IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, JA (IN CHAMBERS)

CIVIL APPLICATION NO. 225 OF 2016 (UR 177 OF 2016)

BETWEEN

OKIYA OMTATAH OKOITI.....1ST APPLICANT

NYAKINA WYCLIFE GISEBE.....2ND APPLICANT

VERSUS

AFRISON EXPORT LIMITED.....1ST RESPONDENT

HUELANDS LIMITED.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THE CABINET SECRETARY MINISTRY

OF FINANCE.....4TH RESPONDENT

THE NATIONAL LAND COMMISSION.....5TH RESPONDENT

THE CABINENT SECRETARY, MINISTRY OF

LAND, HOUSING AND URBAN DEVELOPMENT.....6TH RESPONDENT

TELKOM KENYA.....7TH RESPONDENT

CONTINENTAL CREDIT FINANCE

LIMITED (IN LIQUIDATION).....8TH RESPONDENT

OFFICIAL RECEIVER & INTERIM LIQUIDATION.....9TH RESPONDENT

(***Application for extension of time to file and serve a Notice of Appeal, a Memorandum, and a Record of Appeal out of time in an intended Appeal from the Judgment, Orders, and Decree of the High Court of Kenya (Mabeya, J) Dated 12th February, 2013***

in

Civil Case No. 617 of 2012)

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RULING

Before me is a Notice of Motion dated and lodged in the courts Centrol Registry at Nairobi on the 10th day of October, 2016. It is expressed to be brought pursuant to **Articles 20,22,23,40 (6), 50(1) , 159, 162 (2) (B), 164 (3), 165 (5) (B) 226(5), 258, 259(1)** of the Constitution of Kenya, **2010; Section 3(2) 3A** and **3B** of the Appellate Jurisdiction Act Cap 9 Laws of Kenya; **Rules 1 (2), (4), 42), 43 (1**) and **77** of the Court of Appeal Rules 2010 (**Cap 9, sub rule 9)** and on Authority of the Court of Appeal decision. It seeks six substantive reliefs with an attendant order for costs in prayer seven (7). The applicants basically seek leave of court to lodge the Notice of Appeal out of time. The prayers relevant to this issues are prayers 3 and 4 thereof. These read:-

> ***"(3) That this Honourable court be pleased to grant the applicants herein extension of time and leave to file and serve a Notice of Appeal, a memorandum, and a Record of Appeal on the respondents out of time in the intended appeal from the Judgment and Decree of the High Court of Kenya (Hon. Justice A. Mabeya) delivered at Nairobi on 12th February, 2013 in Civil Case No. 617 of 2012.***
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> ***(4) That the Notice of Appeal dated 3rd May, 2016, and filed herein on 5th May, 2016 being the Notice of Appeal in the intended Appeal be deemed to be duly filed in the said extended time and that the same be served upon the Respondents within the time prescribed by this Honourable Court.***

It is supported by grounds on its body, a supporting affidavit and a further affidavit deposed by **Nyakina Wyclife Gisebe** on the 2nd day of November, 2016 and lodged in the courts registry on the same date of the 2nd day of November, 2016. It has been opposed by a replying affidavit deposed by **Francis Mburu** on the 31st day of October, 2016 and filed in the Courts Centrol Registry on the same date of the 31st day of October, 2016; and the submissions of the 3rd through to 9th Respondents dated and filed on the 26th day of October, 2016.

At the hearing, **Messers Okiya Omtatah Okoiti** leading **Mr. Nyakina Wyclife Gisebe** who are the applicants herein appeared in person; while learned counsel **E.C. Koech** leading learned counsel **Mr. D. Anzala** appeared for the 1st and 2nd respondents and learned counsel **Mr. Onyiso** appeared for the 3rd through to the 9th respondents.

In his submissions to court **Mr. Okiya Omtatah Okoiti** reiterated the contents of both the grounds in the body of the application and the supporting affidavits together with the annextures annexed thereto. It is **Mr. Okiya's** submission that they have moved to invoke the Court's discretion donated by rule 4 of the Rules of the court to grant the relief sought; they were unable to comply with the time lines set by the rules in initiating the intended appellate process because they were not party to the High Court proceedings in Nairobi High Court commercial & Admiralty Division Civil Case No. 617 of 2012 which accounts for their lack of knowledge of the mentioned proceedings and the content of the resulting judgment intended to be impugned. **Mr. Omtatah** continued to submit that they are properly before court and are entitled to the relief sought having been vested with *locus standi* to initiate the intended appellate process vide a ruling of the court delivered on the 30th day of September, 2016 in **Civil**

Application No. 115 of 2016 (UR 92/2016) Okiya Omtatah Okoiti and another versus Afrison Export Limited and 8 Others in which a three judge bench of the court ruled that the applicants had *locus standi* to initiate the intended appellate process as persons who were not party to the High Court

proceedings but are now desirous of appealing against the said intended impugned judgment to protect public interest.

Further that they have a good reason for their failure to comply with the time line set by the rules as they were not aware of the matters they intend to raise in the intended appeal. It was not until the 18th day of April, 2016 when they conducted an in-depth scrutiny of the Auditor Generals' report on the Financial statements for the National Government for the year 2013 and 2014 that they unearthed malpractices and misapplication of public funds involving the respondents who are enjoined by law to be held accountable for the discharge of their official functions. It is only proper that the applicants be accorded an opportunity to give effect to the recommendations in the said report that those responsible for the misuse of public funds be held accountable. They admit the report was a subject of reports, in the public media but could not act on such publications as the details of the alleged malpractices that they unearthed in the course of their in depth analysis of the report on the 18th day of April, 2016 did not feature in the version that had been published by the media. They are alive that such litigation ought to have been undertaken by the office of the Hon. Attorney General but in their view, that office cannot be entrusted with the duty of undertaking the intended appellate process as the documentation on the record indicate clearly that the said office was privy to the matters they intend to raise on appeal.

It was also **Mr. Omtatah's** submission that there has been no inordinate delay as they moved with speed to locate the file for perusal and then applied for proceedings and then initiated the aforementioned litigation in which the court ruled that they have *locus standi* to initiate the intended appellate process. It is also **Mr. Omtatah's** assertion that once capacitated they will move with speed to put the intended appellate process on course to protect further loss of public funds. That any further delay in the disposal of the matter will render the intended appellate process nugatory. In **Mr. Omtatah's** view, they have an arguable appeal with high chances of success. Some of the issues they intend to raise on appeal are that the general public through the applicants had a legitimate expectation that the office of the Attorney General and that the President through its appointed officers as well as the court would not act contrary to the law and the constitution; that the intended impugned judgment intends to privatize public property contrary to the constitution; that the office of Attorney General though being the office that ought to have initiated the appellate process herein is nonetheless not a proper party to initiate the intended appellate process as it is privy to the complaints they intend to raise on appeal. They intend to raise the issue of lack of jurisdiction in the court that issued the orders intended to be impugned which are in essence null and void; lack of mandate on the part of the office of the Attorney General to compromise the suit and commit public funds without express authority from the cabinet and also that public officers responsible for the loss of public funds should be held accountable for that loss among many other issues.

On prejudice **Mr. Omtatah** argued that no prejudice will be suffered by the respondents who have already been paid a colossal amount of money as part of the proceeds of the transaction complained of. Instead it is the public that stands to loose out on the tax payers' money if they are not allowed to initiate the intended appellate process. The public interest to pursue the intended appellate process also out weighs any prejudice if any that may be suffered by the respondents.

Mr. Nyakina on his part reiterated the stand taken by **Mr. Omtatah** that they have been vested with *locus standi* by a ruling of this court mentioned above; they have given a plausible explanation as to why they failed to initiate the intended appellate process within the time line stipulated by the Rules of the court. They have moved with speed to put their intended appellate process on course as soon as they became aware of the matters they intend to raise on appeal on the 18th day of April 2016; a colossal amount of public funds that needs to be protected is involved. He also reiterated that the office of the Attorney General is not a proper party to undertake the intended appellate process as they were party to matters intended to be raised on appeal; their major interest in the intended appellate process is to protect the public interests. Reiterated the stand taken by **Mr. Omtatah** that they have an arguable appeal with high chances of success based on the grounds raised by **Mr. Omtatah.**

To buttress their arguments, **Mr. Omtatah** cited the case of **Kenya Agricultural and Live Stock Research Organization versus Stephen Ngaruiye Kanyanja Nairobi Civil Application No. Nai 215 of 2015** on principles that guide the court in the exercise of its jurisdiction **under Rule 4** of the Rules of

the court.

In response to the applicants submission, learned counsel **Mr. E.C. Koech** reiterated the content of the replying affidavit that the applicants have not brought themselves within the ambit of the principles that guide the exercise of the courts discretion under rule 4 of the rules of the Court because (i) they are guilty of inordinate delay as it has taken them a period of three years and nine months to move to initiate the intended appellate process against a judgment delivered way back on the 12th day of February;2013 (ii) the Auditor generals report of 2013/2014 on which the applicants intent to anchor their intended appellate process has been in the public domain for the last two years having been reported in the Business Daily News Paper of 5th January, 2015; the standard Newspaper of 29th July, 2015 and the Business Daily Newspaper of the 9th day of October 2015 respectively. The court proceedings and the resulting judgment for public records which the applicants could have perused on their own in time to initiate the appellate process within the time line prescribed in the Rules of the Court if they felt aggrieved by it.

On prejudice, **Mr. Koech** submitted that the 1st and second respondents stand to be greatly prejudiced if the applicants are allowed to pursue their intended appellate process as the government has already paid out **Kshs.1,800,000,000/= (Kshs.1.8 billion)** to the 1st and 2nd respondents who are the registered proprietors of the suit property. Only a balance of Kshs. 600 million is still outstanding; the 1st and the second respondents have already executed an indenture of conveyance for the suit property in favour of the government and any extension of time to appeal will not only jeopardize the 1st and 2nd respondents but also the government and the government institution intended to benefit from the said transaction namely the GSU which has been in occupation of the suit property since the year 1988, a process neither the 1st, and 2nd respondents nor the government can possibly seek to reverse. That is why the 1st and 2nd respondents mutually agreed to sell and transfer the suit property to the Kenya Government. Further that the applicants are un deserving of the exercise of the courts discretion in their favour as they are guilty of in ordinate delay; they have not given any plausible explanation for the said delay; they have no arguable appeal and reiterated his earlier submission that any move by this Court to grant the applicants the relief sought will greatly prejudice the Respondents.

Learned counsel **Mr. Onyiso** for the 3rd through to the 9th respondents on the other hand associated himself fully with the submissions of **Mr. Koech**, adopted fully the written submissions filed herein. It was **Mr. Onyiso's** submissions that since the Judgment intended to be impugned was delivered on the 12th day of February, 2012, while the application under review was filed on the 6th day of October, 2016. The applicants have not satisfied the conditions for the grant of extension of time set in the case of **Mwangi versus Kenya Airways Limited [2003] KLR 486** as they have not sufficiently explained the length of the delay, nor given the reason for the delay.

It was also **Mr. Onyiso's** submission that the intended appeal is not arguable because first it is against a consent judgment; second there was no theft of public funds as through the consent the government was able to save **Kshs. 2,400,000,000.(Kshs.2.4 billion)** down from the original decretal sum of **Kshs. 4,086,683,330.00**. Third, the court that determined the suit had jurisdiction as the practice directions in **Gazette Notice No.19 of 2011 of 9/11/2012** directed that all part heard matters commenced in civil courts were to continue and be finalized in the said courts. The matter resulting in the intended impugned judgment was commenced by way of originating summons on the 24/9/2012 and was therefore part heard as at the time the said practice note was issued. In this regard the resulting proceedings as well as the determination were proper. Fourth, the principle in the case of the **Owners of the Motor Vessel Lilian 'S' versus Caltex Kenya Ltd** [**1989] KLR1** is that issues of jurisdiction must be raised at the earliest opportunity. It is too late in the day for the applicants to raise the issue of jurisdiction which they ought to have raised before the trial court. Firth, the intended appeal will be an affront to the cardinal principle that there must be an end to litigation. This is one such litigation that ought to be brought to an end as the contracting parties have mutually agreed to bring it to a close. Further that matters touching on public policy are not immune from the application of this principle as was reasoned by the court in the case of **Musiara Ltd versus Ntimana [2005] 1EA 317.** Further that Such the prayer for joinder is misplaced and should be struck out.

In reply to the respondents submission **Mr. Omtatah** reiterated his earlier submission and the content of the further affidavit that they reiterate that they have met all the prerequisites for the exercise of the courts' discretion in their favour under **Rule 4 of the Rule of the Court**; the replying affidavit has not raised any matters that can compel the court to withhold the exercise of the courts discretion in their favour; that the need to end litigation should not be done at the expense of justice; jurisdiction was challenged at the earliest opportunity by an officer who was subsequently removed from the proceedings and could not therefore pursue it; and second being a point of law it can also be raised on appeal as they intend to do in the intended appeal; still maintained that they intend to

pursue the intent appellate process in the public interest and not for personal gain; still maintain that the office of the Attorney General overstepped its mandate and it is only proper that the Court of Appeal be accorded an opportunity to give a second opinion on the matter. Further that it is not true that the record was easily available.

Turning to the reasons fronted by them for the exercise of the courts' discretion, it was **Mr. Omtatah's** contention that they were disadvantaged as they were not parties to the High Court proceedings on the one hand and on the other hand by the failure of the media to highlight matters that they intend to take up on appeal.

As for prejudice it was **Mr. Omtatah's** contention that it is the tax payer who will suffer great prejudices if the intended appellate process is not allowed to be pursued as it will suffer loss of tax payers money. That the respondents will suffer no prejudice as they have already been paid a substantial amount of money a matter deposed to by themselves. Their intended appeal will not be in vain as there is the remedy of recovery of lost public funds and accountability of public officers towards the loss of such public funds should the intended appeal succeed. Reiterated that the intended appeal has high chances of success as the judgment intended to be impugned went against the weight of the evidence on the records; when the competing interests are weighed against each other, the scales of justice should tilt towards granting the relief; and also that they have satisfied the overriding objective principles.

My invitation to intervene has been invoked under the provisions of law indicated above. Most of the constitutional provisions cited concern of the jurisdiction of the High Court and the Court of Appeal or substantive issues intended to be raised on appeal which I am enjoined to refrain from interrogating at this preliminary stage to avoid either preempting or embarrassing the intended appeal. The only constitutional provisions that touch on the exercise of the jurisdiction under review is article 159. The principles that guide its invocation were set out in 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 stated 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 fall as not all procedural deficiencies can be remedied by it.

Section 3(2) deals with the exercise of the appellate jurisdiction of the court. Section 3A and 3B on the other hand enshrine the overriding objective principle. The principles that guide the invocation of this principle have been crystallized by case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under. (***See the case of***

City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008); The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (See the case of ***Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009);*** that the application of the overriding objective principle 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 (See the case of ***Kariuki (Supra);*** that the principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective (See the case of ***Caltex Oil Limited versus Evanson Wanjihia Civil Application No. Nai 190 of 2009 (UR).***

Rule 1(2) on the other hand provides:

> ***"1(2) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."***

Rule 1(2) above enshrines the inherent power of the court. The principles that guide the invocation of the inherent power of the court enshrined in Rule 1(2) of the Rules of the Court have now been crystallized by case law. In the case of **Equity Bank Limited versus West Link Mbo Limited [2013] eKLR** Musinga, JA inter alia made observations on the instances when this inherent power can be invoked thus:-

> ***"Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their Constitutional mandate.....***
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> ***Inherent power is therefore the natural or essential power conferred upon the Court irrespective of any conferment of discretion."***

The Supreme Court in the case of **Board of Governors, Moi High School, Kabarak & Another versus Malcolm Bell [2013] eKLR** *inter alia* added the following observations:

> ***"....inherent powers are endowments to the Court such as will enable it to remain standing, as a constitutional authority, and to ensure its internal mechanisms are functional; it includes such powers as enable the court to regulate its internal conduct, to safeguard itself against contemptuous or disruptive intrusions from elsewhere, and to ensure that its mode or discharge or duty is conscionable, fair and just."***

Rules 42 and 43 (1) are merely procedural and need no interrogation. **Rule 77** on the other hand provides for the service of the Notice of Appeal. It too does not need any interrogation. The substantive rule to be interrogated is **rule 4** of the **Rules of the Court**. It 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 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 guiding the exercise of this jurisdiction are now well settled. I will highlight a few by way of illustration. In **Edith Gichugu Koine versus Stephen Njagi Thoithi** (supra) Odek, J.A. held the view that:-

> ***"It is trite that the exercise of the mandate is discretionary which discretion is unfettered and does not require establishment of "sufficient reasons" save that it has to be guided by factors not***

limited to the period for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance."

Further that

"***There is also a duty imposed on the court under Section 3A and 3B of the Appellate Jurisdiction Act to ensure that the facts considered are consonant with the overriding objective of civil litigation that is to say the just expeditious proportionate and affordable resolution of disputes before the court" (*** see ***Fakir Mohamed versus Joseph Mugambi & 2 Others Civil Application Nai.332 of 2004 (UR)."***

In **Nyaigwa Farmers Co-operative Society Limited versus Ibrahim Nyambare & 3 Others** (supra) Musinga, J.A. reechoed the above principles thus:

"***The principle that guide this Court in considering an application of this nature are well known. They are the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and lastly, the degree of prejudice to the respondent if the application is allowed."*** (**Patel versus Waweru & 2 Others [2003**] KLR 361 approved).

In **Hon. John Njoroge Michuki & Another versus Kentazuga Hardware Limited [1998**] **eKLR G.S. Pall JA** (as he then was) added inter alia that:-

"an appellant has a right to apply for extension of time to file the notice and record of appeal under rule 4 of the Rules of the Court and this order should liberally granted unless the applicant is guilty of unexplained and in ordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond para adventure, that his intended appeal is not an arguable appeal"

The learned judge then went on to add the following:-

"... the discretion granted under rule 4 of this Court to extend time for lodging an appeal is, as well known, unfettered and is only subject to it being granted on terms as the court may think just. Within this context, this Court has on several occasions granted extension of time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it."

See also **Cargil Kenya Limited Nawal Versus National Agricultural Export Development Board** (supra) in which K.M'Inoti J.A, made the following observations on the exercise of this jurisdiction:-

"Rule 4 empowers this Court, on such terms as it thinks just, to extend the time prescribed by the Court of Appeal Rules for the doing of my act, subject only to the requirement that it must be exercised judicially. The discretion conferred by that rule is wide and unfettered."

Quoting with approval the holding in **Fakir Mohamed versus Joseph Mugambi & 2 Others CA Nai.332 of 2004** the learned judge added the following:-

"The exercise of this Courts discretion under rule 4 has followed a well beaten path since the stricture of "sufficient reasons" was removed by the amendment in 1998. 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 for the 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 the delay on public administration and the importance of compliance with time limits; the responses of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors."

See also **Hellen Waruguru Waweru versus Kiarie Shoe Stores Limited** (supra) in which Odek, J.A approved the principle enunciated by the court in **Mutiso versus Mwangi [1997] KLR 630**, as approved in **Fakir Mohammed versus Joseph Mugambi & 2 Others** (supra). Lastly, there is **Paul Wanjohi Mathenge versus Duncan Gichane Mathenge [2013] eKLR** in which Odek, J.A. held that

> ***"failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other proceedings relied upon by such an applicant"***

Further while quoting with approval the holding in **Joseph Wanjohi Njau versus Benson Maina Kabau- Civil Application No.97 of 2012** the learned judge added that:-

> "***The Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court."***

Further approved the holding in **Richard Nchapi Leiyagu versus IEBC & 2 Others Civil Appeal No.18 of 2013** that:

> ***"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."***

I have given due consideration to the above rival submission in the light of the totality of the content of the record before me. In my view the following matters are not indispute.

i. That the Judgment intended to be impugned was delivered way back on the 12th day of February, 2013, a period of about three years and nine and half months to the presentation of the submissions on the application under review;

ii. It was a consent judgment;

iii. The applicants were not party to the proceedings that gave rise to the said judgment;

iv. Apparently the Auditor General's report that the applicants intend to anchor their appellate process on was a subject of publication both in the Business daily twice and the Standard Newspapers once on the 5th, January 29th July and 9th October, 2015 respectively;

v. The applicants do not controvert that there were such publications but have sought to qualify why such publications should not be a reason enough to warrant a denial of the relief sought because matters they intend to rely on in pursuing the intended appeal were not highlighted in the said publications but were unearthed by them upon an in deph scrutiny of the said report by them on the 18th day of April 2016;

vi. The applicants have not controverted the 1st & 2nd respondents contention that court proceedings as well as the resulting judgment form a public record that the applicants could have easily accessed, perused, formed an expression of the contents and taken timely action if they felt aggrieved by it. This position notwithstanding, there is also nothing to controvert the applicants' assertion that they only came to learn of the content of the judgment on the 18th day of April, 2016 and initiated measures to be clothed with locus standi first before seeking leave to appeal out of time. Also that the file was not readily available to them when they sought to peruse it as demonstrated by a communication from the Deputy Registrar of the Court which they have exhibited herein.

vii. It is also undisputed that since the delivery of the said judgment parties to the said litigation

have since altered their positions by taking steps to give effect to the said judgment. That is, the government has paid out 1,800,000,000.00 (1.8 billion Kenya shillings) leaving only a balance of Kshs. 600 million. The 1st and the 2nd respondents on the other hand have initiated procedures to fulfill their part of the bargain in the said judgment by executing an indenture in favour of the government;

viii. The above transactions are meant to cushion a government institution namely the GSU who have been in occupation of the suit property since 1988;

ix. The applicants have a ruling in their favour in civil application No. Nai 115 of 2016 (UR 92/2016) **Okiya Omtatah Okoiti and Another versus Afrison Export Import Limited and 8 Others** that they have *locus standi* as public interest litigation to initiate the intended appellate process;

x. The applicants have insisted that the time line to be considered for purposes of the application under review should be the time line running from the 18th day of April, 2016 when they stumbled on the information they intend to raise on appeal; moved with speed to clothe themselves with status before seeking the intervention of the court;

xi. What has been stressed most by the applicants has been the protection of public interests in the intended appellate process, to which the respondents have responded that the public stands to suffer greater prejudice if the application is allowed.

I have given due consideration to all the above in the light of the guiding principles set out above. It is not disputed that the judgment intended to be impugned was delivered way back in February 2012. The law obligated the applicants as parties aggrieved by the said judgment to initiate the appellate process in obedience to the time he set in rule 75(2) of the rules of the court namely within fourteen (14) days of the date of the judgment, which time line the applicants did not meet hence the invocation of the rule 4 of the Rules of the court procedures. Both sides agree that it is imperative for them to meet the prerequisites for the exercise of the courts discretion under the said rule. It is the applicants contention that they have satisfied those prerequisites while the respondents state that they have not. It is also evident that the applicants were not parties to the High Court proceedings. It is also apparent that the invitation to join the High Court proceedings has not been extended to them by any of the parties to the said proceedings. According to them this is one of the major reasons that this compelled them to move on their own to seek first to be clothed with *locus standi* before they could intervene. Which they have undisputably done resulting in their being clothed with locus standi to pursue the said appellate process. It is apparent from the content of the grounds in the body of the application and the supporting depositions that the material and or the documentation the applicants relied upon to clothe themselves with locus standi are the same papers and documentation that they have fronted for seeking the courts intervention to appeal out of time. It is therefore my view that with holding the exercise of the court discretion in their favour will be tantamount to giving a relief with one hand and taking it away with another.

1. Upon being clothed with *locus standi* as demonstrated above, the applicants are next obligated to bring themselves within the ambit of the prerequisites required to be met before the exercise of the courts' discretion in their favour. In this regards Matters of the length of the delay and the reason for the delay are also of paramount consideration. It is not disputed that the judgment intended to be impugned was delivered more than three years and nine and half months which in terms of the principles that guide the exercise of the courts discretion under rule 4 of the Rules of the Court would be in ordinate. This finding alone would not automatically disentitle a litigant to the relief sought. I am enjoined to have regard to the explanation given by a party for the said delay. In the instant application the explanation is that the applicants were not party to the litigation and the delivery of the judgment and its impact on public interests litigation. They only come to know of the matters intended to be raised on appeal on the 18th day of April, 2016, after which they had to clothe themselves with *locus standi* first. This is the same reason that they gave before the court that clothed them with *locus standi* which was believed as truthful. I have no reason to disbelieve it. It is therefore my finding that the applicants have given a plausible explanation for their failure to

meet the time lines set in **rule 75(1) and (2)** of the rules of the court because between April, 2016 and October 2016 they had clothed themselves with *locus standi*. Issues of in ordinate delay does not arise.

2. The greatest concern fronted by the respondents as reason for me to with hold the exercise of my discretion in favour of the applicants is because the contracting parties have substantially executed the judgment. Although I have no reason to doubt that this is a major consideration which cannot be ignored, in my view it cannot be used to withhold a right of appeal as an order for leave to appeal out of time does not in itself act as a stay order. The concerns being raised by the respondents are proper candidate for an application for stay. I find these premature. Second, the grant of the relief sought will not also act as an automatic reversal of the ongoing execution of the judgment intended to be impugned. The respondents fears are not justified.

3. Matters of the arguability of the intended appeal though a mere possibility cannot be ignored. Some of the issues the applicants intend to raise in the intended appeal are such as the need for public accountability by public officers in the discharge of their functions. This being one of the considerations that the court used to cloth the applicants with *locus standi* it cannot be ignored. Also given prominence is the issues of lack of jurisdiction on the one hand and whether the consent judgment met the thresh hold set by law for entry of such judgment. All these in my view are arguable. It is now trite that no number of grounds is required for an appeal to be arguable. Even one surfices.

4. Invocation of the inherent power of the court does not arise as **rule 4** of the Rules of the Court as well as the application of the principles that guide the exercise of the Courts discretion under the said rule have provided sufficient anchor for the disposal of the application under review.

5. The applicants have also brought themselves within the ambit of the principles enshrined in **Article 159** of the Constitution and **Section 3A and 3B** of the appellate Jurisdiction Act as with holding the relief sought will be tantamount to rendering justice on technicalities considering that applicants have already been clothed with *locus standi* which should not be in vain. It is therefore imperative for me to accord them an opportunity to actualize it. Second, such with holding of the exercise of the Courts' discretion in my view will defeat the overriding objective principle as the litigation will be prolonged by the applicants moving to seek relief from the full court should they feel aggrieved by such a withholding.

The up short of the above is that I find merit in the application under review, I am inclined to allow it on the following terms.

1. The applicants have 14 days from the date of the delivery of this ruling to file and serve a Notice of Appeal.

2. Thereafter parties to proceed according to law.

3. Prayers 1, 2, 5 and 6 are struck out as being incompetent.

4. Costs of the application to abide the outcome of the intended appeal.

DATED, READ AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2016.

R.N. NAMBUYE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, JA (IN CHAMBERS)

CIVIL APPLICATION NO. 225 OF 2016 (UR 177 OF 2016)

BETWEEN

OKIYA OMTATAH OKOITI.....1ST APPLICANT

NYAKINA WYCLIFE GISEBE.....2ND APPLICANT

VERSUS

AFRISON EXPORT LIMITED.....1ST RESPONDENT

HUELANDS LIMITED.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THE CABINET SECRETARY MINISTRY

OF FINANCE.....4TH RESPONDENT

THE NATIONAL LAND COMMISSION.....5TH RESPONDENT

THE CABINENT SECRETARY, MINISTRY OF

LAND, HOUSING AND URBAN DEVELOPMENT.....6TH RESPONDENT

TELKOM KENYA.....7TH RESPONDENT

CONTINENTAL CREDIT FINANCE

LIMITED (IN LIQUIDATION).....8TH RESPONDENT

OFFICIAL RECEIVER & INTERIM LIQUIDATION.....9TH RESPONDENT

(***Application for extension of time to file and serve a Notice of Appeal, a Memorandum, and a Record of Appeal out of time in an intended Appeal from the Judgment, Orders, and Decree of the High Court of Kenya (Mabeya, J) Dated 12th February, 2013***

in

Civil Case No. 617 of 2012)**********

RULING

Before me is a Notice of Motion dated and lodged in the courts Centrol Registry at Nairobi on the 10th day of October, 2016. It is expressed to be brought pursuant to **Articles 20,22,23,40 (6), 50(1) , 159, 162 (2) (B), 164 (3), 165 (5) (B) 226(5), 258, 259(1)** of the Constitution of Kenya, **2010; Section 3(2) 3A** and **3B** of the Appellate Jurisdiction Act Cap 9 Laws of Kenya; **Rules 1 (2), (4), 42), 43 (1**) and **77** of the Court of Appeal Rules 2010 (**Cap 9, sub rule 9)** and on Authority of the Court of Appeal decision. It seeks six substantive reliefs with an attendant order for costs in prayer seven (7). The applicants basically seek leave of court to lodge the Notice of Appeal out of time. The prayers relevant to this issues are prayers 3 and 4 thereof. These read:-

> ***"(3) That this Honourable court be pleased to grant the applicants herein extension of time and leave to file and serve a Notice of Appeal, a memorandum, and a Record of Appeal on the respondents out of time in the intended appeal from the Judgment and Decree of the High Court of Kenya (Hon. Justice A. Mabeya) delivered at Nairobi on 12th February, 2013 in Civil Case No. 617 of 2012.***
>
> ***(4) That the Notice of Appeal dated 3rd May, 2016, and filed herein on 5th May, 2016 being the Notice of Appeal in the intended Appeal be deemed to be duly filed in the said extended time and that the same be served upon the Respondents within the time prescribed by this Honourable Court.***

It is supported by grounds on its body, a supporting affidavit and a further affidavit deposed by **Nyakina Wyclife Gisebe** on the 2nd day of November, 2016 and lodged in the courts registry on the same date of the 2nd day of November, 2016. It has been opposed by a replying affidavit deposed by **Francis Mburu** on the 31st day of October, 2016 and filed in the Courts Centrol Registry on the same date of the 31st day of October, 2016; and the submissions of the 3rd through to 9th Respondents dated and filed on the 26th day of October, 2016.

At the hearing, **Messers Okiya Omtatah Okoiti** leading **Mr. Nyakina Wyclife Gisebe** who are the applicants herein appeared in person; while learned counsel **E.C. Koech** leading learned counsel **Mr. D. Anzala** appeared for the 1st and 2nd respondents and learned counsel **Mr. Onyiso** appeared for the 3rd through to the 9th respondents.

In his submissions to court **Mr. Okiya Omtatah Okoiti** reiterated the contents of both the grounds in the body of the application and the supporting affidavits together with the annextures annexed thereto. It is **Mr. Okiya's** submission that they have moved to invoke the Court's discretion donated by rule 4 of the Rules of the court to grant the relief sought; they were unable to comply with the time lines set by the rules in initiating the intended appellate process because they were not party to the High Court proceedings in Nairobi High Court commercial & Admiralty Division Civil Case No. 617 of 2012 which accounts for their lack of knowledge of the mentioned proceedings and the content of the resulting judgment intended to be impugned. **Mr. Omtatah** continued to submit that they are properly before court and are entitled to the relief sought having been vested with *locus standi* to initiate the intended appellate process vide a ruling of the court delivered on the 30th day of September, 2016 in **Civil**

Application No. 115 of 2016 (UR 92/2016) Okiya Omtatah Okoiti and another versus Afrison Export Limited and 8 Others in which a three judge bench of the court ruled that the applicants had *locus standi* to initiate the intended appellate process as persons who were not party to the High Court proceedings but are now desirous of appealing against the said intended impugned judgment to protect public interest.

Further that they have a good reason for their failure to comply with the time line set by the rules as they were not aware of the matters they intend to raise in the intended appeal. It was not until the 18th day of April, 2016 when they conducted an in-depth scrutiny of the Auditor Generals' report on the Financial statements for the National Government for the year 2013 and 2014 that they unearthed malpractices and misapplication of public funds involving the respondents who are enjoined by law to be held accountable

for the discharge of their official functions. It is only proper that the applicants be accorded an opportunity to give effect to the recommendations in the said report that those responsible for the misuse of public funds be held accountable. They admit the report was a subject of reports, in the public media but could not act on such publications as the details of the alleged malpractices that they unearthed in the course of their in depth analysis of the report on the 18th day of April, 2016 did not feature in the version that had been published by the media. They are alive that such litigation ought to have been undertaken by the office of the Hon. Attorney General but in their view, that office cannot be entrusted with the duty of undertaking the intended appellate process as the documentation on the record indicate clearly that the said office was privy to the matters they intend to raise on appeal.

It was also **Mr. Omtatah's** submission that there has been no inordinate delay as they moved with speed to locate the file for perusal and then applied for proceedings and then initiated the aforementioned litigation in which the court ruled that they have *locus standi* to initiate the intended appellate process. It is also **Mr. Omtatah's** assertion that once capacitated they will move with speed to put the intended appellate process on course to protect further loss of public funds. That any further delay in the disposal of the matter will render the intended appellate process nugatory. In **Mr. Omtatah's** view, they have an arguable appeal with high chances of success. Some of the issues they intend to raise on appeal are that the general public through the applicants had a legitimate expectation that the office of the Attorney General and that the President through its appointed officers as well as the court would not act contrary to the law and the constitution; that the intended impugned judgment intends to privatize public property contrary to the constitution; that the office of Attorney General though being the office that ought to have initiated the appellate process herein is nonetheless not a proper party to initiate the intended appellate process as it is privy to the complaints they intend to raise on appeal. They intend to raise the issue of lack of jurisdiction in the court that issued the orders intended to be impugned which are in essence null and void; lack of mandate on the part of the office of the Attorney General to compromise the suit and commit public funds without express authority from the cabinet and also that public officers responsible for the loss of public funds should be held accountable for that loss among many other issues.

On prejudice **Mr. Omtatah** argued that no prejudice will be suffered by the respondents who have already been paid a colossal amount of money as part of the proceeds of the transaction complained of. Instead it is the public that stands to loose out on the tax payers' money if they are not allowed to initiate the intended appellate process. The public interest to pursue the intended appellate process also out weighs any prejudice if any that may be suffered by the respondents.

Mr. Nyakina on his part reiterated the stand taken by **Mr. Omtatah** that they have been vested with *locus standi* by a ruling of this court mentioned above; they have given a plausible explanation as to why they failed to initiate the intended appellate process within the time line stipulated by the Rules of the court. They have moved with speed to put their intended appellate process on course as soon as they became aware of the matters they intend to raise on appeal on the 18th day of April 2016; a colossal amount of public funds that needs to be protected is involved. He also reiterated that the office of the Attorney General is not a proper party to undertake the intended appellate process as they were party to matters intended to be raised on appeal; their major interest in the intended appellate process is to protect the public interests. Reiterated the stand taken by **Mr. Omtatah** that they have an arguable appeal with high chances of success based on the grounds raised by **Mr. Omtatah.**

To buttress their arguments, **Mr. Omtatah** cited the case of **Kenya Agricultural and Live Stock Research Organization versus Stephen Ngaruiye Kanyanja Nairobi Civil Application No. Nai 215 of 2015** on principles that guide the court in the exercise of its jurisdiction **under Rule 4** of the Rules of the court.

In response to the applicants submission, learned counsel **Mr. E.C. Koech** reiterated the content of the replying affidavit that the applicants have not brought themselves within the ambit of the principles that guide the exercise of the courts discretion under rule 4 of the rules of the Court because (i) they are guilty of inordinate delay as it has taken them a period of three years and nine months to move to initiate the intended appellate process against a judgment delivered way back on the 12th day of February;2013 (ii) the Auditor generals report of 2013/2014 on which the applicants intent to anchor their intended appellate

process has been in the public domain for the last two years having been reported in the Business Daily News Paper of 5th January, 2015; the standard Newspaper of 29th July, 2015 and the Business Daily Newspaper of the 9th day of October 2015 respectively. The court proceedings and the resulting judgment for public records which the applicants could have perused on their own in time to initiate the appellate process within the time line prescribed in the Rules of the Court if they felt aggrieved by it.

On prejudice, **Mr. Koech** submitted that the 1st and second respondents stand to be greatly prejudiced if the applicants are allowed to pursue their intended appellate process as the government has already paid out **Kshs.1,800,000,000/= (Kshs.1.8 billion)** to the 1st and 2nd respondents who are the registered proprietors of the suit property. Only a balance of Kshs. 600 million is still outstanding; the 1st and the second respondents have already executed an indenture of conveyance for the suit property in favour of the government and any extension of time to appeal will not only jeopardize the 1st and 2nd respondents but also the government and the government institution intended to benefit from the said transaction namely the GSU which has been in occupation of the suit property since the year 1988, a process neither the 1st, and 2nd respondents nor the government can possibly seek to reverse. That is why the 1st and 2nd respondents mutually agreed to sell and transfer the suit property to the Kenya Government. Further that the applicants are un deserving of the exercise of the courts discretion in their favour as they are guilty of in ordinate delay; they have not given any plausible explanation for the said delay; they have no arguable appeal and reiterated his earlier submission that any move by this Court to grant the applicants the relief sought will greatly prejudice the Respondents.

Learned counsel **Mr. Onyiso** for the 3rd through to the 9th respondents on the other hand associated himself fully with the submissions of **Mr. Koech**, adopted fully the written submissions filed herein. It was **Mr. Onyiso's** submissions that since the Judgment intended to be impugned was delivered on the 12th day of February, 2012, while the application under review was filed on the 6th day of October, 2016. The applicants have not satisfied the conditions for the grant of extension of time set in the case of **Mwangi versus Kenya Airways Limited [2003] KLR 486** as they have not sufficiently explained the length of the delay, nor given the reason for the delay.

It was also **Mr. Onyiso's** submission that the intended appeal is not arguable because first it is against a consent judgment; second there was no theft of public funds as through the consent the government was able to save **Kshs. 2,400,000,000.(Kshs.2.4 billion)** down from the original decretal sum of **Kshs. 4,086,683,330.00**. Third, the court that determined the suit had jurisdiction as the practice directions in **Gazette Notice No.19 of 2011 of 9/11/2012** directed that all part heard matters commenced in civil courts were to continue and be finalized in the said courts. The matter resulting in the intended impugned judgment was commenced by way of originating summons on the 24/9/2012 and was therefore part heard as at the time the said practice note was issued. In this regard the resulting proceedings as well as the determination were proper. Fourth, the principle in the case of the **Owners of the Motor Vessel Lilian 'S' versus Caltex Kenya Ltd** [**1989] KLR1** is that issues of jurisdiction must be raised at the earliest opportunity. It is too late in the day for the applicants to raise the issue of jurisdiction which they ought to have raised before the trial court. Firth, the intended appeal will be an affront to the cardinal principle that there must be an end to litigation. This is one such litigation that ought to be brought to an end as the contracting parties have mutually agreed to bring it to a close. Further that matters touching on public policy are not immune from the application of this principle as was reasoned by the court in the case of **Musiara Ltd versus Ntimana [2005] 1EA 317.** Further that Such the prayer for joinder is misplaced and should be struck out.

In reply to the respondents submission **Mr. Omtatah** reiterated his earlier submission and the content of the further affidavit that they reiterate that they have met all the prerequisites for the exercise of the courts' discretion in their favour under **Rule 4 of the Rule of the Court**; the replying affidavit has not raised any matters that can compel the court to withhold the exercise of the courts discretion in their favour; that the need to end litigation should not be done at the expense of justice; jurisdiction was challenged at the earliest opportunity by an officer who was subsequently removed from the proceedings and could not therefore pursue it; and second being a point of law it can also be raised on appeal as they intend to do in the intended appeal; still maintained that they intend to

pursue the intent appellate process in the public interest and not for personal gain; still maintain that the office of the Attorney General overstepped its mandate and it is only proper that the Court of Appeal be accorded an opportunity to give a second opinion on the matter. Further that it is not true that the record was easily available.

Turning to the reasons fronted by them for the exercise of the courts' discretion, it was **Mr. Omtatah's** contention that they were disadvantaged as they were not parties to the High Court proceedings on the one hand and on the other hand by the failure of the media to highlight matters that they intend to take up on appeal.

As for prejudice it was **Mr. Omtatah's** contention that it is the tax payer who will suffer great prejudices if the intended appellate process is not allowed to be pursued as it will suffer loss of tax payers money. That the respondents will suffer no prejudice as they have already been paid a substantial amount of money a matter deposed to by themselves. Their intended appeal will not be in vain as there is the remedy of recovery of lost public funds and accountability of public officers towards the loss of such public funds should the intended appeal succeed. Reiterated that the intended appeal has high chances of success as the judgment intended to be impugned went against the weight of the evidence on the records; when the competing interests are weighed against each other, the scales of justice should tilt towards granting the relief; and also that they have satisfied the overriding objective principles.

My invitation to intervene has been invoked under the provisions of law indicated above. Most of the constitutional provisions cited concern of the jurisdiction of the High Court and the Court of Appeal or substantive issues intended to be raised on appeal which I am enjoined to refrain from interrogating at this preliminary stage to avoid either preempting or embarrassing the intended appeal. The only constitutional provisions that touch on the exercise of the jurisdiction under review is article 159. The principles that guide its invocation were set out in 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 stated 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 fall as not all procedural deficiencies can be remedied by it.

Section 3(2) deals with the exercise of the appellate jurisdiction of the court. Section 3A and 3B on the other hand enshrine the overriding objective principle. The principles that guide the invocation of this principle have been crystallized by case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under. (***See the case of City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008)***; The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (See the case of ***Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009);*** that the application of the overriding objective principle 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 (See the case of ***Kariuki (Supra);*** that the principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective

(See the case of ***Caltex Oil Limited versus Evanson Wanjihia Civil Application No. Nai 190 of 2009 (UR).***

Rule 1(2) on the other hand provides:

> ***"1(2) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."***

Rule 1(2) above enshrines the inherent power of the court. The principles that guide the invocation of the inherent power of the court enshrined in Rule 1(2) of the Rules of the Court have now been crystallized by case law. In the case of **Equity Bank Limited versus West Link Mbo Limited [2013] eKLR** Musinga, JA inter alia made observations on the instances when this inherent power can be invoked thus:-

> ***"Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their Constitutional mandate.....***
>
> ***Inherent power is therefore the natural or essential power conferred upon the Court irrespective of any conferment of discretion."***

The Supreme Court in the case of **Board of Governors, Moi High School, Kabarak & Another versus Malcolm Bell [2013] eKLR** *inter alia* added the following observations:

> ***"....inherent powers are endowments to the Court such as will enable it to remain standing, as a constitutional authority, and to ensure its internal mechanisms are functional; it includes such powers as enable the court to regulate its internal conduct, to safeguard itself against contemptuous or disruptive intrusions from elsewhere, and to ensure that its mode or discharge or duty is conscionable, fair and just."***

Rules 42 and 43 (1) are merely procedural and need no interrogation. **Rule 77** on the other hand provides for the service of the Notice of Appeal. It too does not need any interrogation. The substantive rule to be interrogated is **rule 4** of the **Rules of the Court**. It 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 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 guiding the exercise of this jurisdiction are now well settled. I will highlight a few by way of illustration. In **Edith Gichugu Koine versus Stephen Njagi Thoithi** (supra) Odek, J.A. held the view that:-

> ***"It is trite that the exercise of the mandate is discretionary which discretion is unfettered and does not require establishment of "sufficient reasons" save that it has to be guided by factors not limited to the period for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance."***
>
> Further that
>
> "***There is also a duty imposed on the court under Section 3A and 3B of the Appellate Jurisdiction Act to ensure that the facts considered are consonant with the overriding objective of civil litigation that is to say the just expeditious proportionate and affordable resolution of disputes before the court" (*** see ***Fakir Mohamed versus Joseph Mugambi & 2 Others Civil***

Application Nai.332 of 2004 (UR).”

In **Nyaigwa Farmers Co-operative Society Limited versus Ibrahim Nyambare & 3 Others** (supra) Musinga, J.A. reechoed the above principles thus:

> “***The principle that guide this Court in considering an application of this nature are well known. They are the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and lastly, the degree of prejudice to the respondent if the application is allowed.”*** (**Patel versus Waweru & 2 Others [2003**] KLR 361 approved).

In **Hon. John Njoroge Michuki & Another versus Kentazuga Hardware Limited [1998**] **eKLR G.S. Pall JA** (as he then was) added inter alia that:-

> ***“an appellant has a right to apply for extension of time to file the notice and record of appeal under rule 4 of the Rules of the Court and this order should liberally granted unless the applicant is guilty of unexplained and in ordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond para adventure, that his intended appeal is not an arguable appeal”***

The learned judge then went on to add the following:-

> ***“... the discretion granted under rule 4 of this Court to extend time for lodging an appeal is, as well known, unfettered and is only subject to it being granted on terms as the court may think just. Within this context, this Court has on several occasions granted extension of time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it.”***

See also **Cargil Kenya Limited Nawal Versus National Agricultural Export Development Board** (supra) in which K.M’Inoti J.A, made the following observations on the exercise of this jurisdiction:-

> ***“Rule 4 empowers this Court, on such terms as it thinks just, to extend the time prescribed by the Court of Appeal Rules for the doing of my act, subject only to the requirement that it must be exercised judicially. The discretion conferred by that rule is wide and unfettered.”***

Quoting with approval the holding in **Fakir Mohamed versus Joseph Mugambi & 2 Others CA Nai.332 of 2004** the learned judge added the following:-

> ***“The exercise of this Courts discretion under rule 4 has followed a well beaten path since the stricture of “sufficient reasons” was removed by the amendment in 1998. 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 for the 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 the delay on public administration and the importance of compliance with time limits; the responses of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors.”***

See also **Hellen Waruguru Waweru versus Kiarie Shoe Stores Limited** (supra) in which Odek, J.A approved the principle enunciated by the court in **Mutiso versus Mwangi [1997] KLR 630**, as approved in **Fakir Mohammed versus Joseph Mugambi & 2 Others** (supra). Lastly, there is **Paul Wanjohi Mathenge versus Duncan Gichane Mathenge [2013] eKLR** in which Odek, J.A. held that

> ***“failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other proceedings relied upon by such an applicant”***

Further while quoting with approval the holding in **Joseph Wanjohi Njau versus Benson Maina Kabau- Civil Application No.97 of 2012** the learned judge added that:-

> "***The Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court."***

Further approved the holding in **Richard Nchapi Leiyagu versus IEBC & 2 Others Civil Appeal No.18 of 2013** that:

> ***"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."***

I have given due consideration to the above rival submission in the light of the totality of the content of the record before me. In my view the following matters are not indispute.

i. That the Judgment intended to be impugned was delivered way back on the 12th day of February, 2013, a period of about three years and nine and half months to the presentation of the submissions on the application under review;

ii. It was a consent judgment;

iii. The applicants were not party to the proceedings that gave rise to the said judgment;

iv. Apparently the Auditor General's report that the applicants intend to anchor their appellate process on was a subject of publication both in the Business daily twice and the Standard Newspapers once on the 5th, January 29th July and 9th October, 2015 respectively;

v. The applicants do not controvert that there were such publications but have sought to qualify why such publications should not be a reason enough to warrant a denial of the relief sought because matters they intend to rely on in pursuing the intended appeal were not highlighted in the said publications but were unearthed by them upon an in deph scrutiny of the said report by them on the 18th day of April 2016;

vi. The applicants have not controverted the 1st & 2nd respondents contention that court proceedings as well as the resulting judgment form a public record that the applicants could have easily accessed, perused, formed an expression of the contents and taken timely action if they felt aggrieved by it. This position notwithstanding, there is also nothing to controvert the applicants' assertion that they only came to learn of the content of the judgment on the 18th day of April, 2016 and initiated measures to be clothed with locus standi first before seeking leave to appeal out of time. Also that the file was not readily available to them when they sought to peruse it as demonstrated by a communication from the Deputy Registrar of the Court which they have exhibited herein.

vii. It is also undisputed that since the delivery of the said judgment parties to the said litigation have since altered their positions by taking steps to give effect to the said judgment. That is, the government has paid out 1,800,000,000.00 (1.8 billion Kenya shillings) leaving only a balance of Kshs. 600 million. The 1st and the 2nd respondents on the other hand have initiated procedures to fulfill their part of the bargain in the said judgment by executing an indenture in favour of the government;

viii. The above transactions are meant to cushion a government institution namely the GSU who have been in occupation of the suit property since 1988;

ix. The applicants have a ruling in their favour in civil application No. Nai 115 of 2016 (UR 92/2016) **Okiya Omtatah Okoiti and Another versus Afrison Export Import Limited and 8 Others** that they have *locus standi* as public interest litigation to initiate the intended appellate process;

x. The applicants have insisted that the time line to be considered for purposes of the application under review should be the time line running from the 18th day of April, 2016 when they stumbled on the information they intend to raise on appeal; moved with speed to clothe themselves with status before seeking the intervention of the court;

xi. What has been stressed most by the applicants has been the protection of public interests in the intended appellate process, to which the respondents have responded that the public stands to suffer greater prejudice if the application is allowed.

I have given due consideration to all the above in the light of the guiding principles set out above. It is not disputed that the judgment intended to be impugned was delivered way back in February 2012. The law obligated the applicants as parties aggrieved by the said judgment to initiate the appellate process in obedience to the time he set in rule 75(2) of the rules of the court namely within fourteen (14) days of the date of the judgment, which time line the applicants did not meet hence the invocation of the rule 4 of the Rules of the court procedures. Both sides agree that it is imperative for them to meet the prerequisites for the exercise of the courts discretion under the said rule. It is the applicants contention that they have satisfied those prerequisites while the respondents state that they have not. It is also evident that the applicants were not parties to the High Court proceedings. It is also apparent that the invitation to join the High Court proceedings has not been extended to them by any of the parties to the said proceedings. According to them this is one of the major reasons that this compelled them to move on their own to seek first to be clothed with *locus standi* before they could intervene. Which they have undisputably done resulting in their being clothed with locus standi to pursue the said appellate process. It is apparent from the content of the grounds in the body of the application and the supporting depositions that the material and or the documentation the applicants relied upon to clothe themselves with locus standi are the same papers and documentation that they have fronted for seeking the courts intervention to appeal out of time. It is therefore my view that with holding the exercise of the court discretion in their favour will be tantamount to giving a relief with one hand and taking it away with another.

1. Upon being clothed with *locus standi* as demonstrated above, the applicants are next obligated to bring themselves within the ambit of the prerequisites required to be met before the exercise of the courts' discretion in their favour. In this regards Matters of the length of the delay and the reason for the delay are also of paramount consideration. It is not disputed that the judgment intended to be impugned was delivered more than three years and nine and half months which in terms of the principles that guide the exercise of the courts discretion under rule 4 of the Rules of the Court would be in ordinate. This finding alone would not automatically disentitle a litigant to the relief sought. I am enjoined to have regard to the explanation given by a party for the said delay. In the instant application the explanation is that the applicants were not party to the litigation and the delivery of the judgment and its impact on public interests litigation. They only come to know of the matters intended to be raised on appeal on the 18th day of April, 2016, after which they had to clothe themselves with *locus standi* first. This is the same reason that they gave before the court that clothed them with *locus standi* which was believed as truthful. I have no reason to disbelieve it. It is therefore my finding that the applicants have given a plausible explanation for their failure to meet the time lines set in **rule 75(1) and (2)** of the rules of the court because between April, 2016 and October 2016 they had clothed themselves with *locus standi*. Issues of in ordinate delay does not arise.

2. The greatest concern fronted by the respondents as reason for me to with hold the exercise of my discretion in favour of the applicants is because the contracting parties have substantially executed the judgment. Although I have no reason to doubt that this is a major consideration which cannot be ignored, in my view it cannot be used to withhold a right of appeal as an order for leave to appeal out of time does not in itself act as a stay order. The concerns being raised by the respondents are

proper candidate for an application for stay. I find these premature. Second, the grant of the relief sought will not also act as an automatic reversal of the ongoing execution of the judgment intended to be impugned. The respondents fears are not justified.

3. Matters of the arguability of the intended appeal though a mere possibility cannot be ignored. Some of the issues the applicants intend to raise in the intended appeal are such as the need for public accountability by public officers in the discharge of their functions. This being one of the considerations that the court used to cloth the applicants with *locus standi* it cannot be ignored. Also given prominence is the issues of lack of jurisdiction on the one hand and whether the consent judgment met the thresh hold set by law for entry of such judgment. All these in my view are arguable. It is now trite that no number of grounds is required for an appeal to be arguable. Even one surfices.

4. Invocation of the inherent power of the court does not arise as **rule 4** of the Rules of the Court as well as the application of the principles that guide the exercise of the Courts discretion under the said rule have provided sufficient anchor for the disposal of the application under review.

5. The applicants have also brought themselves within the ambit of the principles enshrined in **Article 159** of the Constitution and **Section 3A and 3B** of the appellate Jurisdiction Act as with holding the relief sought will be tantamount to rendering justice on technicalities considering that applicants have already been clothed with *locus standi* which should not be in vain. It is therefore imperative for me to accord them an opportunity to actualize it. Second, such with holding of the exercise of the Courts' discretion in my view will defeat the overriding objective principle as the litigation will be prolonged by the applicants moving to seek relief from the full court should they feel aggrieved by such a withholding.

The up short of the above is that I find merit in the application under review, I am inclined to allow it on the following terms.

1. The applicants have 14 days from the date of the delivery of this ruling to file and serve a Notice of Appeal.

2. Thereafter parties to proceed according to law.

3. Prayers 1, 2, 5 and 6 are struck out as being incompetent.

4. Costs of the application to abide the outcome of the intended appeal.

DATED, READ AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2016.

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR