IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO 179 OF 2014

BETWEEN

DR MARANGU RUCHA……1ST APPLICANT

DR WALTER KONYA……..…….2ND APPLICANT

AND

SISTER BERNADETTE MUTHINA NZIOKI…….....1ST RESPONDENT

SISTER TERESIA MUMBE……..2ND RESPONDENT

SISTER ANNE NGARUIYA……3RD RESPONDENT

SISTER NICOLETA NGOIRI…….…..4TH RESPONDENT

SISTER ASSUMPTA……...5TH RESPONDENT

SISTER MATILDA KAVINYA……..6TH RESPONDENT

SISTER TERESIA MUENI ……..……...7TH RESPONDENT

SISTER FELISTER MUTIO……..8TH RESPONDENT

ST MARY'S MISSION HOSPITAL…….…….9TH RESPONDENT

(An application for extension of time to lodge an appeal against the decision of the Industrial Court at Nairobi (Makau, J.) made on the 31st July 2012 in Industrial Court Cause No 538 of 2011)

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RULING

On 31st July 2012, the applicants herein were found guilty of contempt of court order and each sentenced to one month. The applicants were of course aggrieved with the said finding and the subsequent sentence and they instructed their advocates then record, Messrs Mindo & Co Advocates to file a notice of appeal against the whole decision. This notice was filed on the 14th August 2012. The applicants also instructed the firm of Macharia-Mwangi & Njeru Advocates to ***'have a new look at the matter with fresh and unbiased eyes and seek interim relief'*** on their behalf by way of a constitutional petition as they believed that their constitutional rights had been violated.

In addition, the applicants also filed in the High Court a suit for defamation. In that suit, they sued the respondents herein for defamation of character. The said suit was also being handled by the firm of Macharia-Mwangi & Njeru Advocates. In July 2014, the 1st applicant received an inquiry from his advocate regarding the fate of the appeal against the ruling and consequential orders of Makau, J., and he in turn contacted his former advocate Mr Mindo. It was then informed that they learnt that no appeal had been filed and prosecuted. This turn of events led to the applicants asking Mr Mindo Advocae to handover their files to M/S Macharia Mwangi & Njeru Advocates. It is on the advice of their advocates that the applicants now bring the present application in which they seek an order ***"that the time limited for the applicants to lodge their memorandum of appeal, record of appeal, the prescribed fee and security for the costs of the appeal pursuant to their notice of appeal dated and filed on 14th August 2012 be enlarged."***

The respondents oppose the application for extension. The sum total of their arguments are that the applicants are guilty of laches, that the applicants are only filing numerous suits in order to abuse the court process; that they are not candid in the assertion that they did not know that the appeal was not being pursued and; that they have not shown sufficient cause to benefit from the exercise of this Court's discretion.

The principles upon which the court exercises this discretion vary, but the main principles are that the appeal should be an arguable, that the order of extension would not prejudice the respondents, and that the delay in question is satisfactorily explained. See ***Standard Ltd v Gekonga & 2 others [2005] eKLR***

(Civil Application No. Nai. 131 Of 2004 (NAK.8/04)).

Those factors are just a few of what the Court will consider, and it cannot be gainsaid that the discretion of this Court is wide and unfettered. As stated by this Court in ***Mongira & Another v Makori & Another [2005] 2 KLR 103:***

> ***"Those, in general are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words "in general," Rule 4 gives the judge an unfettered discretion and so long as the discretion is exercised judicially a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way".***

These are the principles that I will now apply in the determination of the application before me. I have considered the application, the responses thereto and the submissions filed by the parties.

It suffices to say that Rule 81 of this Court's rules requires that a record of appeal be filed within sixty days of the filing of the notice of appeal. It appears that the proceedings from the High Court were ready on or about June 2013. I say so because there is a stamp from the Registrar of the Industrial court on those proceedings bearing the date 5th June 2013. There is however no certificate of delay; in fact there was no action on the matter until the filing of this application over one year later. The delay therefore in this case is quite inordinate and unexplained.

The reason for the delay is set out in detail at the beginning of the ruling, and is in a nutshell, that the blame lies squarely on Messrs Mindo & co. Advocates. A mistake of advocate is one of the factors that the court may consider in determining whether or not time can be extended under Rule 4 of the Court's rules. However, the mistake must be an excusable mistake for it to inure to the benefit of the applicant. I is not the law that every mistake or error committed by an Advocate ought to be excused or forgiven, when his client puts all the blame on the Advocate. In think case, the applicants took long to find out whether he former Advocate acted on their instructions. That itself smacks of some indolence or blame attributable to the applicants. What is apparent is a party who allegedly gave instructions but did nothing to the fulfillment or performance of he said instruction. Consequently, I think the reasons for the delay is somewhat unexplained and unclear. See ***Shital Bimal Shah & 2 others v Akiba Bank Limited & 4 others [2006] eKLR (Civil Appeal Appli 159 of 2005).***

In my view, the cause of the delay is not satisfactorily explained. It would have aided the applicants cause if they had more evidence towards the omission of the former advocate. There is none. Without any indication from the advocate whose actions are impugned, I find it difficult to blame the delay on Mr. Mindo. In addition, it is apparent that the advocates currently on record were actively pursuing matters that were quite similar to the neglected appeal. To my mind this inaction on the part of the applicants is inexcusable and it militates against the applicant benefiting from my discretion.

The applicant have invoked the overriding objectives provided for in section 3A of the Appellate Jurisdiction Act. That section was considered in an application similar to this one in ***Aviation Cargo Support Limited v St Mark Freight Services Limited [2014] eKLR (Civil Application No Nai 98 of 2013)***. In that application, the Court rendered itself in the following manner:

> ***"in the face of these facts, my finding that the applicant has failed to satisfactorily explain the inordinate delay is inevitable. Yet the policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. That is why the principle of overriding objective was enacted in section 3A (1) of the Appellate Jurisdiction Act, Cap 9."***

I agree with the Court's exposition of the utility and purpose of the overriding objective. I am equally of the view that the objective is not to be used as panacea of all ills, and to excuse each and every omission by parties in the prosecution of their appeals. In ***Westmont Power (K) Ltd V. Commissioner of Income Tax [2010] eKLR (Civil Appeal No. 128 of 2006***) this Court underscored this very point in the following manner:

> ***"It is, accordingly, clear to us that the amendment to section to 3 of the Appellate Jurisdiction Act, did not, without more, come in to sweep away well known and established principles of law hitherto in place before the said amendment…This to our understanding means sections 3A and 3B of Cap. 9 cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to this Court."***

In light of the fact that the inordinate delay has not been satisfactorily explained by the applicants, I find that the application is without merit. I hereby order it be dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 3rd day of July, 2015

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR