IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, (PCA) (IN CHAMBERS)) CIVIL APPLICATION NO. NAI. 144 OF 2015

BETWEEN

JONES M. MUSAU……..……1ST APPLICANT

MAGDALENE WAYUA MAVYUVA……..……2ND APPLICANT

AND

THE KENYA HOSPITAL ASSOCIATION……..…1ST RESPONDENT

PETER MUNGAI NGUGI…….....2ND RESPONDENT

(An application for extension of time within which to file and serve a notice of appeal and record of appeal against the ruling of the High Court of Kenya at Nairobi (Aburili, J.) dated 10th December 2014

in

H. C. C. C. No. 527 of 2013)

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RULING OF THE COURT

1. The applicants, Jones M. Musau and Magdalene Wayua Mavyuva, are the legal representatives of the estate of the late Benjamin Mavyuva Mwangangi. In August 2008, the deceased had been admitted at the Nairobi Hospital, which is operated by the 1st respondent, and was undergoing treatment under the care of Peter Mungai Ngugi, the 2nd respondent. The deceased underwent two surgeries performed by the 2nd respondent, and eventually died on the 29th August 2008. The applicants lodged a complaint with the Medical Practitioners and Dentists Board which determined that the deceased succumbed to acute peritonitis arising from a perforation of the bowels caused by medical malpractice by the respondents herein.

2. Based on that report, the applicants sued the respondents for negligence by way of a plaint dated the 19th December, 2013 and amended on the 3rd April 2014. The respondents applied to have the plaint struck out for disclosing no reasonable cause of action and for being statute barred by virtue of the provisions of section 4 (2) of the Limitation of Actions Act. This application was allowed by Abuliri J. in a ruling delivered on the 10th December 2014.

3. The time to file a notice of appeal against that decision has run out, and the applicants have brought this application under ***rule 4*** of this Court's rules seeking an extension of the same. The application is supported by the 1st applicant's affidavit sworn on the 26th May 2015. From that affidavit, it can be gleaned that the applicants' advocate, Miss Koki Mbulu, did not attend court for the delivery of that ruling. Instead she directed her court clerk, one Mr. Musomba, to attend court and request an advocate to hold her brief for purposes of taking the ruling. The said Mr. Musomba requested a Mr. George Wandati to take the ruling and he did so, writing down notes as the ruling was read. Miss Mbulu claims that she was misled by the notes that Mr. Wandati took, and that instead of filing a notice of appeal and memorandum appeal against the decision of Abuliri J., she instead applied for leave to extend time for filing the suit afresh.

4. Miss Mbulu further submitted that after delivery of the ruling, the court file was unavailable between the 11th December 2014 and the 6th May 2015; it is only after the file was availed on the 7th May 2015 that she learnt that her clients' suit had been dismissed.

5. She now asks that her application for extension of time be granted to enable her file the notice of appeal and memorandum of appeal against the order dismissing the suit. She argued that the intended appeal is arguable and has a high chance of success since the learned judge improperly applied doctrine of *stare decisis* and arrived at an illegal decision. Miss Mbulu therefore urged the Court not to visit the mistakes of counsel on her clients, but to be guided by ***Article 159 (2) (b)*** of the ***Constitution*** and ensure that substantive justice is done.

6. The respondents on their part oppose the application. Mr. Queenton Ochieng, counsel for the 1st respondent, submitted that the applicants have not explained the delay. He contended that Aburili J. looked at the issues before her and made a correct decision, and thus, the intended appeal is not arguable. Mr. Ochieng further submitted that to allow this application would be prejudicial to the respondents since it has been over seven years since the deceased died and the cause of action arose.

7. Mr. Gordon Ogado, counsel for the 2nd respondent claimed that this application is an abuse of the court process since the applicants have filed an application in the High Court seeking leave to file their suit out of time. He also took issue with the explanation of the delay, pointing out that Mr. Wandati's notes clearly state that the suit was struck out. He therefore urged that since the applicants had not made an effort to satisfactorily explain the delay, the application ought to be dismissed with costs.

8. The power to extend time under ***rule 4*** of this Court's Rules is an exercise in discretion. The factors that a single judge will consider before exercising that discretion include:

> ***"… the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted."*** See ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No. Nai. 255 of 1997 (unreported)***

9. This list of factors is not exhaustive, and the Court is free to exercise its discretion to extend time after considering all other relevant factors when deciding the matter before it. See ***Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04))*** where it was held that:

> ***"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. 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 of 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 delay on public administration, the***

importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors."

10. Rule 75(2) of this Court's rules requires that any party intending to appeal to this Court ought to file a notice of appeal against the decision within fourteen days of the delivery of the decision. The decision from which the applicants want to appeal was delivered on the 10th December 2014. Therefore after taking into account the courts' December vacation, the applicants were required to file their notice of appeal by the 21st January 2015. That did not happen. The present application for extension of time was lodged in this Court on the 29th May 2015. The delay herein is therefore for a period of over four months. I find that this delay is inordinate.

11. In the words of the Court in ***Fredrick Jones Kinyua & Another v Wanda Baird [2000] eKLR (Civil Application No. Nai. 17 of 1999) "In an application of this nature, an applicant must give a satisfactory explanation [for the delay] to warrant the court to exercise its discretion in his favour."***

12. The explanation given by Miss Mbulu is that Mr. Wandati, who was holding her brief misrepresented the position in his notes. I have looked through the said notes, which are annexed to the applicants' affidavit in support of the motion. They read, in part:

> ***"Section 29, Cap 22 suit ought to have been filed within 12 months from the date of the deceased's death. Court cannot invoke sections 1A &1B in the circumstances.***
>
> ***Suit cannot stand Defendant's application as prayed Suit struck out.***
>
> ***Each party to bear its own costs"*** *(emphasis added)*

13. From the above excerpt it is clear that the application to strike out the suit was allowed; the notes above are clearly a true reflection of the ruling. In light of this, it is difficult to accept Miss Mbulu's contention that she was misled and that she proceeded on the presumption that the suit was not struck out.

14. Counsel further states that she could not take any steps towards the matter because the court file went missing. The applicants have however not presented any evidence in support of this claim to this Court, either by way of letters to the registry enquiring as to the whereabouts of the file or by way of attendance dockets detailing visits made to the registry in search of the court file. In the whole, the applicants have not demonstrated in any way what the reason for the inordinate delay is.

15. Counsel invoked **Article 159** of the Constitution as well as the overriding principles provided for in ***sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** to submit that this Court ought to ensure substantive justice. In my view, the applicants' will find no solace in these principles. It has been stated that an unexplained delay will militate against the overriding objectives and the principles of extension of time. In ***Bi- Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR (Civil Application 15 of 2011)*** this Court stated that an unexplained delay, which in that case was four months, ***"militates against the overriding objective and the [principles of extension of time]".***

16. In ***M. S. K v S. N. K [2010] eKLR (Civil Appeal (Application) No. 277 of 2005)*** this Court held that the overriding objectives cannot be invoked to aid litigants who make no effort to comply with the rules of the Court. The Court rendered itself in the following manner:

> ***"The overriding principle will no doubt serve us well but it is important to point out that it is not going to be the panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained."***

17. While courts are to be guided in the interpretation of the law by the oxygen principles, it must always be remembered, therefore that parties are under a duty to lay a basis for the application of those principles, and they do this by showing that they have not willfully subverted the rules of the Court. See also the holding of the Court in ***Waweru & Another v Kirori [2003] KLR 448*** where it was stated that:

> ***"The rules of the Court must prima facie be obeyed and in order to justify a court in extending the time during which some step in the procedure requires to be taken there must be material on which the court can exercise its discretion."***

18. There is no material placed before me to warrant the exercise of my discretion in favour of the applicants, and accordingly, I find that this application has no merit. It is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 23rd day of October, 2015. P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR