IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M KARIUKI JA (In Chambers))

CIVIL APPLICATION NO. NAI 282 OF 2012 (UR 240/2015)

VELOS ENTERPRISES LTD.....APPLICANT

VERSUS

PARAGON ELECTRONICS LIMITED.....RESPONDENT

(Application for Extension of Time to file and serve the Notice of Appeal out of time in an intended appeal from the judgment of the High Court of Kenya at Nairobi (Ogola, J) dated and delivered on 23rd day of October 2015

in

H.C.C.C. NO. 285 of 2010

***consolidated with Civil Case No. 289 of 2009*)**

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RULING OF THE COURT

1. Velos Enterprises Limited, the applicant, applied to this court on 24th November 2015 by way of a Notice of Motion dated 20th November 2015 for extension of time to file Notice of Appeal out of time against the judgment of the High Court of Kenya (by Ogola J) delivered on 23rd October 2015 in Nairobi in H.C. Civil Suit No.285 of 2010 which was consolidated with suit No.289 of 2009.

2. The applicant avers that it is aggrieved by the judgment of Ogola J and is desirous of appealing against it and that its intended appeal is arguable and has good prospects of success.

3. The applicant filed a Notice of Appeal late on 20th November 2015 and on the same date applied for a typed copy of the proceedings. A draft Memorandum of Appeal is attached to the application reflecting the intended grounds of appeal.

4. In the affidavit sworn on 20th November 2015 by Simon Wekesa, an advocate, in support of the application, it is averred on behalf of the applicant that the delay in giving the notice of appeal as required by rule 75 of the Rules of this Court was *"due to the fact that there was a change in clerical services in the offices of the applicant's advocates"*. It is further deponed that *"the clerk charged with filing the notice of appeal left employment of the applicant's advocates and failed to notify the applicant's advocates that the Notice of Appeal was yet to be filed."* The delay, it is averred, was beyond the

applicant's or its advocate's control.

5. The respondent in its replying affidavit sworn by advocate Carolyne Karimi Nyaga on 9th May 2016 in opposition to the application avers that the explanation proffered by the applicant for the lateness in giving notice of appeal is lame. The respondent further contends that even if leave to file notice of appeal is given, service of the notice of appeal shall be hopelessly out of time because the applicant has not sought in the application an order to serve it out of time. Moreover, contends counsel, the applicant is in breach of rule 82 (1) of this Court's Rules, because it did not serve the respondent within 30 days of delivery of the judgment with a copy of the application letter seeking the proceedings. The effect of this default, avers the respondent, is that the applicant cannot take advantage of the proviso to rule 82(1) of this Court's Rules and therefore cannot have excluded from the 60 day period for lodging appeal the period for the preparation of the proceedings. Consequently, in the respondent's view, the time for the applicant to lodge appeal has elapsed in absence of exclusion of the time for preparation of the proceedings as the applicant is precluded from taking advantage of the proviso to rule 82(1). It is the respondent's contention that the court would be engaging in academic exercise if it were to allow the application for extension of time to give notice of appeal. Finally, the respondent contended that the intended appeal has no chance of success because *"the High Court based its judgment on the testimony and documents adduced by the parties."*

6. When the application came up for hearing, Mr. Walter Amoko assisted by Mr. Geoffrey Muchiri appeared for the applicant while Ms Nyaga held brief for Mr. Fred Ngatia for the respondent.

7. Mr. Amoko urged the Court to allow the application to facilitate filing and determination of the appeal on merit. He conceded that he filed the notice of appeal on 20th November 2015, exactly 27 days after the delivery of the judgment on 23rd October 2012. If the notice of appeal had been timeously filed not later than 14 days after the judgment on 23rd October 2015, it would have been filed on or before 7th November 2017. Instead, it was filed on 20th November 2015, exactly 13 days out of time.

8. Mr. Amoko contended that the intended appeal is arguable and has chances of success. He drew the attention of the court to the intended grounds of appeal in the draft memorandum of appeal and submitted that the judgment of the High Court intended to be challenged on appeal shall be impugned on the grounds, inter alia, that the trial judge *"descended from the Bench and acted as an advocate for the respondent"* because he gave advise on the reliefs available to the respondent. This is because the judge stated in paragraph 58 of his ruling that –

> ***"…the defendant (respondent herein) is entitled to quantify that damage from the time of the blockade of the sewerage to the date of this ruling, and to recover the same in a suit filed separately if the time limitation is not exhausted. The report by Topmark Valuers should therefore be used in proof of that claim, except that for the purposes of this judgment this court shall take the monthly rent of the suit to be Ksh.1,178,000/= as per the said valuation. This amount shall be payable from the date of this Ruling until the Plaintiff provides the Defendant with a separate title as determined hereinunder…"***

9. Mr. Amoko urged the court to grant the application and order extension of time. He invited our attention to the court decisions in his list of authorities.

10. On his part, Ms. Nyaga was of the view that the delay has not been sufficiently explained and that the excuse given was lame. She contended that because the letter bespeaking the proceedings was not copied to the respondent's counsel as required by the rules, the applicant could not take advantage of the proviso to rule 82(1) and consequently the time for filing appeal had run out. She invited my attention to the court decisions in her list of authorities to buttress her submissions that the applicant had not made out a case for the court to exercise its discretion to extend time.

11. I have perused the application and given due consideration to the rival submissions made by all the counsel for the parties.

12. It is a fact that the applicant filed the notice of appeal 13 days out of time. The explanation for the delay has been pooh poohed by the respondent as lame and as not constituting a "sufficient reason."

13. The court has unfettered discretionary power under rule 4 of this Court's Rules to extend time. The rule stipulates –

> ***"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 or 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 tie shall be construed as a reference to that time as extended."***

14. The existence of the rule 4 is an acknowledgement of human fallibility and the need to mitigate on the harshness resulting from strictness of timelines in the rules and in court orders. The rule is intended to help in achieving justice. It is acknowledged that as long as people remain human, mistakes will continue to be made. But mistakes that are plainly reckless or are a result of intolerable indolence may not be excused. However, each case must be decided on its own merit. This Court expects litigants to be vigilant and will excuse mistakes that arise due to inadvertence or unavoidable circumstances. In the case of **The Ministry of Education & Attorney General versus The Arya Pratinidhi Sabha East Africa** (Civil Application No.120 of 2013 (unreported) the court stated that –

> ***"… in cases where a litigant seeks to be excused for lapses on timelines set in the rules or Court Orders, it must be demonstrably shown that the extension sought will not be an exercise in futility. Judicial discretion is defined by Black?s Law Dictionary (Ninth Edition) as***
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> ***"the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court?s power to act or not to act when a litigant is not entitled to demand the act as a matter of right" Also termed "legal discretion".***

15. In **Gulam Hussein N. Cassamand and Another v. Shashikant Ramji** [Civil Application No. Nai 1 of 1981] C.B. Madan, J.A as he then was held that errors by a Legal Advisor can be pardoned. The court acknowledged that human errors, or mistakes including errors by legal advisors can constitute acceptable excuse for not acting within the timelines set in the rules or in the orders of the court.

16. In the case of **Githere V. Kimungu** [1984] KLR 387 a full Bench of this Court addressed the issue of delay and the exercise of this Court's discretion under rule 4 of this Court's Rules. In that case, the applicant filed an application for extension of time ten and half months after a decision of the High Court intended to be appealed against. While the application for extension of time was pending in that case, rule 4 of the Court of Appeal Rules was amended to what it is today and the provision then existing to the effect that one needed to show "sufficient reason" for the extension of time to be granted was replaced with one expanding the jurisdiction of the court by giving the court unfettered power to extend time limited by the rules or by any decision of the court or of a superior court *"on such terms as the court thinks just."* The respondent's advocate in that case, if I may digress a little, submitted that the previous rule 4 should be applied as all the events that related to the application had occurred before the coming into force of the amended rule. The court held that rule 4 was to be applied as amended as it was intended henceforth that the court should have unfettered discretion in dealing with applications for extension of time which came before it and not to be too rigidly bound by previous decisions; that the court had free discretion in granting extension of time; that the discretion is to be exercised judicially considering that it should not be so far bound by rules of procedure as to do that which may cause injustice; and that it is incumbent upon a party who is out of time to make an application for extension of time within a reasonable time.

17. Again in **Eastleigh Mattresses Ltd versus Stephen Mihang'o Kariuki & 2 Others** [Civil Application No. Nai 208 of 2014] (unreported), this court stated with regard to extension of time –

> "***But sight must not be lost of the fact that Rules of court are designed to set timelines in litigation with a view to ensuring expeditious determination of disputes otherwise tardiness in the***

court process might invite ridicule and result in loss of confidence in the judicial intervention. The House of Lords in its decision dealing with the amendments of pleadings in the case of Ketterman V Hansel Properties Ltd [1988] 1 ALL ER 38, (Lord Griffiths) (in a matter involving an application to amend at the end of trial) stated –

"Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings."

The sentiment expressed by the House of Lords as above captures the aims set out in section 3B (1) of the Appellate Jurisdiction Act whose purpose is to further the overriding objectives specified in section 3A of the Act.

18. In **Pola Charo Kariki v. Teddy Davis Ngala** [Civil Application No.44 of 2015] (in Chambers) cited by the advocates for the applicant, Ouko JA had this to say with regard to extension of time –

"***Under rule 4 of the Court of Appeal Rules, I reiterate, the discretion vested in the court to extend time is unfettered and may be granted on such terms as the court may think just. In Leo Sila Mutiso v Rose Helen Wangari Mwangi Civil Application No.255 of 1997 the Court laid down factors which may be taken into account in deciding whether to grant an application for extension of time. Those factors include the length of the delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted and (possibly), the chances of the appeal succeeding. This list, as was observed in Mongira & Another v Makori & Another [2005] 2 KLR 103 is not exhaustive. A single Judge is at liberty to consider any other factor outside those listed in Leo Sila (supra), so long as the discretion is exercised judicially. It is equally true that a single judge hearing an application under rule 53 is precluded from expressing any definitive view on the merits of an intended appeal. Whether or not the applicant?s intended appeal is likely to succeed is irrelevant for the purpose of the application for extension of time under Rule 4 unless the intended appeal is demonstrated to be patently frivolous. See Hon. John M. Michuki v Rose Waruino Muthemba, Civil Application No. Nai 16 of 1998 (Pall, JA). That is why the word "possibly" in Leo Sila when describing the 3rd factor namely, the chances of the appeal succeeding."***

19. The jurisprudence that has emerged from decisions of this court on interpretation of rule 4 shows that the factors to be considered in deciding whether to exercise the discretionary power in favour of an applicant include the length of the delay; the reasons for the delay; the arguability of the applicant's intended appeal; the degree of prejudice, if any, to the other party if time is extended; the public interest or importance of the matter; and generally the requirements of the interest of justice including the need to facilitate access to justice under Article 48 of the Constitution and the need to ensure under Section 3A(1) of the Appellate Jurisdiction Act, Cap 9, that the overriding objective of the Act and the rules made thereunder is to facilitate the just expeditious, proportionate, and affordable resolution of appeals governed by the Act.

20. In this application, the delay was of 13 days in giving the notice of appeal. In the circumstances explained by the applicant, it cannot be said to be inordinate. Although there was scepticism by the respondent about the explanation, there was no basis for casting aspersions on the veracity of the explanation. On the face of it, I accept it as true.

21. The applicant contends that the appeal is arguable. Without wishing to go into the merits, prima facie, and on the material placed before me, the appeal cannot be said to be a non-starter or unarguable. I accept that it is arguable.

22. If the extension sought is granted, will this be an exercise in futility? It was argued by the respondent that the applicant did not seek in the application an order for extension of time to serve the notice. But if time is extended, and notice is filed, the period for service of the notice will run from the date of filing. Normally an applicant is expected to seek extension of time to serve the notice of appeal in addition to the prayer for extension of time to file it. Where, as here, the applicant has failed to seek an order to serve, it is plain to see that the order to file without an order to serve would be valueless.

Though not pleaded, justice demands that we eschew technicalities and dispense justice and in the interest of justice, *suo moto*, order service of the notice of appeal after granting extension so that the Court does not act in vain in extending time. What prejudice would the respondent suffer if the court orders service of the notice of appeal after granting extension of time. None.

23. The respondent also raised the issue that the requirement of rule 82(1) that the 60 day period from the time of judgment will run from 23rd October 2015 unless the letter by the applicant bespeaking the proceedings was copied to the respondent. If it was not, the applicant will not be entitled to take advantage of the proviso to the rule 82(1). Consequently, the time for filing appeal ran out towards the end of December 2015. But at the time when the applicant applied for extension of time, on 24.11.2015, the 60 day period had not expired. That period expired during the pendency of the application for extension of time. The 60 day period run from 23rd October 2015 and elapsed on 23rd December 2015. As there was no compliance with rule 82(2), and as there was no prayer for the appeal to be admitted out of time, it seems clear that extension of time, even if granted, to give and serve notice of appeal will not assist the applicant to bring the intended appeal on board. This court in a full Bench of three Justices of Appeal expressed the position in the case of **Harry Njai V. Taita Ranching Co. Ltd** [Civil Application No. Nai 255 of 2010] at Mombasa (unreported) as follows –

> ***"It is not in dispute that the judgment the respondents seek to appeal against, was delivered on 2nd November 2007; it is not in dispute that by dint of the order of Ojwang J. delivered on 22nd October, 2010, the respondent had up to 22nd November, 2007 to file notice of appeal. He had filed it on 21st November, 2007. It is not in dispute that from that date, 21st November, 2007 to the date this notice of motion was filed, i.e. 3rd November, 2010, about three years, no memorandum and record of appeal had been filed and even by the date this matter was heard on 19th January, 2011 none had been filed. Lastly parties agree that no request was made for copies of proceedings and judgement within 30 days of the date of ruling and obviously no such copy was sent to the applicant."***
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> ***Rule 81 (1) and (2) of this Court?s Rules which was then in operation stated –***
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> ***"81 (1) subject to the provisions of rule 112, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when notice of appeal was lodged.***
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> ***(a) a memorandum of appeal in quadruplicate***
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> ***(b) the record of appeal in quadruplicate***
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> ***(c) the prescribed fee and***
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> ***(d) security from the costs of the appeal. Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with subrule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.***
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> ***(2) An applicant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was sent to the respondent."***

"It is clear that the appeal which is yet to be filed will be hopelessly out of time. That situation could have been salvaged if there was proof that the respondent had, within thirty (3) days from the date of the delivery of judgment, written a letter to the Deputy Registrar, bespeaking the copies of the proceedings and judgement and if such a copy of such letter had been sent to the applicant. In this case at the end of 30 days from 2nd November, 2007, no such letter had been written and a copy sent to the appellant. This was readily conceded. The allegation that the respondents were not aware of the date of the delivery of judgment until 21st November 2007, cannot be of any assistance to the respondents because, by the time they came to know of the existence of the judgment on 21st November, 2007, thirty (30) days had not expired. They still had about ten (10) days within which such a letter could have been written and sent to the applicant. If they were able to prepare and file notice of appeal as they did, what could have stopped them from writing a short letter similar to the one they wrote on 25th October, 2010 and send a copy of it to the applicants? None at all. In our view the sixty day-period for lodging memorandum and record of appeal started running from 21st November 2007 considering the extension granted by Ojwang J. and that that was the date when notice was filed. If after sixty days from that date the memorandum and record were not filed, then only compliance with the proviso to rule 81(2) as spelt out above could have helped the situation. That rule is the same in the new Rules except it is now rule 82 and the letter is now required to be "served" upon the respondent instead of being „sent? to the respondent and rule 112 is now rule 115. Since the respondent failed to comply with it, nothing would salvage the appeal. Hence the notice of appeal no longer serves any useful purpose."

24. A full Bench of this court reviewed a number of authorities in the case of **Development Bank of Kenya Ltd & Another v. Francis Ndegwa** [Civil Application No.28 of 2013] in considering whether to strike out the appeal on the ground, inter alia, that the Memorandum of Appeal and the Record of Appeal were filed out of time. The court had this to say –

"We cannot help but note that from the record there is no evidence that the appellant served the respondents with the letter requesting for certified proceedings. Further, the appellant?s counsel did not address us on this issue. We find that the appellant applied for the certified copies of proceedings out of the stipulated time and did not serve the letter requesting proceedings upon the respondents. Consequently, time within which the appellant was required to file the appeal begun to run on 25th February, 2011 when the Notice of Appeal was filed and lapsed on or about 27th April, 2011. In Ramji Devji Vekaria - vs - Joseph Oyula – Civil Appeal (Application) No.154 of 2010, this Court held:

We hold therefore that no letter bespeaking the copies of proceedings was sent to the applicant/respondent or his advocates as is required vide proviso to rule 81 or now 82 of the Court?s Rules. That in effect means that the respondent/appellant cannot benefit under the provisions of that rule and thus the record of appeal was clearly filed out of time and without leave of the Court."

25. It seems clear to me that this application must fail. Even if time to give and serve notice of appeal is extended, and I was inclined to so order, it would not help the applicant as the appeal is out of time because the applicant cannot take advantage of the proviso to rule 82(1) of the court's rules not having applied and copied to the respondent the letter bespeaking the proceedings. In the result, I dismiss the application with costs to the respondent.

Dated and delivered at Nairobi this 28th *day of April, 2017*.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR