IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & AZANGALALA, JJ.A.) CIVIL APPLICATION NO. NAI. 144 OF 2015 (UR 117 OF 2015)

JONES M. MASAU……..…..……..……1ST APPLICANT

MAGDALENE WAYUA MAVYUVA…….…..….....…2ND APPLICANT

VERSUS

THE KENYA HOSPITAL ASSOCIATION…..…….1ST RESPONDENT

PETER MUNGAI NGUGI…….…….....2ND RESPONDENT

(An application for extension of time within which to file and serve a Notice of Appeal and Record of Appeal against the Ruling of Aburili, J. dated 10th December, 2014

in

H.C.C.C. No. 527 of 2013)

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RULING OF THE COURT

This is a reference arising from a decision of a single judge of this Court **(Kihara Kariuki, (PCA))**, made on 23rd October, 2015 in which the learned Judge rejected an application by **Jones M. Musau** and **Magdalene Wayua Mavyuva**, *("the applicants")*, for extension of time to file a notice of appeal and record of appeal out of time. The application is opposed by the respondents, **The Kenya Hospital Association** and **Peter Mungai Ngugi**, (*"the 1st and 2nd respondents" respectively)*. The learned single judge determined that the delay of over four months to seek extension of time was inordinate and was not satisfactorily explained. Learned counsel for the applicants, **Ms Mbulu**, who also represented the applicants before the single judge, relied on the affidavit sworn by the 1st applicant in support of the application for extension of time. It was deponed in the said affidavit, so far as it is material, that her counsel had been misled by notes made by the advocate who held her brief during the delivery of the decision intended to be challenged on appeal as a result of which an incompetent application was lodged before the High Court which event was compounded by the fact that the High Court file was not immediately available.

The learned single Judge considered the explanation for the delay and after scrutinizing the notes made by the advocate who held brief for the applicants' counsel during the delivery of the High Court decision, concluded that the said notes could not have misled the applicants' counsel as to the outcome of the High

Court case. With regard to alleged non-availability of the High Court file, the learned single Judge found no support for that statement in any of the material availed to him. In the end, the learned single judge determined that the delay of over four months was inordinate and was not explained.

With regard to the provisions of ***Article 159*** of the ***Constitution*** and ***Sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** which were invoked by the applicants, the learned single judge stated:

> ***"In my view, the applicants will find no solace in these principles. It has been stated that an unexplained delay will militate against the overriding objectives and the principles of extension of time".***

The learned single judge found support in three decisions of this Court namely, ***Bi-Mach Engineers Limited –v- James Kahoro Mwangi, [2011] eKLR [Civil Application No. 115 of 2011], M.S.K. –v- S.N.K. [2010] eKLR***, ***Civil Appeal (Application) No. 277 of 2005)***, and ***Waweru & Another –v-Kirori, [2003] KLR 448***. The principle in those decisions is that whereas the overriding objectives have an important role to play in the administration of justice, the rules of this Court are also of importance and before time for taking some step in procedure is extended, basis for doing so or some material must be laid before the court on which its discretion may be exercised.

In summary, those decisions show beyond peradventure that ***Article 159*** of the ***Constitution*** and ***Sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** are not panacea for all ills on all occasions.

Learned counsel for the applicants put forward one strong plea that the learned single judge in rejecting the applicants' application took into account only one factor namely, that of delay. In learned counsel's view, factors such as whether the applicants' intended appeal had any merit; and whether the extension of time sought would cause undue prejudice to the respondents were not considered. Non-consideration of other relevant factors, according to learned counsel, amounted to improper exercise of discretion.

On the merits of the intended appeal, learned counsel contended that the High Court in striking out the applicants' suit misconstrued ***Sections 26, 27*** and ***29*** of ***the Limitation of Actions Act*** and the basis of their claim which was grounded in contract and not under the ***Law Reform Act*** and the ***Fatal Accidents Act*** as the learned Judge of the High Court seemed to believe.

It was also learned counsel's contention that the respondents would not be prejudiced if time to lodge notice of appeal and record of appeal is enlarged. The refusal to extend time, according to learned counsel, would on the other hand result in the respondents unfairly benefitting from the mis-steps of counsel for the applicants.

Mr. Ochieng, learned counsel for the 1st respondent, in opposing the application, submitted that the learned single judge properly exercised his discretion in rejecting the applicants' application. In learned counsel's view, arguability of an intended appeal, although a relevant factor, non consideration thereof is not fatal. In any event, according to learned counsel, the proposed appeal had in reality no chances of succeeding as, in his view, the applicants' claim was wholly unmaintanable as pleaded.

On whether the 1st respondent would suffer prejudice if the extension of time was allowed, **Mr. Ochieng** submitted that given the delay in instituting the suit before the High Court, extending the time to lodge the notice and record of appeal would obviously militate against the overriding objectives which would clearly be prejudicial to the 1st respondent.

Mr. Ogado, learned counsel for the 1st respondent, associated himself with the submissions of **Mr. Ochieng** and reiterated that the intended appeal was not arguable as the applicants' claim as pleaded at the High Court was clearly statute barred. According to learned counsel, the delay in seeking extension of time was inordinate and unexplained and no material was placed before the learned single judge for the exercise of discretion in favour of the applicants.

We have examined the ruling of the learned single judge and the submissions which were made before him and those before us. We have also anxiously considered the record, the authorities cited and the law. Each case will turn on its own peculiar facts. In declining to extend the time to lodge a notice of appeal and record of appeal, the learned single judge of this Court exercised his judicial discretion. In that event, we can only interfere with that exercise of discretion if it is shown that the learned single judge failed to take into account a relevant matter which he was obliged to take into account, or that he took into account an irrelevant matter which he ought not to have taken into account or that he applied wrong principles of law or that he misunderstood the evidence on a particular aspect of the matter and thus reached a wrong conclusion or short of any of the foregoing factors, that the decision of the single judge is plainly wrong, taking into account all the surrounding circumstances of the case – See ***Fakir Mohammed –v- Joseph Mugambi and Others, [2005] eKLR [Civil Application Nairobi 332 of 2004] (UR)***.

The principles applicable in applications for extension of time made under ***rule 4*** of this ***Court's Rules*** are, in our view, well settled and counsel for the parties acknowledged that position. In the said case of ***Fakir Mohammed –v- Joseph Mugambi and 2 Others,*** (supra), we said:

> ***"The exercise of this Court's discretion under rule 4 has followed well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. 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 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 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: See Mutiso –v-Mwangi, Civil Application Nairobi 255 of 1997 (UR), Mwangi –v- Kenya Airways Limited [2003] KLR 486, Major Joseph Mwereri Ingweta –v-Murika M'Ethare and Attorney General –Civil Application Nairobi 8 of 2000 (UR), and Murai –v-Wainaina Number 4 [1982] KLR 38".***

The learned single Judge, indeed, cited the above principles in his ruling. On analysis, however, it is plain that the only factors, the learned single Judge considered were the length of the delay and the reason for the delay. He found that the delay involved was of over four months and that the same had not satisfactorily been explained. The learned Judge said as follows with regard to the reason for the delay: -

> ***"Miss Mbulu claims that she was misled by the notes that Mr. Wandati took, and that instead of filing a notice of appeal and memorandum of appeal against the decision of Aburili, J., she instead applied for leave to extend time for filing the suit afresh.***
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> ***4. Miss Mbulu, further submitted that after delivery of the ruling, the court file was unavailable between the 11th December, 2014 and the 6th May, 2015; it is only after the file was available on the 7th May, 2015, that she learnt that her clients' suit had been dismissed…***
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> ***12. The explanation given by Miss Mbulu is that Mr.Wandati, who was holding brief, misrepresented the position in his notes. I have looked through the said notes, which, are annexed to the applicants' affidavit in support of the motion…***
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> ***13. From the above excerpt, it is clear that the application to strike out the suit was allowed; the notes above are clearly a true reflection of the ruling. In light of this, it is difficult to accept Miss Mbulu's contention that she was misled and that she proceeded on the presumption that the suit was not struck out.***
>
> ***14. Counsel further states that she could not take any steps towards the matter because the court file went missing. The applicants have, however, not presented any evidence in support of this claim to this Court, either by way of letters to the registry enquiring as to the whereabouts of the file or by way of attendance dockets detailing visits made to the registry in search of the court file. In (sic) the whole the applicants have not demonstrated in any way what the reason for the***

inordinate delay is".

The learned Judge then considered whether ***Article 159*** of the ***Constitution*** and ***Sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** would come to the aid of the applicants and came to the conclusion that they would not. It is plain, therefore, that whereas the learned Judge considered the length of the delay and the reason for the delay, it is not evident from the record that the reason for delay was fully appreciated. What we understood, counsel for the applicant to be contending as she did before the learned single Judge was that she had made a mistake and that her mistake should not be visited upon the applicants. The learned single judge said nothing about that aspect of the reason for delay that the applicants had no control of the manner their case could proceed once they instructed counsel. True, there is no rule that counsel's mistake can never be visited upon his or her client. But consideration of the same was, in our view, a relevant matter which the learned single judge should have considered but did not.

Our perusal of the ruling of the learned single judge further shows that no mention was made of the merits or demerits of the applicants' intended appeal, yet that was a relevant factor in the exercise of his discretion. In ***Wasike –v- Swala, [1984] KLR 591***, this Court held, *inter alia*, as follows:

> ***"1. …***
>
> ***……..***
>
> ***2. As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, such an applicant must now show, in descending scale of importance, the following factors:***
>
> ***(a) That there is merit in his appeal.***
>
> ***(b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and***
>
> ***(c)That the delay has not been inordinate".***
>
> (Underlining supplied)

Before the learned single judge, the applicants indicated their intended grounds of appeal in their proposed memorandum of appeal which was annexed to their application. In it the applicants, *inter alia*, intend to contend that the learned Judge of the High Court misinterpreted the provisions of ***Sections 26, 27 and 29*** of the ***Limitation of Actions Act*** and the provisions of the Constitution. The learned Judge did not consider whether or not the proposed grounds of appeal were arguable.

The record shows that the applicants' suit against the respondents was for damages for negligence attributed to the respondents in whose care one **Benjamin Mavyura Mwangangi** was entrusted for medical treatment but died after undergoing two surgeries. The applicants pleaded among, other things, that the Medical Practitioners and Dentists Board, later determined that the respondents were guilty of medical malpractice. The applicants' suit was struck out because the learned Judge concluded that it was statute barred. The applicants contend that the computation of time should have taken account of when the applicants learnt of the medical board's determination that the respondents were guilty of medical malpractice which event, according to the applicants, would have revived their suit.

The intended appeal will, therefore, accord this Court a chance to interpret the provisions of ***Sections 26, 27*** and ***29 of the Limitation of Actions Act.***

In the premises, we think the intended appeal raises a *bona fide* arguable ground. It is not necessary at this stage to demonstrate a multiplicity of grounds nor is it necessary to demonstrate that the appeal will succeed. As it is our view, buttressed by our decision in ***Wasike –v- Swala,*** (supra), that the merits of the intended appeal, is a relevant factor, the learned Judge, with all due respect to him, failed to take a relevant factor *i*nto account before rejecting the applicants' application.

There is also a plethora of authorities to the effect that in considering an application, under ***rule 4*** of this ***Court's Rules***, another relevant factor is whether the extension of time to institute and/or file the appeal will cause undue prejudice to the respondent. Incidentally, the learned single Judge did not say anything about that factor.

Given our above analysis, it must now be obvious that the applicants have demonstrated instances the single judge failed to consider relevant matters. The applicants have thereby, demonstrated that the manner the learned single judge exercised his discretion was wanting. There is, therefore, reason on which the single judge's exercise of discretion can be interfered with.

We allow this reference and set aside the order of the learned single Judge dismissing the applicants' application. We substitute, therefore, an order allowing the applicants' application dated 26th May, 2015. The applicants should file a Notice of Appeal and serve the same upon the respondents within seven (7) days of today. The applicants should also lodge the record of appeal within thirty (30) days from the date hereof and serve the same upon the respondents within seven (7) days of lodgment. The applicants shall pay the respondents the costs of the Notice of Motion.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2016.

E. M. GITHINJI

……..……

JUDGE OF APPEAL

M. K. KOOME

……..……

JUDGE OF APPEAL

F. AZANGALALA

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR