IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, JA. IN CHAMBERS)

CIVIL APPLICATION NO. 29 OF 2016

BETWEEN

JOACHIM VON STACKLELBERG……...1ST APPLICANT

YOLANDA FIRTH ……..……2ND APPLICANT

AND

SYLKE OBST…….RESPONDENT

(Being an application for leave to file Notice of Appeal and Record of Appeal out of time from the judgment of the High Court of Kenya at Mombasa (Kasango, J.) dated 6th November, 2014

in

H. C. C. No. 133 of 2007)

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RULING

Kasango, J in a judgment rendered on **6th November, 2014** ordered the applicants herein to provide to the respondent with all documents necessary to effect transfer of parcels of land known as **KWALE/GALU KINONDO/ 1174, 1175, 1176** and **1177** and in default of this, the Deputy Registrar of the High Court would execute the transfer on behalf of the applicants. It was further ordered that the Land Registrar would thereafter transfer the parcels to the respondent; that the applicants would pay to respondent interest on Kshs. 23,000,000 from 1st February, 2008 upto the date of transfer of the above parcels. The respondent was awarded costs.

The applicants being aggrieved and desirous of appealing to this Court cannot do so because the time allowed for filing the notice of appeal and the appeal has lapsed. By their motion dated 8th June, 2016 they have prayed that time be extended for them to file the notice of appeal and to lodge the appeal. They have explained the delay on the failure of their erstwhile advocates, Omondi Waweru & Company Advocates to whom they had given instructions to appeal but failed to do so even after obtaining orders of stay of execution; that they have an arguable appeal; and that the respondent will not suffer any prejudice if time is extended.

In opposing the application the respondent has argued in both the grounds of opposition and replying

affidavit that the delay of 1 year and 4 months has not been explained; that blaming the former advocate for the delay did not answer the question why the present advocate also delayed in moving the court upon being appointed; that the respondent will be prejudiced if time was extended as the property has since been transferred to a third party; that the applicants had all along frustrated the respondent by failing to transfer the title to the former; that the history of the dispute is full of evidence of consistent delays and failure to list the case for hearing by the applicants, forcing the respondent each time to set down the suit for hearing; that the applicants having been fully paid but failed to transfer the property as agreed, did not stand to suffer any loss or damage should the application be rejected.

Parties exchanged and filed submissions together with authorities which I have duly considered. The power of a single judge sitting pursuant to the provisions of **Rule 4** of the **Court of Appeal Rules** is exercised as a matter of judicial discretion and along the following parameters enunciated by the authorities cited by both sides, namely;

i. The discretion given by **Rule 4** is exercised on behalf of the Court by a single judge on a case by case basis.

See **Ocean Freight Shipping Company Limited** v **Oakdale Commodities Limited**, Civil Application No. NAI.198 of 1995

ii. The discretion although unfettered must be exercised judicially upon defined legal principles, not capriciously and not whimsically. See **Detho** v **Ratinlal Automobiles Limited and 6 Others**, Court of Appeal Civil Application No.304 of 2006.

iii. In considering whether or not to extend time the court will consider, *inter alia,* the period of delay, the reasons for the delay, the degree of prejudice to the respondent, and (possibly) the chances of the appeal succeeding. See **Mutiso** v **Mwangi** Civil Application No. NAI. 255 of 1997.

iv. It is the applicant that has the burden of persuading the Court that he is deserving of relief sought. Extension of time is only available to deserving parties. See **Nicholas Kiptoo arap Salat** v **IEBC & 7 Others**, Sup. C. Applica. No. 16 of 2014.

v. Where the delay is said to be prolonged the question that must be asked is whether, despite the prolonged delay, justice can still be done; that justice is justice to both parties. See **Ivita** v **Kyumbu** (1984) KLR 442.

vi. Apart from the foregoing, the single judge is perfectly entitled to consider any other factor outside those well-known principles so long as it is relevant to the issue being considered. See **Mwangi** v **Kenya Airways Limited** (2003) KLR 48.

The applicants' explanation for the delay is summarized in the affidavit in support of the application sworn by the 2nd applicant, Yolanda Firth, where it is deposed that;

> ***"4.…the 1st Applicant and I having been dissatisfied with the said decision judgment(sic)we instructed our former Advocates aforesaid to file an appeal and application for stay of execution pending hearing and determination of the intended appeal. That after due process of the law the court grant (sic) stay of execution pending hearing of the intended appeal."***

It is further averred that the delay to lodge the notice of appeal and the record of appeal was occasioned by the applicants' former advocates, Omondi Waweru & Company Advocates.

It is not in dispute that the delay involved was for a period of about 1 year and 4 months upto the time this application was brought in June, 2016. It must also be borne in mind that the suit was filed in 2007, some 9 years ago.

Applying the parameters outlined in the decided cases summarized above, I entertain no doubt that the

delay involved is prolonged and inordinate leading to the question whether, despite that, the delay was excusable; whether justice can nonetheless be done; whether there was justifiable reasons for the delay; and whether the respondent will be prejudiced.

Although the applicants have pleaded that the mistakes of their erstwhile advocates should not be visited upon them, I ask myself if it is fair to visit them, instead upon the respondent, who has waited for justice to be done for 9 years. If indeed the applicants erstwhile advocates had instructions to lodge the appeal and in fact filed an application and obtained orders of stay of execution, if indeed they were serious that is the time they should have filed the notice of appeal. But since it was convenient for the applicants not to obtain an affidavit from the advocate to explain why he failed to take that step, it can only be guessed that there was no plausible explanation for the delay of over 1 year delay.

It is fashionable, wherever an advocate commits a blunder which jeopardizes the client's case to call in aid that oft-repeated cliché that the transgressions of an advocate ought not be visited upon an innocent client. I think it must be made clear that the rule, if at all it is a rule, cannot be applied to foist injustice on the other party.

According to the draft notice of appeal and the draft memorandum of appeal, the intended appeal is expressed to be against the whole decision of the learned Judge but from the submissions I was told that the intended appeal will only be challenging the part of the decision directing them to pay to the respondent interest at 15% p.a on the purchase price of Kshs. 23,000,000 from the completion date till the date of registration of the transfer of the property in favour of the respondent. As a single judge I cannot purport to determine the question whether the intended appeal is likely to succeed, I can only say that that likelihood is remote.

It will be unconscionable to delay the conclusion of this matter by enlarging time thereby opening new frontiers to another round of court battle.

The applicants have failed to persuade me to exercise my discretion in their favour. The application must fail and is accordingly dismissed with costs.

Dated and delivered at Mombasa this 25th day of November, 2016

W. OUKO

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR