IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 230 OF 2016 (UR 182/2016)

BETWEEN

ANDREW KARANI IRERI……..……....1ST APPLICANT

PATRICIA WUGHANGA MWAKINA……2ND APPLICANT

AND

NIC BANK LIMITED……..……..…RESPONDENT

(An Application for leave to file a notice of appeal against the Ruling and Order of the High Court of Kenya at Nairobi (Olga Sewe, J) given on 2nd September, 2016

in

H.C.C.C. NO. 142 OF 2016)

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R U L I N G

The application before me is made under **Rule 4 of the Rules of this Court**. Originally, it had only one prayer, which was a prayer for *"leave to file a notice of appeal against the ruling and order given by the Hon. Lady Justice Olga Sewe on 2nd September, 2016"*.

When learned counsel appeared before me for the hearing of the application, Mr. Wamalwa, informally requested for an amendment of the prayers to include one for leave to file the memorandum and record of appeal out of time. Mr. Mugisha, learned counsel appearing for the respondent, though being of the view that the amendment was unnecessary, nonetheless consented to the application and so the amendment was done.

I need to however, clarify at this point that the said amendment was actually otiose. I say so because, as I tried to explain to learned counsel for the applicant, if leave to file the notice of appeal out of time is allowed, then the applicant does not need leave to file the memorandum and record of appeal, as the timelines set by the Court of Appeal Rules come into play, and we cannot anticipate at this point that there will be delay in filing the memorandum and record of appeal. That prayer was in my considered view precipitate and totally misplaced.

That said, I now come to the first prayer. Although not expressly stated, it is apparent from the oral submission of learned counsel for the applicant that the prayer is not for leave to file a Notice of Appeal, but one for extension of time to file the Notice of Appeal out of time.

From the grounds on which the application is predicated, and the contents of the affidavit of Andrew Karani Ireri in support of the same sworn on 13th October, 2016, the applicant was unaware that the impugned Ruling was delivered on 2nd September 2016. Both counsel conceded that the Ruling was not delivered on the scheduled date. Their point of departure however is that according to Mr. Wamalwa, they were not informed of the next date of delivery of the Ruling. Mr. Mugisha on the other hand submitted that on 29th July, 2016 when the Ruling was supposed to be delivered, they went to court and they were informed by the Court Clerk that delivery of all

Judgments and Rulings scheduled for that date had been rescheduled to 2nd September, 2016, and that is why they went back to court on that date. The respondent, NIC Bank through its Manager Legal Services Mr. Kelvin Mbaabu, in the replying affidavit sworn on 17th February 2017, in opposition to the application, even named the clerk who gave them the said information.

Having read the contents of the rival affidavits and the annexures thereto, I am convinced that the applicants did not appear in court on 29th July, 2016 to take the Ruling. There was no evidence placed before the Court to show that they actually appeared. On the other hand, other than the deponements by Mr. Mbaabu, there is the annexure showing that counsel for the respondent had entered that date in diary.

I also find that since there is even no allegation of notices having been served on the parties to inform them of the change of date, there was no other way the respondent would have known of the rescheduled date of delivery of the Ruling. I nonetheless note that the applicants' claim that they were not served with the extracted decree as required by law has not been controverted.

Having extracted the order, the respondent was required to send it to counsel for the applicants for approval pursuant to **Order 21 Rule 8 of the Civil Procedure Rules**. Had this been done, then the applicants would have become aware that the Ruling had been delivered and acted sooner than they did in filing this application.

I have considered the application carefully, along with the rival affidavits and learned counsels' oral submissions.

The principles to guide the Court when dealing with an application for enlargement of time are well settled. There are many decisions of this Court on the subject, but interestingly, neither counsel availed any decided cases on the subject to the Court, in support of their case. I am constrained to say that there was manifest lack of seriousness on the part of counsel for the applicant in the manner the application itself was drafted, and the level of preparedness. I would agree with learned counsel for the respondent that the application was largely incompetent, but given the nature of the applicant's claim before the High Court, I will overlook the apparent deficiencies and determine the application in the broader interests of justice.

Rule 4 of the **Court of Appeal Rules** gives a single Judge unfettered discretion to extend time, but such discretion must be exercised judiciously. In **Mwangi –v-Kenya Airways Limited, [2003] KLR 486** at page 487, this Court stated of this discretion and the manner it ought to be exercised 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'.

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".

In this case the delay was approximately forty days. In some instances such delay has been found to be inordinate, while in others such delay has been countenanced. It all depends on the circumstances of each case. Is the delay in this case inordinate? To start with, I have no doubt in my mind that as deposed by the respondent, the court informed the parties of the date of delivery of the Rulings after the same was deferred from 29th of July. As stated earlier, it is evident that neither the applicants nor their counsel appeared in court on 29th July, 2016 to take the ruling and that would explain why they were not aware of the subsequent date of delivery of the ruling. The reasons given for that failure are not convincing in the least.

As stated earlier on however, the respondent extracted the order but failed to send it to the applicants' counsel for approval as required under the Civil Procedure Rules. No explanation was proffered for that breach of procedure. I agree with learned counsel for the applicants that this failure to serve the order was meant to steal a match on the applicants and ensure that they remained unaware of the fact that the Ruling had been delivered. That in my view smacks of bad faith and militates against this Court's exercise of discretion in favour of the respondent. Had the applicants been served with the ruling sooner, they would have moved the Court in good time and the delay in filing this application would have been lessened. It is purely for that reason that I will allow this application. I will avoid making any comments or findings on whether the applicants have a good appeal or not. This is because the appeal sought to be filed is against an interim order, and I suspect that before the appeal is filed there could be filed before this Court an application under **Rule 5(2) b of the Rules of this Court**, and I do not want to embarrass the Court that may be called upon to determine the issue of arguability of the appeal.

For the foregoing reasons, I allow the application and grant the applicants leave to file the Notice of Appeal within seven (7) days from the date hereof. I also order that the costs of the application abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 3rd day of March, 2017.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR