IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. 1 OF 2016

JOHN WAWERU

ELIZABETH MUTHONI…….....……APPLICANTS

VERSUS

NATIONAL IRRIGATION BOARD…….……1ST RESPONDENT

JOHN GICHOBI KARUGUNI……..2ND RESPONDENT

(*Application for extension of time to file and serve the notice of appeal, memorandum of appeal and record of appeal out of time against the judgment of the High Court of Kenya at Kerugoya (Olao, J) delivered on 26th October, 2015*

in

Miscellaneous Application No. 14 of 2014

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R U L I N G

By their Notice of Motion dated 12th January, 2016, the two applicants **JOHN WAWERU** and **ELIZABETH MUTHONI** seek, in the main, orders;

> **"1. THAT the honourable court be pleased to extend time limited for filing the notice of appeal and grant the applicants leave to file a notice of appeal and record of appeal out of time;**
>
> **2. THAT the Notice of Appeal dated 6th January 2016 be deemed as duly filed".**

The Motion is grounded on no less than a dozen points which appear on its face as follows:

> **"(i) That the time within which to lodge the notice of appeal and the appeal has since lapsed;**

(ii) That the Notice of Appeal ought to be filed within 14 days from the date of judgment;

(iii) That after judgment was made on 26th October, 2015 the applicants instructed the advocate to appeal against the same immediately;

(iv) That it took a while before the applicants could obtain the copy of the judgment;

(v) That the delay was further occasioned in the consultations between the applicants and their previous advocate on the way forward;

(vi) That before the advocate could confirm the way forward in time limited for filing the Notice of Appeal and the record of appeal had lapsed;

(vii) That their then advocate on record did not file a notice of appeal within 14 days as by law required;

(viii) That the delay is not inordinate;

(ix) That the applicants were aggrieved and dissatisfied by the judgment of the High Court and they have good grounds of appeal;

(x) That the mistakes of the applicants' advocate should not be visited upon them; and

(ix) That the respondents shall not suffer loss that cannot be compensated by costs".

It is also based on the affidavit of **ELIZABETH MUTHONI** which essentially repeats the grounds on the motion and attaches documents in proof of the assertions therein.

The second respondent **JOHN GICHUBI KARUGUMU** opposed the application by way of a replying affidavit in which he made various averments which I shall return to as they were repeated by counsel in submissions before me.

At the hearing of the motion, learned counsel Ms. Muthike appeared for the applicants. She submitted that after judgment was delivered by Olao, J on 26th October 2015, the applicants' former advocate did not file a Notice of Appeal within 14 days as required by the Rules of this Court. Counsel contended that the delay was of "**only one month and 24 days**", (excluding the Christmas vacation) which was not inordinate and urged me to exercise my discretion in favour of granting the extension sought.

Taking his turn, the respondents' learned counsel Mr. Kahigah fired off by asserting that the judgment was delivered in the presence of the parties and their advocates and a copy of the same was given to counsel appearing on the spot so that the applicants had no excuse for not deciding and filing a Notice of Appeal within time. He faulted them for not having applied for proceedings at the time the judgment was rendered or at any other time subsequently which, in his view, indicated a lack of interest in pursuit of any appeal from the judgment.

Mr. Kahigah castigated the applicants for merely blaming their former advocate without any basis or evidence of his wrongdoing or inaction. He termed the application '**a mere afterthought**' brought without diligence and asked that it be dismissed as unmeritorious.

Replying to those submissions, Ms. Muthike admitted that proceedings had not been requested but explained that their law firm was first trying to get on record for the applicants at the High Court. She urged me to invoke **Article 159** of the **Constitution** and overlook the delay herein as a procedural technicality which should not defeat the substance. She asked me to allow the application.

It is not in dispute that an application such as the one before me invites me to exercise my discretion. That discretion is free, full and unfettered intended to give a single Judge of this Court the greatest measure of liberty of action with a view to meeting the ends of justice in any particular case. That the discretion is free and unfettered does not mean, however, that it is unaccountable and unquestionable, exercisable capriciously and whimsically in accordance with a Judge's idiosyncrasies. Rather, it is a judicial discretion to be exercised judiciously in principled fashion.

A Judge considers a number of factors which, from authorities without number, can be reduced into the following;

a. **The length of the delay;**

b. **The explanation for the delay;**

c. **Possibly, the merits of the appeal or intended appeal; and**

d. **The prejudice that a grant of the application may occasion on the respondent(s)**

See MWANGI – vs – KENYA AIRWAYS LTD [2003] KLR 486.

The list is, from the nature of things indicative and is not exhaustive.

It is a trite that delay, however small, must be explained. It is not enough for a party to say, "**I am late, let me in**". He must say why he got late. Anything else would make nonsense of the rules that impose timelines for the doing of certain things. The timelines speak to the need for efficiency, expeditiousness and cost-effectiveness which are all part of the overriding objectives of the justice system. They also introduce certainty and rationality in the conduct of Court business and help to ensure that there is a level-playing field. All parties must abide by the rules. A cavalier and presumptuous disregard for rules must be firmly and resolutely resisted and rejected lest the justice project be reduced to a chaotic free- for-all in which caprice and chaos rule supreme. In short, all efforts must be made to obey the times set and if a party falls short, and seeks accommodation, he must place some material before the Court that will unlock the fountain of discretion his way. This is not a fettering of discretion but a logical effectuation of it.

Considering the application before me, I do not at all get the sense that the applicants see their default as a serious matter. They consider a delay of nearly two months to be trifling. I do not think it is. What is more, they seem to make no effort to explain that delay beyond an unbacked blaming of their former advocate. I respectfully agree with Mr. Kahigah that it is not enough for a party to say: "**my advocate let me down**". That line, the advocate's alleged mistake, tempting and easy to state though it be, cannot be some magic wand which, once waved, waives party responsibility. In the present matter the parties were present when the judgment was read. The notice of appeal is a simple, few-folio document the preparation and filing of which is neither difficult nor dependent on the availability of any documentation. All it does is signify in simple terms an intention to appeal. I am not satisfied that a plausible explanation has been given for the failure to file the notice of appeal in time. I note also that proceedings were not sought and remain unbespoken to-date, all indicative of an absence of serious intent to appeal lending credence to the 2nd respondent's contention that this application is an afterthought.

The upshot of my consideration of this application is that it is devoid of merit and must fail. It is accordingly dismissed with costs to the 2nd respondent.

Dated and delivered at Nyeri this 17th day of February, 2016.

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR