IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL (APPLICATION) NO. 176 OF 2015

BETWEEN

PASTEUR DUKUZUMUREMYI .....APPELLANT

AND

ANTHONY MILIMU LUBULELLAH t/a

LUBULELLAH & ASSOCIATES ADVOCATES.....1ST RESPONDENT

KIWAKA GENERAL MERCHANTS .....2ND RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Waweru, J) dated 18th October, 2013

in

H.C. Misc. Application No. 949 of 2007)

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RULING

Before the court is an application dated the 8th day of December, 2015 and lodged in the central registry of the court at Nairobi on the 8th day of December, 2015. It is brought under **Article 159** of the **Constitution 2010, Section 3A** of the **Appellate Jurisdiction Act**, and **Rule 4** of the **Court of Appeal Rules, 2010** and any other enabling provisions of the law. Two substantive reliefs have been sought namely:-

> ***1. That this Honourable Court be pleased to extend the time within which the Applicant herein can serve the 2nd Respondent with a Notice of Appeal against the Ruling and conservation order of the High Court of Kenya (Justice H. P. G. Waweru) delivered on 18th day of October, 2013 in Nairobi Miscellaneous Application Number 949 of 2007;***
>
> ***2. That the Honourable Court be pleased to order that the Notice of Appeal lodged by the Applicant in the Superior Court on and served on the 2nd Respondent on 2nd December, 2015, be deemed as duly served in time.***

It has been opposed by a Replying Affidavit deposed by Wilfred Akhonya Mutubwa on behalf of the 1st Respondent on the 29th day of February, 2016 and lodged in the court's registry on the 2nd day of March, 2016 together with the annextures annexed thereto, and, another replying affidavit deposed by Stephen Kimani Kamau on the 15th day of September, 2016 and lodged in the court's registry on the same 15th day of September, 2016 also together with annextures annexed thereto.

Learned counsel Mr. D. K. Musyoka for the applicant in his submissions reiterated the contents of the documents in support of the application that the ruling sought to be impugned was delivered on the 18th day of October, 2013; the applicant was dissatisfied with the said ruling and he timeously lodged a Notice of Appeal on the 28th day of October, 2013 and had it timeously served on to the 1st Respondent, but failed to serve the 2nd Respondent. He blames in advertence on the part of a clerk in their office for the failure to effect service of the same notice of appeal on the 2ndRespondent but failed to serve the 2nd respondent. The mentioned inadvertence an application under **Rule 5(2)(b)** of the **Rules of the Court** in which part of the documents in support thereof was a copy of the said Notice of Appeal which application was served on to the 2nd respondent who also participated in its disposal. The applicant also thereafter prepared the record of appeal also containing the said Notice of Appeal and had it served on both Respondents. It was not until the 2nd day of December, 2015 as the applicant was preparing to set down the appeal for hearing that his advocates' attention was drawn to their failure to serve the 2nd Respondent with the requisite Notice of Appeal within the stipulated period hence the filing of the application under review to regularize that a normally. Mr. Musyoka continued to urge that the applicants' advocate acted in good faith and in a mistaken but honest belief that they had served both Respondents with the requisite Notice of Appeal hence their filing of the record of appeal dated the 13th day of July, 2015 and lodging it in the court's registry on the 16th day of July, 2015 which record has already been served on all the Respondents.

It is therefore the applicant's contention that it is in the best interests of justice to all parties involved that the application be allowed to pave the way for the merit disposal of the appeal; he should not be punished due to his advocates oversight and failure to serve the 2nd Respondent with the Notice of Appeal within the stipulated time which failure is highly regrettable; and lastly that any inconvenience caused to the Respondents can be compensated for by way of costs.

To buttress his arguments the applicant cited the case of **Michael Muriuki Ngibuini versus East African Society [2016] eKLR** for the reiteration that the matters that the court is enjoined to apply when exercising jurisdiction under Rule 4 of the court are (a) the length of the delay; (b) the reason given for the delay; (c) possibly the merits of the appeal or intended appeal and (d) the degree of prejudice likely to be suffered the opposite part as a result of such an extension. In the same **Ngibuini case** the court upheld the explanation given by the advocate that the failure to comply was as a result of an unfortunate slip on the advocate's part born of human frailty and not as a result of exhibition of slothful, sloppy or lazy attitude towards the handling of the matter. The case of **Shital Bimal Shah & 2 Others versus Akiba Bank Ltd & 4 Others [2006] eKLR** for the holding *inter alia* that

> "***the door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictates***."

In the same **Shital Bimal Shah & 2 others case** (supra), the court excused in advertence on the part of the applicant as the Respondents therein had not been misled in any way by the Applicant that he was not interested on pursuing the appeal. Second the Respondents had not moved to challenge the record of appeal as filed and served before the Applicant presented the application to regularize the appeal. The case of **Edith Gichugu Koine versus Stephen Njagi Thoithi [2014] eKLR** in which there is observation that

> "***it is not unheard of for lawyers; even experienced ones to overlook or fail to file an appeal on time***."

On the basis of which the court refrained from condemning unheard the applicants advocate on record and stated that of paramount importance at that point in time was the fact that the applicant felt aggrieved with the decision of the judge and wished to appeal against it and whether or not she succeeded or otherwise was for the appellate court to decide. What the court should concern itself with at that stage was not to delve into the merits of the appeal but to determine as to whether the applicant had made out a case to warrant the court to exercise its discretion in her favour under Rule 4 of the court. Also cited is the case of **Samiyan Kaur Devinder Singh versus Speedway Investment Limited and another [2014] eKLR** for the proposition among others that where it has not been demonstrated that the applicant in invoking the jurisdiction of the court under rule 4 of the court was in effect seeking to frustrate the cause of justice, the exercise of the court's discretion in favour of such an applicant should not be withheld. Second, that the existence of an alternative or specific relief under the rules is not a bar to an applicant availing himself of the relief under Rule 4 of the Court Rules. Learned counsel Mr. E. L. Lubulellah on behalf of the 1st Respondent also reiterated the content of their replying affidavit that indeed the ruling sought to be impugned was delivered on the 18th day of October, 2013; the applicant was aggrieved by the said ruling and he filed a Notice of Appeal but failed to serve it on all the Respondents'. He also unsuccessfully sought an injunction to stop the sale and transfer of the very subject matter of the appeal. The sale was effected on the 29th day of September, 2010 and made absolutely by the court on the 17th day of May, 2011. The appeal has in this regard been overtaken by events and granting the applicant the relief sought will serve no useful purpose as the judgment sought to be fore stalled has already been executed. Mr. Lubulellah also urged that there has been no demonstration of any due diligence on the part of the applicant who was all along aware of the existence of not only the ruling but also the procedures he was expected to undertake if he desired to exercise his right of appeal. He has come to court to seek the court's indulgence seven hundred and eighty one (781) days after the delivery of the said ruling which delay is not only inordinate but has also not been explained. Further that the pending appeal has no chances of success as it is not arguable but more importantly no leave was sought before lodging it. It does therefore not lie and the applicant's insistence on pursuing it to its logical conclusion is nothing but an abuse of the due process of the court which should not be countenanced by a court.

To buttress his arguments Mr. Lubullelah cited the case of **Aviation Cargo Support Limited versus St. Mark Freight Service Ltd. [2014] eKLR** in which the court withheld the exercise of its discretion in favour of the applicant for review under Rule 4 of the court because (i) the applicant who was aware that the proceedings were typed and ready failed to explain the delay in not filing the appeal within the stipulated sixty days; (ii) no reason was given as to why the applicant waited for six months to present the application for the extension of time after capacitation for which delay the court found that it was not only inordinate but it had not been explained notwithstanding that the appeal may have been meritorious (iii) lastly that the overriding objective principle did not operate to facilitate the granting of orders seeking leave or extension of time to file a record of appeal out of time where the applicant has not shown to the satisfaction of the court that the delay is not inordinate or that it has been explained to the satisfaction of the court. The case of **Jubilee Insurance Company (K) Limited versus Daniel Maingi Muchiri [2016] eKLR** in which the exercise of the courts' discretion under Rule 4 of the Court Rules was withheld because there was no demonstration that the intended appeal was not frivolous; that it will not cause prejudice to the Respondent; the explanation given for the delay was not satisfactory and lastly that the filing of the application for extension of time had been precipitated by the onset of the execution proceedings and not by a genuine desire to appeal.

Learned counsel Mr. H. Kago on behalf of the 2nd respondent also reiterated the content of the 2nd respondent's replying affidavit together with the annextures annexed thereto. He has submitted that the applicant is undeserving of the exercise of the court's discretion in his favour because: (i) he was aware of the delivery of the ruling on the 18.10.2011; (ii) he was aware of the peremptory requirement that he ought to have served the Notice of Appeal on the respondents, within seven (7) days of it being lodged and lastly that (iii) he has not given any cogent reason for non-compliance. Mr. Kago submitted further that the applicant has also failed to disclose material facts that as at the time he purported to serve the 2nd respondent with the notice of appeal on the 2nd day of December, 2015 he had already been served with the 2nd respondent's application intending to strike out the appeal on the same ground amongst others way back in August 2015. Second that his appeal is a non-starter for failure to seek leave of court before

presenting the same which is one of the other reasons on which the 2nd respondent seeks to strike it out. The application under review is therefore a desperate attempt to cure the above defects but the same is not sustainable as the applicant is guilty of unexplained, inexplicable and in excusable delay as well as misrepresentation and/or concealment of material facts.

His conduct is also a clear demonstration that the application is an afterthought and an abuse of the court process. The 2nd respondent will be greatly prejudiced if the application were to be granted as the judgment giving rise to the appeal has already been executed; the 2nd respondent is a beneficiary of the fruits of the ruling and the process of the High Court as borne out by the tenor and purport of the ruling of this court of 6th June, 2014 in which the applicant's application for an injunction to forestall the execution of the judgment was dismissed by this court, a fact not also disclosed by the applicant. In Mr. Kago's view, the above submissions as well as the documentation annexed in opposition to the application all go to demonstrate that it will not be in the public interest that the applicant's application be allowed because the appeal itself is moot and has no chance of success for the reason that the 2nd respondent purchased the suit property in an auction on the 29th day of September, 2010 in execution of the judgment and decree of the High Court; he paid the full purchase price; the sale was affirmed by an order of the court on 22nd December, 2010 and ratified on the 17th day of May, 2011; the property is vested in the 2nd respondent vide a vesting order from the superior court; he was given vacant possession through eviction orders; the applicant challenged the sale of the suit property to the 2nd respondent which was dismissed in the ruling of Waweru, J on 18th October 2013 thereby affirming the sale in favour of the 2nd respondent as the bona fide owner.

By reason of the totality of the above it is Mr. Kago's submission that it will be a grave injustice to the 2nd respondent to be held at ransom so as to countenance the indolence and the impropriety on the part of the applicant. This is a matter where there must be an end to litigation as justice delayed is justice denied. In his view, ends of justice will be defeated if the applicant's application were to be allowed. It will also serve no useful purpose for the reason given earlier by them that the appeal itself is moot. This court is asked not to act in vain as in doing so it will be aiding inequity or indolence of the applicant.

In reply to the submissions of both respondents, Mr. Musyoka urged that rules of procedure should not be employed to deny substantive justice in situations where strict adherence to the said rules would occasion miscarriage of justice. That is why there is provision against employing them to be used as such in **Article 159** of the **Constitution**; reiterated that the failure to comply with the timelines was a genuine mistake on the part of the advocate for the applicant. Further that no prejudice will be suffered by any of the respondents as the 2nd respondent is already in possession, already enjoying the fruits of the judgment, a situation the granting of the application will not reverse until the appeal is heard and determined. As for the failure to seek leave to file the appeal, Mr. Musyoka stated that this very issue is pending before the High Court to decide whether leave was necessary or not. It should not therefore be employed here as a reason for denying the applicant the relief sought.

The jurisdiction to intervene on behalf of the applicant has been invoked under **Article 159** of the **Kenya Constitution 2010; Section 3A** of the **Appellate Jurisdiction Act Cap 9 Laws of Kenya** and **Rule 4** of the **Rules of the Court**. **Article 159(2)(d)** provides that "***justice shall be administered without undue regard to procedural technicalities.***" **Section 3A** of the **Appellate Jurisdiction Act** on the other hand provides:-

> ***(1) The overriding objective of this Act and the Rules made there under is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.***

> ***(2) The court shall in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subjection***

(3) An advocate in an appeal presented to the court is under a duty to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with discretion and orders of the court."

Rule 4 on the other hand provides:-

(4) 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."

The principles that guide both the invocation and application of all the three (3) provisions of law cited by the applicant above as enabling provisions have now been crystalized by case law. Those governing the exercise of the jurisdiction under rule 4 are that the court's jurisdiction under **Rule 4** of the Rules of the Court discretionary and unfettered. See **Mutiso versus Mwangi Civil Application No. Nai 255 of 1997 (UR).** The factors that the court is enjoined to inquire into before exercising the said jurisdiction are the length of the delay; the reasons for the delay; possibly the merits of the appeal or intended appeal; and the degree of prejudice likely to be suffered by the respondent by such extension. See **Michael Muiruri Ngubuini** (supra). It is also now trite that the list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive as Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other outside those enumerated above so long as the factor is relevant to the issue being considered. See **Mwangi versus Kenya Airways Ltd [2003] KLR 486**. In order to benefit from the above principles, it is imperative upon the applicant to place sufficient material before the court explaining each of the above factors before the court can rule in their favour. When determining the plausibility or otherwise of the explanation given by the applicant in terms of the factors set out above, the court has to bear in mind the fact that the right of appeal intended to be exercised must be balanced against an equally weighty right that of the successful party to enjoy the fruits of the judgment delivered in his/her favour. In this regard, the court has to bear in mind the fact that there has to be a just cause for depriving the successful party the right to enjoy the fruits of his/her judgment. See **M/s Port Reitz Maternity versus James Karanja Kabia Civil Appeal Number 63 of 1997.**

Further that a plausible and satisfactory explanation for the delay is the key that unlocks the court's flow of discretionary favour. This means that there has to be a valid and clear reason upon which the discretion can be favorably exercised. See **Aviation Support Ltd** (supra). When a reason is proposed to show why there was a delay, it must be specific and not based on guess work. See **Monica Malel & Another versus R Eldoret Civil Application No. Nai. 245 of 2008**.

Turning to those governing the invocation of **Article 159(2)(d)** of the **Constitution, 2010**, there is the case of **Jaldesa Tuke Dabelo versus IEBC & Another [2015]** eKLR wherein the court held *inter alia* that

"***rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prescribed by an Act of Parliament that procedure should strictly be followed as Article 159 of the Constitution was neither aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action***";

in **Raila Odinga and 5 Others versus IEBC & 3 Others [2013] eKLR** the Supreme Court that the essence of Article 159 of the Constitution is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case. In **Lemanken Arata versus Harum Meita Mei Lempaka & 2 Others eKLR** it was stated that the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice. Lastly in **Patricia Cherotich Sawe versus IEBC & 4 others [2015] eKLR** it was stated that **Article 159(2)(d)** of the **Constitution** is not a panacea for all procedural short falls as not all procedural deficiencies can be remedied by it.

Turning to **section 3A** of the **Appellate Jurisdiction Act** (*supra*) in **Westmont Power (K) Ltd versus Commissioner of Income Tax CA No. 128 of 2006** the court held that

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> *"**section 3A** and **3B** of **Cap. 9 cannot be invoked as a matter of cause so as to, exercise all and any kind of failing on the part of a party to abide by the requirements on the rules made to regulate appeals to this courts**."*
>
> ***In Kenya Commercial Finance Ltd versus Richard Akwesere Onditi, C A No. Nai 329 of 2009 that "in applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why to simply wave before the court the provisions of section 3A and 3B of the Appellate Jurisdiction Act;" and lastly in Muradura Suresh Kantara versus Suresh Nanalal Kantaria CA No. 277 of 2005, that "the overriding objective, principle though a useful tool in the dispensation of justice, it is not a panacea for all ills and in every situation a foundation for its application must be properly laid.***

Although the second respondent has not disputed the applicant's submission, that he had prior notice of the said Notice of Appeal when he was served with the application presented by the applicant under **Rule 5(2)(b)** of the **Rules of the Court** in the first instance, and the record of appeal in the second instance, a reading of **rule 75** and **77(1)** of the Rules of the court is a clear demonstration that these were not the approved modes of service of the said Notice of Appeal. Their undisputed existence do not operate to absolve the applicant from the responsibility of complying with the said rules. This is borne out clearly by the principles in the case law construing the application of the enabling provisions of law cited by the applicant. It is imperative for the applicant as enabling provisions therefore to demonstrate that he has brought himself within the ambit of those principles before he can earn the relief sought.

In the instant application, there is no dispute that the applicant was aware of the date when the ruling was delivered as that is why he moved to lodge the Notice of Appeal in time. He therefore complied with the pre-requisite in **Rule 75** of the Rules of the Court. He was equally obligated to comply with the pre-requisite in **rule 77(1)** of the Rules of the court which obligated him to serve the said Notice of Appeal on all the respondents within seven (7) days of its being lodged. He only complied with this requirement with regard to the 1st respondent and not the 2nd respondent hence the presentation of the application under review in which he seeks leave of court to deem his belated service of the Notice of Appeal on the 2nd respondent. It is therefore imperative for the court to look at all the surrounding circumstances of this application inclusive of the conduct of the applicant generally in relation as to how the whole issue has been handled by his said advocates office and in particular the manner in which his advocate has approached the court for relief. See **Michael Muriuki Ngibuini** (supra).

There is no dispute that the notice of appeal lodged on the 28th day of October, 2013 and served on the 2nd respondent on the 2nd day of December, 2015 is what the applicant seeks to effect its service on the 2nd respondent. There is also no dispute that it is sought to be deemed served beyond the seven (7) days stipulated in the rules. In fact learned counsel Mr. Lubulellah has undisputably put the delay at seven hundred and eighty one (781) days. This is what both respondents have termed inordinate, unexplained, inexcusable and prejudicial to their interests. The explanation the applicant has given is that it arose from inadvertence on the part of a clerk in their office a clerk who as submitted by the respondents has not sworn an affidavit to that effect. The above notwithstanding there is demonstration that the inadvertence arose from a mistake on the part of counsel which Mr. Musyoka has urged should not be visited on the applicant who already has an appeal in place.

The fact of the existence of the appeal is not in dispute save that it has been undisputably submitted by the respondents that it is also under challenge on account of failure to seek leave of court before presenting it. One of the reasons why it is under challenge is the very reason as to why the applicant is before me. As

was stated by the court in the **Edith Gichugu Koine** case (*supra*) it is not within my province to deal with the issue of the competence or otherwise of the appeal at this stage. I have to confine myself to the issue as to whether the applicant has brought himself within the ambit of the principles governing the granting of the relief sought already outlined above.

Inadvertence of an advocate being the sole reason given by the applicant, it is imperative for me to appreciate that what the applicant now faces at the hands of his advocate is not peculiar to him. It was acknowledged so in the **Michael Muriuki**

Ngibuini case (supra) and Shital Bimal Shah & 2 Others (supra). See also **Githiaka versus Nduriri [2004] KLR 67** for the holding *inter alia* that:-

> ***"mistakes by counsel are not as reason for denying an otherwise deserving applicant of a favourable exercise of discretion."***

As to whether the mistake on the part of the applicants advocate should be excused or not, it has to be considered vis-a-vis the issue of the prejudice the respondents will suffer if the relief sought is, withheld Case law assessed above on the application of **Article 159(2)(d)** of the **Kenya Constitution 2010** (*supra*) **section 3A** of the Appellate Jurisdiction Act (supra) as well as rule 4 of the Rules of the Court are a clear demonstration that Rules of Procedure were not made for Cosmetic value. They are meant to be obeyed and a party who is guilty of non-compliance has to face consequences of such non-compliance with the only caveat being that such consequences have to be tempered with where the need to do justice to both parties as a whole demands so.

In my view, taking the totality of the above, withholding the relief sought from the applicant will not be in the best interests of justice to all parties on board, reason being that:-

> *i. The proceedings are likely to be prolonged as the applicant has a right to refer the same issues under review to a full bench for consideration.*
>
> *ii. The first respondent will be prejudiced as he will have to face alone the consequences of the outcome of the appeal should the intended application to strike it out fail*
>
> *iii. The 2nd respondent will be denied an opportunity to pursue his application for striking out the appeal which is already on the record*
>
> *iv. The remainder of the proceedings after removing the 2nd respondent may be embarrassed since the applicant had sort relief against both respondent on the basis of which he filed the appeal which is still pending.*
>
> *v. The judgment has already been executed and there is no likelihood of that status quo being upset otherwise than by the outcome of the appeal. In this regard neither respondent will suffer any prejudice*

> *vi. Compensation by way of costs offered by the applicant will suffice in the circumstances of this application*
>
> *vii. It is trite that where possible parties should be capacitated to ventilate their disputes first on merit as opposed to short circuiting these on technicalities. The totality of the facts assessed above is clear demonstration that this is one such dispute that should be allowed to be ventilated fully on merit as opposed to it being short-circuited on a point of technicality* In the result and for reasons given in the assessment the following orders are made:-

1. The application under review is allowed in terms of prayer 1 and 2 thereof, in that time allowed

for the service of the Notice of Appeal on the 2nd respondent be and is hereby extended to the 2nd day of December, 2015.

2. The Notice of Appeal served on the 2nd respondent on the 2nd day of December, 2015, be and is hereby deemed as properly filed and served.

3. The respondents will have costs of the application to be agreed or assessed.

Delivered and Dated at Nairobi this 3rd day of October, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR