IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, JA (IN CHAMBERS

CIVIL APPLICATION NO. 207 OF 2016

BETWEEN

DAVID MAINA MWANGI.....1ST APPLICANT

JOHN KARANJA MWANGI….....….2ND APPLICANT

NANCY NJERI NDUNGU…….....…3RD APPLICANT

AND

PERIS WANJIKU KAMARA.....RESPONDENT

(Application for extension of time to file and serve Notice of Appeal and record of appeal out of time in the intended appeal from a judgment of the High Court of Kenya at Nairobi (Kimaru, J) Dated on 8th April, 2011 in

H.C. Succ. Cause No. 1723 of 2009)

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RULING

Before me is a Notice of Motion dated the 7th day of September, 2016 and lodged in the Courts' Centrol Registry at Nairobi on the 8th day of September, 2016. It seeks one substantive relief together with an attendant prayer for costs, namely:

> ***1. That this Honourable court be pleased to enlarge time within which the applicant can file a Notice of Appeal and intended appeal."***

It is grounded on the grounds on its body and the supporting affidavit together with the annextures annexed thereto. There was no reply to it but, oral submissions on behalf of the respondent were allowed through her son **John Kamau Kamara (Kamara)** who holds a power of Attorney in her favour, registered at Murang'a on the 15th day of December, 2016.

The applicants **David Maina Mwangi (David), John Karanja Mwangi (John)** and **Nancy Njeri Ndungu (Nancy**) are sons and a daughter to one **Beth Mwangi** and **Mwangi Karugo. Beth Mwangi** was a daughter to **Waruga Kamandu,** the deceased upon whose demise, the Respondent **Peris Wanjiku Kamara (Peris)** took out letters of administration, with regard to Loc.3/Kariua/T.69 and

Loc.3/Kariua/145 (the suit properties); granted to her on the 27th day of February, 1986 in Thika Resident Magistrates Court Succession Cause No.305 of 1983, and subsequently confirmed in her favour on the 8th day of November, 1990 vide which the suit properties devolved to her on transmission.

The applicants' father, **Mwangi Karugo (**now deceased) took out summons to revoke the grant issued to **Peris** in Nairobi High Court Misc. Application No.764 of 1994 but failed to prosecute the same resulting in its dismissal for want of prosecution on the 5th day of July, 2001. Other civil litigation over the suit property between the said **Mwangi Karugo** and **Peris** were decided in her favour**,** prompting **Peris** to take out eviction proceedings against the said **Mwangi Karugo** and family, but he passed on before these were finalized. Upon his demise, the applicants took out summons for revocation a second time, dated the 31st day of July, 2009, resisted by **Peris** through a replying affidavit. The merit disposal of the applicants summons for revocation is what resulted in the intended impugned judgment of **L. Kimaru, J** dated the 8th day of April, 2011 in which the learned judge dismissed the applicants summons for revocation.

The applicants are now before me on the application under review seeking enlargement of time within which to file both the Notice of Appeal and the intended appeal.

David made representations on behalf of the other applicants contending that they are grand children of the deceased who have all along lived on the suit property since birth; that **Peris** fraudulently applied and obtained letters of administration to their grand father's estate without their knowledge subsequently confirmed in her favour, and which were unsuccessfully challenged twice through summons for revocation; the intended impugned judgment was delivered in their absence and without any notice to them. It was not until they were served with an application for eviction from the suit property that they learned that the judgment had been delivered. When they tried to follow up the matter, they found that the file had gone missing hence their inability to lodge the Notice of Appeal timeously. Lastly that they have an arguable intended appeal.

In response to that submission, **Kamara** submitted that the judgment intended to be impugned was delivered in the presence of all the parties; that no explanation has been given as to why the applicants did not timeously lodge the notice of appeal; that the applicants were evicted from the suit property but defied the court orders and came back and put up temporary iron sheet structures; that their mother, **Peris**, already has a title in her name.

In reply to **Kamara's** submission, **David** stated that they came into the litigation much later after the death of their father **Karugo** ; that they have lived on the suit property for over forty(40) years and that **Peris** took the title deed in 1986 without their knowledge and that they jointly use the suit property with **Peris**.

Although the provision of law under which my invitation to intervene has been invoked was not indicated in the heading of the application; the provisions of **Article 159(2)(d)** of the Kenya Constitution 2010, enjoins me not to strike out the imperfect application but to determine it on its own merits.

This provision provides *inter alia* thus:-

> ***"Justice shall be administered without undue regard to procedural technicalities."***

The relief the applicants seek from the court is enlargement of time within which to lodge both a Notice and intended appeal against the intended impugned judgment of **L. Kimaru, J** of 8th April, 2011,which invitation can only lie under **Rule 4** of the rules of the Court. It provides;-

> ***"4. 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 by way of illustration. In **Edith Gichugu Koine versus Stephen Njagi Thoithi** (supra) Odek, J.A. held the view that:-

> **"It is trite 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."**

Further that

> "***There is also a duty imposed on the court under Section 3A and 3B of the Appellate Jurisdiction Act to ensure that the facts considered are consonant with the overriding objective of civil litigation that is to say the just expeditious proportionate and affordable resolution of disputes before the court" (*** see ***Fakir Mohamed versus Joseph Mugambi & 2 Others Civil Application Nai.332 of 2004 (UR)."***

In **Nyaigwa Farmers Co-operative Society Limited versus Ibrahim Nyambare & 3 Others** (supra) Musinga, J.A. reechoed the above principles thus:

> "***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."*** (**Patel versus Waweru & 2 Others [2003**] KLR 361 approved)

In **Hon. John Njoroge Michuki & Another versus Kentazuga Hardware Limited [1998**] **eKLR G.S. Pall JA** (as he then was) added inter alia that:-

> ***"an appellant has a right to apply for extension of time to file the notice and record of appeal under rule 4 of the Rules of the Court and this order should 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"***

The learned judge then went on to add the following:-

> ***"... 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. Within this context, this Court has on several occasions granted extension of time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it."***

See also **Cargill Kenya Limited Nawal Versus National Agricultural Export Development Board** [2015] eKLR (supra) in which K.M'Inoti J.A, made the following observations on the exercise of this jurisdiction:-

> ***"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 my act, subject only to the requirement that it must be exercised judicially. The discretion conferred by that rule is wide and unfettered."***

Quoting with approval the holding in **Fakir Mohamed versus Joseph Mugambi & 2 Others CA Nai.332 of 2004** the learned judge added the following:-

> ***"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 application 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."

See also **Hellen Waruguru Waweru versus Kiarie Shoe Stores Limited** (supra) in which Odek, J.A approved the principle enunciated by the court in **Mutiso versus Mwangi [1997] KLR 630**, as approved in **Fakir Mohammed versus Joseph Mugambi & 2 Others** (supra). Lastly, there is **Paul Wanjohi Mathenge versus Duncan Gichane Mathenge [2013] eKLR** in which Odek, J.A. held 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 other proceedings relied upon by such an applicant"

Further while quoting with approval the holding in **Joseph Wanjohi Njau versus Benson Maina Kabau- Civil Application No.97 of 2012** the learned judge added 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."***

Further approved the holding in **Richard Nchapi Leiyagu versus IEBC & 2 Others Civil Appeal No.18 of 2013** 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 applied the above principles to the rival submissions set out above. On the length of the delay, it is not disputed that the judgment intended to be impugned was delivered way back on 8th April, 2011. The application under review is dated the 7th day of September, 2016 and lodged in courts' Registry on the 8th day of September, 2016, a period of about five (5) years and five (5) months. This period falls outside the statutory period within which a Notice of Appeal ought to have been lodged as of right, enshrined in **rule 75** of the Rules of the court. It provides:

1. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

2. Every such notice shall, subject to rules 84 and 97, be lodged within fourteen days of the date of the decision against which it is desired to appeal.

The explanation the applicants have given for the delay is that, they were not aware of the dates of the delivery of the intended impugned judgment. The applicants as the parties who had moved the court for the revocation of the grant were under an obligation to keep track of the delivery of the judgment. They have not demonstrated any efforts made by them to make any follow up on the delivery of the said judgment. There is mention that, at one time, the file went missing. The source of that information is not disclosed. Neither is there any communication from them to the Deputy Registrar of the court expressing concern over the alleged missing file and efforts made to solicit the Deputy Registrars' support in locating the same. In the absence of such a demonstration, their assertions are nothing but mere unsubstantiated allegations.

As for the arguability of the intended appeal, it is now trite that this is a mere possibility. Demonstration of its existence or otherwise will not normally vitiate the exercise of the courts' discretion either way. The above principles are however explicit that it is prudent to include issues intended to be raised on appeal

either through a draft memorandum of appeal or in the grounds in the body of the application or affidavit, simply to demonstrate that theapplicant's guest for an intended appeal process is a serious one and not one simply bend on delaying the cause of justice. Here in a part from the applicants deposing that they have a good appeal, there is no demonstration of the issues they intend to raise on appeal.

As for prejudice to be suffered by the opposite party, it is not disputed that the litigation resulting in the intended impugned judgment has its roots in Thika Resident Magistrate's Court, Succession Cause No.305 of 1983 finalized way back on 8th November, 1990 in favour of **Peris,** when the suit property devolved to her and title subsequently issued in her name. She has thus been prevented from enjoying the fruits of that litigation, which in my view amounts to sufficient prejudice.

On the basis of the totality of all the above, it is my view that there has been no explanation for the said delay of five (5) years and five (5) months considering that no proof of the un availability of the file was demonstrated. Second, there was also no demonstration of any efforts made to make a follow up on the delivery of the judgment to pave the way for the initiation of the appellate process timeously, if need be. This coupled with the failure to disclose the issues the applicants intend to raise on appeal is sufficient reasonfor me to withhold the exercise of my discretion in their favour which I hereby do.

In the result, I find no merit in the application dated the 7th day of September, 2016 and filed on 8th September, 2016. It is accordingly dismissed.

Being a family issue each party will bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR