IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

CORAM: SICHALE, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO NYR 39 OF 2017

BETWEEN

JOSEPH LENDUSE ELDAISABA & 2 OTHERS.....APPLICANTS

AND

PAUL GUGO LESWAGEY & ANOTHER.....RESPONDENTS

(Being an application for extension of time to file a Notice of Appeal and record of appeal out of time from the Ruling of the High Court of Kenya at Nakuru (Waithaka, J.) dated 6th December, 2014

in

NAKURU ELC No 66 OF 2013

****

RULING OF THE COURT

JOSEPH LENDUSE ELDAISABA, ***DANIEL LENDUSE ELDAISABA*** and ***MIKE LENDUSE*** (**hereinafter 'the applicants'**) have filed a **Notice of Motion** dated **14th March, 2017** seeking orders **THAT:-**

> ***(i) The time for filing a Notice of Appeal and the entire appeal against the Ruling of the superior court in ELC No 66 of 2013 against the Ruling delivered on the 10th day of December, 2014 by Hon L.N. Waithaka be extended and/ or enlarged.***
>
> ***(ii) The Notice of Appeal filed and served on the 6th December, 2016 be deemed as filed and be admitted within the time extended by the court.***
>
> ***(iii) There be a stay of execution pending appeal from the Ruling of the Court delivered on 10th December, 2014.***

The applicants are desirous of obtaining the said orders with view to reversing the Ruling and Orders of the superior court which were favourable to ***PAUL GUGO LESWAGEY*** **(hereinafter 'the 1st Respondent')** and ***THE COUNTY COUNCIL OF NAKURU*** **(hereinafter ' the 2nd Respondent')**.

The application is premised on ***SECTION 3A*** and ***3B*** of the ***APPELLATE JURISDICTION ACT***, ***RULE 4*** and ***RULE 41*** of the ***COURT OF APPEAL RULES*** **(hereinafter 'the Rules')**. It is supported by the supporting affidavit of one of the applicants namely, ***MIKE LENDUSE*** sworn on **14th March, 2017** whose tenor I construe THAT:-

- ***The applicants had filed a Notice of Motion dated 7th March, 2012 seeking an injunction restraining the 1st&2nd respondents herein from interfering and or trespassing on the parcel of land Nessuit Settlement Scheme / NKU / No 1947, 1948, 1949…… (the suit properties).***
- ***The applicants sought eviction orders against the respondents herein.***
- ***The applicant's former advocates never informed them of the outcome of the application until they went to peruse the***

court file, whereupon they discovered that a Ruling had been delivered on 10th December, 2014 without their knowledge as their advocate was not present on the material date.

- ***Being dissatisfied with the said Ruling the applicants decided to appoint another advocate who filed a Notice of Change of Advocates, a Notice of Appeal and a letter requesting for typed certified proceedings.***
- ***The said advocates now on record informed the applicants and advise them that there was need to lodge an application for extension and or enlargement of time as the applicants were time barred.***
- ***It will be against the rules of justice for a mistake of the applicant's former advocates to be visited upon them.***

After two false starts on account of unsatisfactory service of hearing notices upon the applicant's advocates, the hearing of the application finally proceeded on **26th September, 2017** with all the parties adopting and relying on their respective written submissions.

I have had the benefit of perusing the record in its entirety, the application, the supporting affidavit thereto, Grounds of Opposition filed by the respective respondents, the Lists of Authorities and the authorities thereto; and the respective written submissions. Discernable from the foregoing pleadings is an earnest plea by the applicants for me to exercise my discretion pursuant to ***RULE 4*** of the rules and accord them the opportunity to lodge their Notice of Appeal and the substantive appeal out of time. Ancillary to the said plea is a prayer that the **Notice of Appeal** filed and served on **6th December, 2016** be deemed as duly filed and admitted within the time extended by this Court. Alongside the preceding prayers is one for stay of the impugned ruling of the superior court. Conversely, I have heard a fervent plea by the respondents that the applicant's motion be disallowed for want of merit.

RULE 4 of the rules is evidently the centerpiece of the applicant's effort to salvage themselves from their unenviable situation. It states 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 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 time shall be construed as a reference to that time as extended". [Emphasis added]***

Vivid in my mind is the unfettered discretion that the foregoing rule grants this Court to extend time, but always keeping to the confines of factors which have been set out in several decisions of this Court. See ***MWANGI V KENYA AIRWAYS LTD [2003] KLR, MUTISO V MWANGI- CIVIL APPLICATION NO NAI 255 OF 1997 and FAKIR MOHAMMED V JOSEPH MUGAMBI & ANOTHER-CIVIL APPLICATION NO NAI 332/ 04 (Unreported)*** wherein it was held that:-

> ***"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" as removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider too long as they are relevant. The period of 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, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors".***

By no means are the said decisions exhaustive owing to the recurrent nature of such applications.

Applying the foregoing principles to the instant view, I hold the considered view that Iam principally being asked to determine two questions namely:-

> ***(i) Whether the mistake of an advocate would warrant the exercise of this Court's discretion in favour of a litigant who finds himself on the short end of this Court's Rules; and***
>
> ***(ii) Whether the mistake of an advocate ought to be allowed to impede the course of justice.***

Human endeavour is fraught with mistakes and litigation is no exception. This Court came to terms with the foregoing reality in ***BELINDA MURAI & OTHERS V AMOI WAINAINA [1978] LLR 2782 (CALL)*** when **Madan, J.A.** (as he then was) memorably described what constitutes a mistake to wit:-

> ***"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever necessary to rectify it if the interests of justice so dictate. It is known that courts of justice make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule…"***

What do the Respondents have to say on the question of mistake?

I hear both Respondents downplaying the absence of the applicant's advocate on the material date as the cause of their present predicament. The **1st Respondent** avers as follows at **paragraph 4** of his **Grounds of Opposition** dated **20th June, 2017**:-

> ***"THAT there is no evidence to show that the applicants were unaware of the Ruling in ELC 66/ 13 by Hon L.N. Waithaka on the 6th December, 2014".***

On its part the **2nd Respondent** renders itself as follows at **paragraph 2** of its **Grounds of Opposition** dated **19th June, 2017**:-

> ***"THAT failure of both the advocate and the applicants being absent on the date of ruling can never be a ground for seeking for extension of time in favour of parties who are indolent".***

I cannot help but notice the nexus between the applicant's Advocates absence on the material date and the length of delay which ensued before the present application was filed. Iam fortified in this regard by the applicant's averments at **paragraphs 5**, **6** and **7** of their **Supporting Affidavit** sworn on 14th March, 2017 **THAT:-**

- ***"Our former advocates never informed us of the outcome of the application until when we went and perused the court file whereby we discovered that a ruling had been delivered on the 10th day of December, 2014 without our knowledge as our advocate did not represent us during the delivery of the said Ruling".***
- ***" After being dissatisfied with the said ruling we decided to appoint another advocate to replace (sic) current advocates who then filed a notice of change of advocates, a notice of appeal and a letter requesting for typed certified proceedings".***
- ***"Our current advocates on record herein informed and advised us, which advice we believe to be true, that it requires filing an application for extension / enlargement of time since we are time barred".***

It is clear that the applicants had placed all their trust in their Advocates, as any client would, only for their Advocates to let them down at the hour of need. Presumably lay in law, jolted by the import of the impugned Ruling, and the conduct of their Advocates; the applicants sought a second opinion from their current advocates who recommended the present course of action. Even if the applicants were in court on the material date as the 2nd Respondent has alluded to in its Grounds of Opposition, there is little they would have done apart from listening, then relaying the portions of the Ruling which they could grasp, to their then Advocates. The upshot is that the applicant's Advocates utterly failed in their professional duties, and the record attests as much. No further evidence would be required in my considered view.

What do the applicants have to say about the ensuing delay of 26 months?

They simply attribute the same to the absence of their advocates on the material date, and pray that the said omission should not be visited upon them. The Respondents find the delay to be inexcusable and inordinate.

Should this Court countenance the mistake of counsel, and what would be the effect thereof?

Having acknowledged that mistakes are inevitable hereinabove, the question remains whether they should be tolerated by this Court. I am of the considered view that it would depend on the circumstances as each case is distinct. That said, the moment has now come for me to balance two competing interests namely: - whether to allow the applicant's plea on one hand or to disallow the same as urged by the respondents. Conversely, I can surmise it as: - fidelity to the rules of this Court as regards time; or to allow justice to take its course. To balance the scales I will exercise my discretion in favour of the applicants albeit conditionally noting the latitude given to me by ***RULE 4*** of the rules.

The prayer for the grant of stay pending appeal is improperly before me as in my view as it should be canvassed in a separate application under ***RULE 5 (2) (b)*** of this Court's rules as opposed to within the current application. I shall say no more on this. In the premises, I make the following orders:-

> ***(i) Leave be and is hereby granted to the applicants to lodge their Notice of Appeal and Record of Appeal out of time.***
>
> ***(ii) The Notice of Appeal dated 6th December, 2016 be and is hereby deemed as filed and served upon delivery of this Ruling.***
>
> ***(iii) The applicants shall file and serve their Record of Appeal upon the Respondents within 60 days of the delivery of this Ruling. In default, the intended appeal shall stand dismissed.***
>
> ***(iv) Costs shall abide the outcome of the appeal.***

Dated and delivered at Nakuru this 1st day of November, 2017

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR