and serve a notice of appeal against the Judgment in this suit*** (sic).
>
> ***(2) That the Applicant do have leave to file its record of appeal within the time to be considered by the court.***
>
> ***(3) That costs of this Application be in the intended appeal."***

The application is supported by the grounds on its body and a supporting affidavit deposed by **Kanyaiyalal Mansukhlal Goradia** together with annextures thereto. It is un opposed.

It was canvased by way of oral submissions by learned counsel **Mr. A.B. Shah,** instructed by the firm of A.B. Shah Advocates for the applicant. There was no appearance for the firm of **Kipkorir Tito & Kiara** for the respondent, who were served on the 5th of November, 2018, with a hearing notice, and which notice was not received under protest. No explanation was given for non-attendance. Being satisfied that the respondent had due notice of the date of the hearing of the application, allowed the applicant to prosecute the application exparte.

In support of the application, learned counsel **Mr. A.B. Shah** submitted that the proceedings resulting in the intended appeal were conducted at the High Court by the late **Rustam Hira Advocate**; that upon his demise, it took time for the office of the late **Rustam Hira** to instruct another advocate to take over the conduct of the matter; that by the time the firm of **A.B. Shah and Company Advocates**, were instructed to take over the matter, time for initiating the appellate process had lapsed; delay in seeking the Courts' intervention is not inordinate and therefore excusable. On that account, counsel prayed for the application to be allowed as prayed or on such terms as I may find fit to grant.

My invitation to intervene has been invoked under rules **4** of the Rules of the Court. It provides:

> ***1. 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 this jurisdiction are now well settled. I will highlight a few cases by way of illustration. In **Edith Gichugu Koine versus Stephen Njagi Thoithi [2015]** eKLR, it was stated that the exercise of the mandate 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. In **Nyaigwa Farmers' Co-operative Society Limited versus Ibrahim Nyambare & 3 others** [**2016] eKLR**, it was stated that the principle that guide this Court in considering an application of this nature are well known. They are 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.

In **Hon. John Njoroge Michuki & Another versus Kentazuga Hardware Limited [1998] eKLR,** it was stated that an order sought under Rule 4 of the Rules of the Court should be liberally 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. Further that the discretion granted under rule 4 of this Court to extend time for lodging an appeal is, as well known, unfettered and is only subject to it being granted on terms as the Court may think just. In **Cargil Kenya Limited Nawal versus National Agricultural Export Development Board** [2015] eKLR, The Court added that, Rule **4** empowers this Court, on such terms as it thinks just, to extend the time prescribed by the Court of Appeal Rules for the doing of any act, subject only to the requirement that it must be exercised judicially. The discretion conferred by that rule is wide and unfettered. Further that the exercise of this Courts discretion under rule 4 has followed a well beaten path since the stricture of "sufficient reasons" was removed by the amendment in 1998. 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 for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the applications is granted; the degree of prejudice to the respondent if the applications is granted; the effect of the delay on public administration and the importance of compliance with time limits; the responses of the parties whether the matter raises issues of public importance are all relevant but not exhaustive factors.

In **Mathenge versus Duncan Gichane Mathenge [2013] eKLR,** it was stated 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 proceedings relied upon by such an applicant. Further that the Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before Court. Lastly in **Richard Nchapi Leiyagu versus IEBC & 2 others Civil Appeal No. 18 of 2013,** it was 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. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.

I have considered the principles of law enunciated above in light of the reasons advanced in support of the instant application. It is my finding that it is not disputed that the Judgment of the High Court was delivered on the 10th day of May, 2018. The rules required the applicant to lodge a notice of appeal within fourteen (14) days of the date of that Judgment in terms of Rule 75 (1) of the Rules of the Court; to apply for a certified copy of the proceedings and judgment within thirty (30) days of the date of that judgment in terms of Rule **82(1)** of the Rules of the Court; and to file the record of appeal within sixty (60) days of the date of the Judgment in terms of Rule **82(1)** of the rules of the Court; none of which were complied with hence the filing of this application under Rule **4** of the Rules of the Court.

Rule **4** of the Rules of the Court donates jurisdiction to extend time within which to comply with the procedural lapses highlighted above. The principles that guide the Court in the exercise of its mandate under the said rule are as distilled in the case law highlighted above. The core principle is that, the exercise of jurisdiction under Rule 4 of the rules of the Court is discretionary. The factors to be considered when deciding either way in the exercise of that mandate are as crystalized by the same case law highlighted above. I have considered these in line with the uncontroverted reasons advanced by the applicant for the delay namely, death of counsel who conducted the proceedings before the High Court on behalf of the applicant; and the delay in instructing the current advocate to take over the conduct of the matter. I find the reasons advanced for the delay plausible and excusable. There is also no inordinate delay as the Courts intervention was sought within a period of about one month and ten (10) days, as soon as the advocate currently on record for the applicant was capacitated, which period in my view is not inordinate. It is also excusable as it has been sufficiently explained that it was on account of the death of the advocate who was then seized of the matter on behalf of the applicant at the High Court, from which the intended appeal arises.

In the result, I find merit in this application. It is allowed on the following terms:

(1) The applicant has seven (7) days from the date of the reading of the ruling to file a notice of appeal.

(2) The applicant has sixty days from the date of the lodging of the notice of appeal to file the record of appeal.

(3) The costs of the application to abide the outcome of the intended appeal.

Dated and Delivered at Nairobi this 23rd day of November, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR