IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, JA (IN CHAMBERS)

CIVIL APPEAL NO. 162 OF 2018 (UR

BETWEEN

DOLORES N. COLLINS …….....APPLICANT

=VERSUS=

JOHN OKUNA OGANGO …….....RESPONDENT

(**Being an Application for extension of time within which to file an appeal from the Judgment of the Environment and Land Court at Nairobi (Hon. Lady Justice K. Bor, J.) Dated 18th September, 2007**

in

Civil Appeal No. 606 of 2016

****

RULING

Before me is a Notice of Motion dated 25th day of May, 2018 and filed in the Courts' Registry on 29th May, 2018 pursuant to Article 159 (1) (d) of the Constitution of Kenya, 2010, Section 3A, 3B & 7 of the Appellant Jurisdiction Act, 2010; Rule 4, 42 & 83 of the Court of Appeal Rules, 2010 and all other enabling provisions of the Constitution and the Law. It seeks orders as follows:-

> ***(1) That the Court to extend time for filing a fresh Notice of Appeal from the Judgment of the Environment and Land Court at Nairobi (Hon. Lady Justice K. Bor) dated 18th September, 2017 in Civil Suit No. 606 of 2016.***
>
> ***(2) That in the alternative to prayer "1" above, the court do extend the validity of the Notice of Appeal filed on 27th September, 2017.***
>
> ***(3) That the Court do extend time for filing appeal from the Judgment of the Environment and Land Court at Nairobi (Hon. Lady Justice K.Bor) dated 18th September, 2017 in Civil Suit No. 606 of 2016 by thirty (30) daysfrom the date of ruling herein.***
>
> ***(4) That the costs of and incidental to this application abide the result of theintended appeal.***

The application is supported by the grounds in the body of the application and a supporting affidavit, together with the annextures thereto. It has been opposed by a replying affidavit deposed by **Engineer John Okuna Ogango,** and filed on the 25th day of September, 2018.

The application was canvased by way of oral submissions by learned counsel **Mr. Ochieng Ogutu,** of **Ochieng Ogutu & Co. Advocates** for the applicant, and learned counsel **Ezekiel Oduk,** of **Oduk & Co. Advocates** for the respondent.

In support of the application, learned counsel **Mr. Ogutu** submitted that the Judgment was delivered on the 18th day of September, 2017; that the applicant was dissatisfied with the said Judgment and expressed a desire to lodge an appeal against the same. The Notice of Appeal was filed on the 27th day of September, 2017 albeit out of time; that the applicant also timeously applied for certified copies of the proceedings and the Judgment on the 27th day of September, 2017; that it was not until the 6th day of February, 2018, when a certified copy of the

proceedings and Judgment were supplied and a certificate of delay issued to that effect; that the applicant moved diligently intending to file the appeal timeously within the prescribed period of sixty days from the date the certificate of delay was issued as stipulated for within the rules; that the applicant's advocates on record was not however able to lodge record of appeal timeously as the client who was to meet the courts filing fees was out of the jurisdiction, away in Kampala. Secondly, that the last day for filing the record of appeal after assessing court fees fell on a weekend; that they have prepared the record and are ready to lodge it as soon as they are capacitated to do so, borne out by the inclusion of the said record as an annexure to the application. Lastly, that the intended appeal is arguable.

To buttress the above submissions, counsel cited the case of **Gurdev Singh Bundi & Narinder Sing Ghatora** as Trustees of **Ramgharia Institute of Mombasa versus Abubakar Madhbuti [1997] eKLR; Hon John Njoroge Michuki & another versus Kentazuga Hardware Limited [1998] eKLR; Kiragu Mwangi versus James Mwangi Kagera [2018] eKLR** and **Imperial Bank Limited (in Receivership) and another versus Alnashir Popat & 18 others [2018]' eKLR,** all on the principles that guide the Court in the exercise of its mandate under Rule **4** of the Rules of the Court and which I will revert to at a later stage in this ruling.

In opposition to the application, learned counsel **Mr. Ezekiel Oduk,** while reiterating the content of the replying affidavit, submitted that both the judgment and the proceedings were ready for collection on the very date that the judgment was delivered. It is therefore counsel's submission that no sufficient explanation has been given by the applicant for the delay in filing the appeal from 18th September, 2018 to 5th April, 2018; that lack of filing fees is not a sufficient reason for the delay and it should therefore be rejected. Lastly, that the intended appeal is not arguable as all that is sought to be appealed against is an award of Kshs. 5,000,000.00 which had been provided for in the sale agreement as forfeiture on account of a purported breach and lastly that no appeal lies against costs as these usually follow the event and were properly awarded to the respondent as the successful party.

To buttress the above submissions, counsel also cited the case of **Peter Mbugua Muturi and another versus James Weigwe Kaireta [**2017] eKLR and **David Simiyu Wanyonyi versus John Silakwa & another [2016],** also all on the principles that guide the Court in the exercise of its mandate under Rule 4 of the Rules of the Court as will be reverted to at a later stage in this ruling.

In reply to the respondent's submission learned counsel**, Mr. Ogutu** submitted that the delay in lodging the appeal within the stipulated time has been sufficiently explained; that the same was not inordinate; that the certificate of delay exhibited on the record is sufficient demonstration that the applicant moved diligently and with speed to ready the record of appeal for filing but was late by one day which fell on a weekend; that the same is therefore excusable. Still maintained that the record is now ready for filing as soon as capacitated.

My invitation to intervene has been invoked under the provisions of the law cited above. Article 159 (1) (d) of the Kenya Constitution, 2010, simply enshrines the principle that enjoins Courts of Law not to uphold technicalities at the expense of substantive justice. The parameters for its invocation have now been delineated by case law. In the case of **Jaldesa Tuke Dabelo versus IEBC & Another [2015] eKLR,** the court held *inter alia* that:

> ***"Article 159 of the Constitution was neither aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action".***

In **Raila Odinga and 5 others versus IEBC & 3 others [2013] eKLR**, the Supreme Court stated that the essence of Article **159** of the Constitution is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case. In **Lemanken Arata versus Harum Meita Mei Lepaka & 2 others eKLR**, it was stated that the exercise of the jurisdiction under Article **159** of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice. Lastly, in **Patricia Cherotich Sawe versus IEBC & 4 others** [2015], it was stated that Article **159 (2) (d)** of the Constitution is not a panacea for all procedural short falls as not all procedural deficiencies can be remedied by it.

Section 3A and 3B of the Appellate Jurisdiction Act enshrines the overriding objective principle which advocates for quick dispensation of justice. Its parameters have also been delineated by case law. The Principle confers on the Courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under. See the case of **City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukonya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR. 199/2008);** the aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate time and cost saving disposal of cases before it. See the case of **Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009);** that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the Court to be guided by a broad sense of justice and fairness. See the case of **Kariuki** (supra); that the principal aim of the overriding objective principle is to give the Court greater latitude to overcome any technicalities which might hinder the attainment of the overriding objective. See the case of **Caltex Oil Limited versus Evanson Wanjihia Civil Application No. Nai 190 of 2009 (UR).**

The substantive provision for intervening in the applicant's application as already indicated above is Rule 4 of the Rules of the Court as the other cited Rules namely; 42, 43 (1) and 82 are merely procedural and need no further interrogation. Rule **4** provides as follows:-

> ***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 guiding 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, i**t 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 factors to be considered include; 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. Secondly that discretion 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, it was stated that, Rule **4** empowers the 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. Since 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 application 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. By an arguable appeal, it 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 as enshrined in the Constitution and is also the cornerstone of the rule of law.

I have given due consideration to the above guiding principles in light of the rival pleadings and submissions of the opposing parties as highlighted above. It is my finding that it is not disputed that Judgment was delivered on 18th September, 2017 and the applicant being dissatisfied with that outcome, filed a Notice of Appeal on the 27th day of September 2018, albeit out of time. The applicant also moved diligently and applied for a certified copy of the proceedings on the 26th September, 2017, within the stipulated time of thirty (30) days from the date of the pronouncement of the Judgment.

The applicant concedes that the appeal was not filed within the requite sixty days from the date of the lodging of the Notice of Appeal, citing a failure to supply the certified copy of the proceedings and judgment within time. Although, the respondent has asserted that the proceedings were ready for collection on the very day the Judgment was delivered, learned counsel **Mr. Ogutu** has urged me to be guided by the contents of the certificate of delay. A perusal of the same reveals that, it indicates clearly that the proceedings were ready for collection on the 6th of February, 2018. Sixty days from 6th February would fall on or about the 7th day of April,2018, which fell on a Saturday as correctly submitted by **Mr. Ogutu.** The appeal ought therefore to have been filed on or before the 6th day of April, 2018.

The application to regularize the above position was filed on the 29th day of May, 2018. The explanation given for the length of time taken before the filing of the said application was that, after the assessment of court fees, counsel had to get through to his client who was outside the jurisdiction, in Kampala, Uganda to remit the requisite court filing fees, hence the filing of this application about one month and twenty two days later.

When the above explanation is considered in light of the principles set out above, I find that the delay between the date of the Judgment of 18th September, 2017 to the date when a certified copy of the proceedings were ready for collection on the 6th day of February, 2018, has been sufficiently explained. I find nothing to suggest as asserted by the respondent, that the proceedings were ready for collection on the 18th day of September, 2018, the very date when the judgment was delivered. There has been no reason given for me to doubt the veracity of the content of the certificate of delay. I therefore reject the invitation of the respondent to overlook the content of the certificate of delay.

The above being the position, it therefore means that the only delay the applicant has to explain in order to succeed on this application is that between the 6th February, 2018 when the certified copy of the proceedings and Judgment were collected, to the 29th May, 2018, when the court's intervention was sought, which in my estimation is approximately three months in all. It has been explained that the last day for filing of the record of appeal fell on a Saturday which has not been disputed. Beyond this date the record could not be filed without the courts' intervention. As already mentioned above, the application was filed about one month and twenty two days later. The explanation given was that of the delay in obtaining the requisite court filing fees on account of the client being out of the jurisdiction. It was not disputed that it was the client to meet court fees. That explanation was therefore plausible as it has not been seriously contested, considering that it is trite that in law, it is the client to meet court filing fees. In my view, it is not such a delay that would justify me to curtail an appellate right which has accrued and which I have been told will accordingly be actualized as soon as capacitated. I have also been informed that the record is ready for filing. Denying the applicant the relief sought in the circumstances of the facts displayed above in my view will amount to rendering technical justice as opposed to substantive justice. It may also prolong the procedural litigation as between the parties and in the process, defeat the overriding objective principle in sections 3A and 3B above.

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

(1) The applicant has seven days from the date of this ruling to file a Notice of Appeal;

(2) The applicant has fourteen days from the date of filing 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 9th 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