IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, JA (IN CHAMBERS)

CIVIL APPEAL NO. 161 OF 2018

BETWEEN

JIMCAB SERVICES LIMITED.....APPLICANT

=VERSUS=

BARTHOLOMEW BERNARD OSODO

& JACOB OTIENO (Suing as the Administrators of the

Estate of **RICHARD OMONDI**

ODHIAMBO (DECAESED).....RESPONDENTS

(Being an Application for leave to file Appeal out of time being an appeal from the Judgment of the High Court of Kenya at Nairobi (J.K. Sergon, J.) Dated 19th February, 2016

in

H.C. Civil Suit No. 413 of 2007

****

RULING

Before me is a Notice of Motion dated 24th May, 2018, and filed in the Courts Registry on 25th May, 2018, pursuant to Rule 4, Rule 42, Rule 43(1), Rule 82 of the Court of Appeal Rules, substantively seeking an order for this Honourable Court to extend the time within which to file a record of appeal from the Judgment of the High Court of Kenya Nairobi **(Honourable Justice J.K. Sergon)**, delivered on 19th February 2016 in High Court Civil Case No. 413 of 2007, together with an attendant order that costs of this application be provided for.

The application is grounded on the grounds on the body of the application and a supporting affidavit, together with annextures thereto. It has been opposed by an affidavit in reply deposed by **Bartholomew Benard Osodo,** on the 31st July, 2018 and lodged at the Courts Central Registry in Nairobi on the same date.

The application was canvased by oral submissions by learned counsel **Mr**. **Thomas Obel** holding brief for **Mr. John Katiku**, instructed by the firm of **Musyoka Wambua & Katiku Advocates,** for the applicant; and learned counsel **Otieno Oluoch** instructed by the firm of **Ng'ani & Oluoch Advocates,** for the respondent.

In support of the application, learned counsel **Mr. Obel** adopted the content of the grounds in the body of the application and supporting affidavit, and submitted that the intended impugned Judgment was delivered by **J.K. Sergon, J** on the 19th day of February, 2016; that the applicant was dissatisfied with the said decision and lodged a Notice of Appeal on the 10th day of March, 2016, albeit out of time, intending to appeal against the whole of that decision. That the applicant timeously applied for a certified copy of the proceedings and Judgment; that they also obtained an extension of time within which to lodge the Notice of Appeal out of time from the High Court. That it was not until the 18th day of January 2018 when the certified copy of the proceedings and Judgment were ready for collection; that these were collected by the office of the applicant's advocate on the 21st day of February, 2018; that they concede that they had sixty days from the said date to lodge the appeal. In advertently, a clerk in their firm who had collected the certified copy of the court proceedings and judgment locked them away

when he proceeded on leave and by the time he came back, time for lodging the appeal had run out on the applicant, hence the filing of the application for the extension of time to regularize that position.

The applicant contends further that, in light of the above, the applicant has given a reasonable explanation for the delay; that the said delay is neither in ordinate nor in excusable. Lastly that the intended appeal is not frivolous and that the applicant should be accorded an opportunity to ventilate the same on appeal.

In opposition to the application, learned counsel, **Mr. Oluoch** reiterated the content of the affidavit in reply that the applicant was granted thirty (30) days stay of execution upon the delivery of the Judgment during which time no action was taken to initiate the appellate process; that it was not until the 10th day of March, 2016 close to the expiry of the 30 days stay of execution granted upon the delivery of the judgment that the applicant moved the High Court for an order of extension of time within which to lodge a notice of appeal out of time, and also for a stay of execution of the decree pending appeal both of which were granted on the 9th day of September, 2016.

Counsel continued to submit that no action was taken by the applicant to initiate the appellate process following that extension of time and an order of stay of execution pending appeal. It is conceded by the respondent that it was not until the 18th day of January, 2018, when both parties were notified by the court Registry that a certified copy of the typed proceedings and Judgment were ready for collection; that it was not until the 21st day of February, 2018, when the applicant collected the certified copy of both the proceedings and the judgment, but failed to initiate the appellate process timeously citing in advertence on the part of a clerk who had allegedly collected the said proceedings from the court and locked them away when he proceeded on leave.

In light of all the above, counsel urged that the conduct portrayed above by the applicant is inexcusable. It does not portray a party keen on pursuing his intended appellate rights, but one who is bent on delaying the respondent from realizing the fruits of the judgment.

To buttress the above submission, counsel cited the case of **Aviation Cargo Support Limited versus ST. Mark Freight Services Ltd** [2014] eKLR; **Catherine Njuguini & 2 others versus Commercial Bank of Africa Limited** [2015] eKLR, and **Tana and Athi River Development Authority versus Jeremiah Kimigho Mwakio & 3 others** [2015] eKLR, all on the principle that guide the court in the discharge of its mandate under Rule **4** of the Rules of the Court, which is the substantive provision under which the application is premised. These will be reverted to at a later stage of this ruling.

In reply to the respondents' submission, learned counsel **Mr. Obel** submitted that Rule **4** of the Rules of the Court gives the Court an unfettered discretion to grant the relief sought; that they were excused by the High Court on the basis of the explanation they gave before the High Court as the reason for the delay in initiating the appellate process timeously. Counsel denied that the facts presented before me demonstrated a pattern calculated to withhold the respondents from the fruits of the Judgment. Instead, counsel contended that the application was filed timeously and the delay involved is not inordinate. It was largely contributed to by the court in its failure to timeously prepare and avail a certified copy of the proceedings and the invertence on the part of a clerk as their office as alluded to above. It cannot therefore be used as a basis for imputing negligence on the part of the applicant. On that account, counsel urged me to allow the application.

My invitation to intervene has been invoked under Rules **4**, 42, **43 (1)** and **82** of the Rules of the Court. **Rules 42, 43(1)** and **82** are merely procedural and need no further interrogation. Rule **4** is the substantive rule. 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 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].** 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 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. 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**, it was stated 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. 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 applications is granted; the degree of prejudice to the respondent if the application 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 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.

I have given due consideration to the record, in light of the rival submission set out above as well as the principles of law that guide the exercise of the mandate under Rule 4 of the Rules of the Court. My finding is that, it is not disputed that the Judgment intended to be impugned was delivered on the 19th day of February, 2016. The applicant sought a stay of execution for thirty days which I am told was granted. No explanation was given as to why the appellate process was not initiated timeously by the filing of the notice of appeal. It was not until the 10th of March 2016 when a Notice of Appeal was filed out of time. The applicant has not disputed the respondent's assertion that the applicant upon defaulting as above, successfully sought the High Courts' intervention, seeking two reliefs. The first was for time within which to lodge the notice of appeal out of time. While the second was for stay of execution of the decree pending appeal. Both orders were granted. I have not traced on the record the notice of appeal filed pursuant to the leave granted by the High Court on the 9th day of September, 2016. Neither was the ruling granting those orders annexed to the application for me to appraise myself as to whether the Notice of Appeal filed on 10th March, 2016 was deemed as properly filed. I also note that no relief has been sought with regard to Notice of Appeal filed on the 10th of March, 2016. In the absence of an order that the Notice of Appeal filed on 10th May, 2016 was deemed as properly filed on the one hand, or that there is one filed pursuant to the orders of 9th September, 2016, the applicant stands non suited on this application, especially in an instance alluded to above when there is no prayer currently sought either for the validation of the Notice of Appeal filed on 10th March, 2016 or for a fresh one to be filed out of time. The substantive prayer is explicit that all it seeks from me is an order for leave to file the record of appeal out of time.

The above finding in my view disposes of the application. However, since the other aspects of the application were substantively argued by the respective parties, it is only prudent that the issues raised therein be addressed as well. As already mentioned above, the judgment was delivered on the 19th day of February, 2016. It was correctly contended by the applicant that the request for a certified copy of the Judgment and proceedings was made timeously. I have however not traced anything on the record demonstrating efforts made by the applicant to speed up that process, especially after it had been granted order of stay of execution pending appeal. It is also evident from the record that the Registry notified both parties on the 18th January that certified copies of both the Judgment and the proceedings were ready for collection. It was not until the 21st day of February, 2018 that these were collected by the applicant. It was not until the 25th day of May, 2018 when the application subject of this ruling was filed, citing in advertence on the part of a clerk in their office who had collected the proceedings from the court and who allegedly locked them away when he proceeded for his leave. Although I have no reason to doubt the veracity of that deposition considering that it is a deposition from learned counsel, the deposition would have carried more weight if the name of the clerk concerned would have been disclosed supported by confirmation of the facts deposed to by the counsel by the very clerk together with a document evidencing that indeed leave was taken at that point in time.

In the absence of demonstration as alluded to above, the conduct of the applicant falls short of the threshold provided for in the principle of case law assessed above as conduct excusable and one that justifies the courts intervention on behalf of a deserving litigant. The above being the position, it matters not that the intended appeal may have been arguable. There is therefore no need for me to interrogate that issue.

In the result, and for the reasons given in the assessment, I find no merit in the application. It is accordingly dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 9th day of November, 2018.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Deputy Registrar