IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 150 OF 2016

BETWEEN

CATHERINE NJGUGUINI KANYA ……..……...……..….. 1ST APPLICANT

RAPHAEL JONAH MUTAHI ……..……...…… 2ND APPLICANT

VIOLET MUMBUA NDAMBUKI ……..……... 3RD APPLICANT

AND

COMMERCIAL BANK OF AFRICA .....RESPONDENT

(An application for extension of time to file and serve a Notice of Appeal out of time from the Ruling of the Court of Appeal at Nairobi (Nambuye, Gatembu & Mwilu, JJ.A) dated 6th March, 2015

in

Civil Application No. 366 of 2009)

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RULING

The application before me dated 21st June 2016 is by the three named applicants and is ***"for further extension of time to file and serve notice and record of appeal from the Ruling of the Court of Appeal at Nairobi by the honourable Nambuye JA, Gatembu JA, and Mwilu JA, dated 6th March 2015 Civil Application No. 366 of 2009."***

As stated, the application gives the impression, in the event erroneous, that what is sought to be appealed from is the order of my named honourable Judge colleagues, which it is not. The prayer in the motion is for an order;

> ***"1. THAT there be an extension of time to allow the 1st, 2nd and 3rd applicants to file and serve their record of appeal out of time."***

The intended appeal is in fact against the "ruling and decree (sic)" of the High Court at Nairobi (Kimaru, J) dated 21st March 2009, a date that the applicants seem to be very careful not to mention on the

application itself. The application is based on various grounds appearing on its face as follows;

> ***(a) THAT the applicants have arguable appeal with good prospects of success.***
>
> ***(b) THAT the ruling dated 6th March, 2015 was delivered without notice being served upon parties to the application.***
>
> ***(c) THAT the advocates on record for the parties became aware of the ruling about a year after it was delivered.***
>
> ***(d) THAT in the ruling the applicants were directed to lodge and serve record of appeal within 30 days from the date or reading of the ruling.***
>
> ***(c) THAT on ground that the applicants were not aware of the ruling, compliance with orders became futile.***
>
> ***(f) THAT no prejudice will be caused to the respondent if the application is allowed.***
>
> ***(g) THAT it is only fair that the applicants be afforded a fair opportunity to be heard on merit.***

In support of the motion, the second applicant Raphael Jonah Mutahi swore an affidavit on 21st June 2016. In it he deposes to the fact that the applicants had by Civil Application No. 366 of 2009 sought to file and serve a record of appeal against Kimaru J's orders aforesaid out of time. That application was in fact a reference to the Court following the rejection by Onyango-Otieno, JA of their said application. The Court by a majority (Gatembu-Kairu JA, dissenting) allowed the application by its ruling of 6th March 2015. The Court directed the applicants to file their record of appeal within 30 days of delivery of that ruling in default whereof the extension orders would lapse.

Neither party appeared at the delivery of the ruling with the deponent swearing that notice of the ruling was never served. It was only on 27th January 2016, continued the deponent, that the applicant's advocates became aware of the ruling following correspondence from the respondent's advocates.

On 17th February 2016 the applicant's advocates wrote to the Deputy Registrar of the Court requesting for a certified copy of the ruling for purposes *"of getting acquainted with the directives given thereof (sic)"*, he averred. He then concluded his deposition by absolving his advocates of blame as follows;

> **10. THAT further, vide the same letter, they requested the Deputy Registrar to place this matter before the judge on duty for purpose of taking directions.**
>
> **11. THAT due to failure to respond to the said letter, my advocates took initiative and sent a represent to the Court of Appeal registry to make a follow up.**
>
> **12. THAT on inquiry, am informed , information which I believe to be true the representative was advised that of purposes of seeking directions in regard to the lapsed orders, the applicants had to make a formal application and file the same at the registry.**
>
> **13. THAT non-compliance within the stipulated period was attributed to the fact that the date of the ruling and the directive given were not within my knowledge and also not within my advocates.**

In her submissions before me Ms. Koko learned counsel holding brief for the applicant reiterated the contents of the motion and the supporting affidavit and maintained that the applicant was not to blame for the delay in taking corrective action. She did not cite any authorities, a habit that is to be decried, especially at this level.

Opposing the application, the respondent filed a replying affidavit sworn by its head of the Remedial Management Unit, Ronald Mworia on 5th September 2016. He outlined the various efforts made by the respondent's advocates to obtain a copy of the ruling delivered by the Court on 6th March 2016 and exhibited copies of the correspondence they addressed to the applicants' advocates informing the latter about the delivery of the ruling and the timelines that needed to be honoured. In response to the correspondence, the said advocates wrote to the respondent's advocates on 29th January 2016 stating as follows;

> ***We thank you for your letter of 27/1/2016. We are unaware of the ruling under reference.***
>
> ***If a ruling was delivered on 6/4/2015, it was without our knowledge and/or notice. Consequently, we were unable to comply with any condition imposed in the ruling. We shall extract the ruling and deal with it, as appropriate.***
>
> ***In the result, it would be inadvisable to put our client property on sale as it also appears that you were also equally unaware of the delivery of the ruling.***

The respondent's advocates wrote further letters to the firm of Oduk & Co. Advocates in early 2016 and even opined that the latter needed to make an application before a Judge of the Court for appropriate orders of extension of time or else they would instruct the disposal of the charged properties by way of sale. The advocates do not appear to have been overly concerned about the risk of adverse action being taken against the applicants. All entreaties having failed, the respondent's advocates issued appropriate notices under **Section 96** of Lands Act to the 1st and 2nd applicants on 22nd June 2016. These notices were copied to the firm of Oduk & Co. Advocates who received and date-stamped them on 24th June 2016.

This action seems to have roused that firm from slumber and spurred them into swift action for that is the very day they filed the application before me from the stamp of our Registry although it purports to be dated 21st June 2016. They did not, however, serve the application on the respondent's advocates who became aware of its existence on 24th August 2016 when served with a hearing notice therefor slated for 6th September 2016. They wrote twice to the Registrar of this Court on 24th and 31st August 2016 indicating that they had not been served with the application and seeking a photocopy. Notwithstanding that on both occasions they copied the letters to the applicant's advocates, the latter made no effort to effect service.

In his submissions before me, the respondent's learned counsel Mr. Fraser urged that there is need for the applicant to provide explanation for the delay to the Court's satisfaction and that none had been provided. He explained that whereas he too never received notice of the delivery of the ruling of the court, he was by reasonable diligence able to establish its delivery and content from as early as October 2015 and was able to collect their copy on 26th October 2015. He submitted that the applicants' advocates just ignored his letters to them. There was an 8-month delay between the Court's letter to the said advocates and the filing of this application yet the respondent's advocates had literally begged them to make application to no avail. Even when the application was finally filed the applicants advocates deliberately failed to effect service even when pleas for the same were made.

Counsel urged that a party who seeks the court's discretion must act promptly in order to obtain it and the applicants herein did not do so. He made reference to earlier applications for extension of time that were rejected including that by Tunoi JA on 21st March 2007. He concluded that the delay herein is inordinate and prejudicial and asked me to dismiss the application with costs. He cited the cased of ***DIAMOND TRUST OF KENYA LTD vs. BIDALI*** [1995-98] ICEA 45 and ***MUTISO vs. MWANGI*** [1999] 2EA 233.

Miss Koko in rely admitted that she did not seek to respond to or rebut the averments in the respondent's affidavit by way of a further affidavit but pleaded that the delay by the advocates should not be visited on the applicants.

I have considered the application, the affidavits for and against its grant, the rival submissions and the authorities cited before me. I consider it axiomatic that the process of litigation is meant to achieve a quick, efficient and just determination of the rights of the parties who come to seek justice in our courts. For it to achieve that purpose, there are clear rules establishing the manner of approach and setting the times within which certain procedural steps must be taken. The rules are a logical, practical guide and serve to ensure certainty and predictability. In appreciation of the frailties, foibles and other limitations of the human condition, however, the rules foresee and attempt to ameliorate the hardships that may result from failure to adhere to them especially with regard to timelines. Hence ***Rule 4*** of the Court of Appeal Rules. It provides for the possibility of enlargement of time so as to meet the ends of justice.

A Judge of this Court when moved may at his discretion, which is free and unfettered, extend time. He does so when satisfied that the ends of fairness and substantial justice require that defaults be excused and time be extended. That discretion, as has been stated in numerous cases, is a judicial one to be exercised on the basis of sound principle. In ***MUTISO vs. MWANGI*** (supra) it was held that some of the matters the single judge considers include;

(a) The length of the delay

(b) The explanation for the delay

(c) Possibly, the chances of success of the intended appeal

(d) The degree of prejudice likely to be suffered by the respondent should time be extended.

As the power to extend time lies in the discretion of the judge, it is meet and proper that all the circumstances surrounding the case be given due consideration including the conduct of the parties especially the seeker, and the degree of candour exhibited. It being an equitable remedy, any inequitable or dishonourable conduct on the part of an applicant may well disentitle him to the prayers sought.

Having borne all of those principles and considerations in mind, I find that the application before me is plainly undeserving of grant. The delay between the time the applicants became aware of the favourable discretion granted by the Court on 6th March 2015 is long, inordinate and unexplained. I find it quite astonishing that a litigant who has made a reference from a time-extension application should literally go to sleep and make no effort to find out what became of it for months on end. What is beyond astonishing as the attitude of total indifference that attended the discovery that the ruling had been delivered and had been given a 30-day timeline which had already lapsed. Instead of moving with the promptitude and urgency that such a situation required, the applicant moved in a languorously slow and sluggish manner. It is bizarre, almost that even when urged by opposing counsel to move the Court by application to extend time, counsel for the applicants still dragged their feet about it. Theirs was a don't-care attitude they appear to have been wholly impervious to the entreaties, which they were not entitled to, by the respondent's counsel who seem to have been more solicitous of the interests of the applicants than were their own counsel.

The cumulative effect of the indolence displayed by the applicants' counsel is that so much time has passed since the initial rulings by Kimaru, J (on 27th March 2009) that it would be iniquitous and a travesty of justice for me to extend time for applicants such as these. To do so would be to bring the judicial process to disrepute and make it a laughing stock. I cannot do so.

The totality of my consideration of this application is that it is manifestly lacking in merit and I accordingly dismiss it with costs.

Dated and delivered at Nairobi this 14th day of October, 2016.

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR