IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 17 OF 2015

BETWEEN

DANCUN WARUINGE KAGIRI

MAINA KAGIRI

JOHN MWANGI KAGIRI.....APPLICANTS

AND

GEORGE MWANGI KAGIRI.....RESPONDENT

(Application for Orders granting leave to file appeal out of time, arising from the Ruling of the High Court of Kenya (Wendoh, J.) Dated 1st October, 2014

in

Misc. Succ Cause No. 12 of 2007)

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RULING OF NAMBUYE, JA

Before me is a Notice of Motion dated the 17th day of December, 2014 and lodged in this Court's Sub-Registry at Nakuru on the 13th day of January, 2015. It is brought under Rules 42 and 43 of the Rules of the Court and **section 3A** of the Civil Procedure Act. It substantively seeks leave of court to file an appeal out of time. Alternatively the applicants' Notice of Appeal dated the 14th October, 2014 and lodged in this Court's sub-Registry at Nakuru on the 17th day of October, 2014 and endorsed by the Deputy Registrar of the Court on the 23rd October, 2014 be deemed to be properly filed and served.

The application is grounded on the grounds on its body and the content of the supporting affidavit. It has been opposed by a replying Affidavit deposed by ***George Mwangi Kagiri*** on the 16th day of February, 2016 and lodged in the sub-Registry on the 17th day of February, 2016.

Learned counsel ***Mr. Kahiga Waitindi*** presented arguments on behalf of the applicant, while learned counsel ***Mr. Gachiengo*** did so on behalf of the Respondent.

In his submissions, ***Mr. Waitindi*** reiterated the contents of both the grounds on the body of the application and the supporting Affidavit. In summary, ***Mr. Waitindi*** has contended that the applicants were not in court on 1st October, 2014 when the ruling intended to be impugned was read. They came to learn of its delivery much later. Upon perusal, they were aggrieved by it and desired to appeal against it. They however, only managed to lodge the Notice of Appeal sought to be validated on the 17th day of October, 2014, a period of two, (2) days lapse after the date when they ought to have lodged it, that is on the 15th day of October, 2014. Although the Deputy Registrar of the High Court endorsed it on the 23rd day of October 2014, the said endorsement did not breathe life into it as it had been lodged out of time. It was also not served on the respondent for the reason that it had been irregularly lodged. The applicants thereafter consulted with their advocates on record, raised funds, and then presented the application under review.

It is further ***Mr. Waitindi's*** argument that they are within the ambit of the principles governing the granting of the relief sought; the applicant is genuinely aggrieved by the ruling intended to be impugned; the intended appeal is not frivolous. It is arguable; the delay in initiating the intended appeal process is not in ordinate and is therefore excusable, it has also been sufficiently and satisfactorily explained.

To buttress the above arguments, ***Mr. Waitindi*** has urged me to be guided by the case of ***Ashit Patani & 2 others versus Dhirajlal Patani & 2 others [2014] eKLR, Edith Gichugu Koine versus Stephen Njagi Thoithi [2014] eKLR; Kenya Airport Authority & another versus Timothy Nduvi Mutungi [2014] eKLR, and Susan Wamaitha versus Naomi Njoki Kimani & 3 others [2014] eKLR*** all for the propositions that (i) the decision whether or not to extend time for appealing is essentially discretionary; (ii), the court's primary consideration in the exercise of such a discretion should be to weigh and balance all the relevant factors in the interest of justice, to the parties; (iii), any in ordinate delay in initiating the appeal process should be frowned upon notwithstanding, the requirement that any such form of delay has to be satisfactorily explained; (iv), demonstration of the arguability of the intended appeal is never a primary consideration. It is simply a possibility. Security for costs is also never a consideration. Further that the court also has to ensure that any other factors under consideration are consonant with the overriding objective in civil litigation as enshrined in sections 3A & 3B of the Appellate Jurisdiction Act Cap 9 Laws of Kenya.

In his response, to the applicant's submissions, ***Mr. Gachiengo*** also reiterated the content of the replying affidavit and urged me to dismiss the applicants' application. In his view, the application is without merit because first, no cogent reasonable or believable reason has been advanced for the applicant's failure to initiate the intended appeal process in time as both the ruling and the court file were always available for perusal and timeous initiation of the intended appeal process.

Second, no draft memorandum of appeal has been exhibited to show the seriousness of the issues intended to be raised on appeal. Third, there has been no explanation as to why the Notice of Appeal filed on 17th October, 2014 was served on to the respondent one and a half (1½) months later, while the application to regularize the intended appeal process was presented more than three (3) months later from the date of the ruling intended to be impugned.

Four, there has been inordinate delay in the prosecution of the application under review which was filed way back in 2015. Five, there is nothing to show that the deponent of the supporting affidavit had capacity to so depose on his own behalf and on behalf of the other two applicants as no authority to so depose has been exhibited. Six, the respondent has suffered great prejudice as the applicants have all along unsuccessfully engaged him in numerous court battles to his detriment.

I have given due consideration to the rival pleadings and arguments relied upon by either side together with the principles set out in the case law relied upon by the applicant. My invitation to intervene has been invoked under **rules 42** and **43** of the Rules of the court and purportedly also under **Section 3A** of the Civil Procedure Act. **Rules 42 and 43** of the court are merely procedural rules donating power to present applications to this Court supported by affidavit. Whereas **section 3A** of the Civil Procedure Act Cap 21 Laws of Kenya has no application to the appellate process before this Court. It is therefore hopelessly misplaced.

From the content of the reliefs sought, what the applicant seeks from my seat of justice is either leave to file a Notice of Appeal out of time or the validation of the irregularly filed Notice of Appeal already on the record. In this regard, it is my view that the proper Rule that the applicant ought to have cited as an access Rule should have been Rule 4 of the Rules of the Court. Failure to so cite the correct rule of access for the relief sought will not however disentitle the applicant to a merit decision on his application. See the observations of **Lakha JA** (as he then was) in **Mwaniki Njoroge Kamau & another** versus **Leesheh Poong** [1998] eKLR thus:

> ***"As it often happens, the application highlights two principles, each in itself is salutary. The first principle is that the rules of the Court must be observed. The second principle is that a party should not be denied a determination of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate".***
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> The foregoing principle was approved in the case of **Francis Kaagu Karicho versus John Mburu Karicho** (2015) eKLR, in which the court added the following:-
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> "*This Principle is reflected in the general discretion to extend time conferred by **rule 4** of the Rules of the Court, but which discretion is to be exercised in accordance with the requirements of Justice in the particular case*"

In addition to the above jurisprudence there is a ready hand maid of substantive justice, in Article 159(2) (d) of the Kenya Constitution 2010 which enjoins this court not to render justice laced with technicalities. In **Jaldesa Tuke Dabelo versus Electoral & Boundaries Commission & another [2015] e KLR** it was proposed thus;

> ***"It has often times been stated that rules of procedure are hand maidens of justice and where there is a clear provision for redress of any grievance prescribed by an Act of Parliament, that provision should be strictly followed; second, that Article 159 of the Constitution was neither aimed at conferring jurisdiction where none exists nor was it intended to derogate from express statutory procedures for initiation of causes of action before courts.***

In **Patricia Cherotich Sawe versus Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR** the court added the following caution:-

> ***"Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls".***
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> See also **Lemankan** versus **Harun Meitamei Lempaka & 2**

others [2014] e KLR for the proposition that the courts' authority under Article 159 of the Constitution remains unfettered especially where procedural technicalities pose an impediment to the administration of justice.

The jurisdiction to intervene therefore lies under Rule 4 of the Rules of this Court. It provides:-

> ***"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".***

In **Ratman versus Camarasamy** [1964] 3 **Aller 933** approved in **Simon Towett Maritim versus Jotham Muiruri Kibaru** [2005] eKLR, the following observation was made:-

> ***"the Rules of Court must prima facie be obeyed and in order to justify a court in extending the time during which some step in the procedures requires to be taken there***

must be material on which the court can exercise its discretion."

In addition to the above rich jurisprudence see also **Aviation Cargo Limited versus St. Mark Freight Services Ltd [2014] eKLR** for the prepositions that the exercise of the discretion under rule 4 though unfettered it has to be exercised with a view to do justice; (ii) any other factor that the court deems necessary as a consideration in deciding whether to withhold or grant such a relief has to be relevant to the issues being considered. See also **Peter Gatahi Kamaithia versus Secretary Public Service Commission and 3 others [2014] eKLR** for the proposition that a court may also exercise such a discretion where demands of justice dictate so in order to enable parties ventilate their respective positions on merit because the right to a hearing has not only been a well-protected right in our Constitution but also acts as the corner stone of the rule of law. See also the case of **Joseph Gachuhi Muthangi versus Mary Njuguna [2014] eKLR** for the propositions that (i) the extension of time is not a right of any party but a discretionary remedy that is only available to a deserving party who has discharged the burden of laying a basis to the satisfaction of the court that the court should exercise its discretion to extend time in his or her favour; (ii) a rule that the court applies on a case to case basis when determining whether a reasonable explanation has been given for the delay (iii) whether the issues of prejudice to the opposite party or matter of a public interests should also be a consideration.

The predicament the applicants find themselves in and in respect of which they have invited me to intervene on their behalf is similar to what **G.B.M. Kariuki, JA** captured in the case **of Aviation Cargo Support Limited Versus St. Mark Freight Services Ltd** (supra) thus:-

> ***"Each case depends on its own merit. For the court to exercise its discretion in favour of an applicant the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is in ordinate the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to the court as soon as was practicable. In normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to this fact. When this happens the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time."***

The overriding objective Principle enshrined in sections **3A & 3B** of the appellate Jurisdiction Act **Section 3A (1**) can also be invoked on my own motion for purposes of ensuring substantive justice to the parties; it provides:-

> ***"3A (1) the overriding objective of this Act and the rules made thereunder is to facilitate the just, expedition us, proportionate and affordable resolution of the appeals governed by this Act."***

Case law on the applicability of this principle now a bound, to offer guidance. See the case **of *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima wa Mukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR 1999/2008)*** for the proposition that the principle confers on the Court considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder; the case of ***Kariuki Network Limited & Another versus Dally & Figgis Advocates Civil Application No. Nai 293*** *for* the proposition that the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it; but does not operate to uproot established principles and procedures, but to embolden the Court to be guided by a broad sense of justice and fairness; and lastly the case of ***Hunter Trading Company Limited versus ECF/011 Kenya Limited Civil Application No. Nai 6 of 2010 (UR 3/2010)*** for the proposition that, the overriding objective principle is intended to not only energize the process of the Court but also ensure that interpretation of any of the provisions of the Act and the Rules made thereunder are "02" compliant."

The case law assessed above is a clear demonstration that the exercise of the undoubted right of appeal is recognized and protected by law. A party wishing to exercise this right can only be

denied the right to do so especially where such intended denial is based on a failure to observe a procedural step in the initiation of the appellate process, in instances where the inconvenience or prejudice intended to be suffered by the opposite party cannot be compensated for by way of costs.

A court confronted with such competing interests is obligated to weigh and balance all the relevant factors and determine whether the threshold for granting such a relief has been met or not.

The threshold set by the above case law simply enjoins me to determine the length of the delay, reasons for the delay, possibly the arguability of the intended appeal, consider any public policy issues or any prejudice that may be suffered by the opposite party that cannot be compensated for by way of costs. Also not to be overlooked are any other relevant factors that would ensure that the resulting decision would go a long way in ensuring ends of justice to both parties. Lastly that such a resulting decision should be in consonant with the overriding objective principle of this Court already set out above.

On the delay, in terms of **rule 75** of the Rules of the Court the Notice of Appeal ought to have been filed within fourteen (14) days of the delivery of the judgment, that is on 15th day of October 2014. It was however lodged on the 17th day of October 2015 a period of two (2) days late.

In my view a delay of two (2) days cannot qualify to be inordinate in terms of the threshold set by **rule 4** of the Rules of the Court. Instances where a reprieve may be withheld are like those set out in the case of **George Mwenda versus Mama Day Nursery and Primary School** in Nyeri CA No.4 of 2014 (UR 2/2014) where there had been a delay of twenty (20) months; the case of **Aviation Cargo Support Limited** (supra) where proceedings were supplied before the expiry of sixty days required for the filing of the record of appeal but no action was taken in the matter, and, lastly the case of **Christopher Mugo Kimotho versus the Hon. Attorney General [2009] eKLR** where there was no demonstration that the applicant had ever even applied for a copy of the judgment as well as the typed proceedings for purposes of setting in motion the appellate process.

The reasons given for the delay were that the ruling intended to be impugned was delivered in the absence of the applicants. This has not been seriously contested by the respondent who has simply deposed that both the file and the ruling were always available for perusal by the applicants thereby confirming the applicant's assertion that the ruling was delivered in their absence. In my view a party who learns of the delivery of a ruling in his absence and moves to take action only to find that he is time barred by only two (2) days cannot be said to have been indolent. The inadvertence is therefore excusable considering that there was need for consultation between the applicants and their advocate on the way forward.

As for the arguability of the intended appeal, I agree with the assertion of Mr. Gachiengo that there is no exhibited draft memorandum of appeal. However as submitted by **Mr. Waitindi** it is not a primary or mandatory consideration when deciding whether to grant or withhold the relief sought. There is room to display this once a reprieve is granted.

With regard to the consideration of other relevant factors, it is not disputed that the respondents herein are family members. They have hitherto been engaged in raging battles over succession issues which I am informed have all along been determined in the respondent's favour. It is these raging battles that the respondent has implored me to bring to an end by denying the applicants' the reprieve sought. In **Ashit Patani & 2 Others versus Dhirajlal Patani & 2 Others** (supra) Nambuye JA had this to say about family disputes:-

> *"It is preferable that family disputes should be ended on a positive note if not a harmonious note as opposed to a negative and acrimonious note. Indeed decisions have previously been made on the same issues in controversy as between them. The law however allows a right of appeal over the court decision on the said issues, which same law enjoins me to withhold the right of appeal only where, the party pleading for my intervention has not met the threshold for such intervention.*

The disputing family members herein are no exception. They deserve a second opinion on the issues in controversy as between them. In my view it will be fair and in the best interest of Justice if the applicants were accorded an opportunity to ventilate whatever issues they intend to raise on appeal. It is appreciated the activity to depose on behalf of the other co applicants has not been, it is however in my view not fatal to the application under review as I can intervene on the strength of the applicants request to intervene alone.

It is appreciated the purported notice of appeal was served on to the respondent one and half (1 ½) months later. He is genuinely aggrieved by this conduct. However in my view although the respondents' grievance was justified it cannot be acted upon to vindicate him as the purported notice of appeal was incompetent. It is therefore as if it had never been served at all.

As for the delay in the disposal of the application under review, I find the applicants not to blame for this delay as they have no control over the courts' diary. It is the court which controls its diary by giving hearing dates. Parties do not dictate the flow of business in the Court.

Turning to the application of the overriding objective Principle, there is no doubt that this Principle underscores the need for speedy disposal of disputes, and second, that it is not a pancea for clandestine breaches of the rules of Precedure. At the same time it has enjoined the courts not to overlook the need to do justice to both parties as also one of its paramount objectives. The interest of justice would therefore demand that the disputants here in be accorded an opportunity to ventilate their grievances on appeal.

In the result and for the reasons given above, I find the applicants' application meritorious. I allow it on the following terms.

1. The applicant has fourteen (14) days of the date of the reading of the ruling to lodge and serve a Notice of Appeal.
2. There after the record of appeal to be filed within sixty (60) days of the reading of the ruling.
3. The Respondent to be compensated for by way of costs of the application paid to him by the applicants to be agreed or assessed by the Deputy Registrar of the Court.

Dated and Delivered at Nakuru this 14th day of April, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR