IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPLICATION NO. NAI 2 OF 2013

BETWEEN

1. **YUMNA M. ALI**
2. **GADDAFI M. ALI**
3. **HABIBA ALI**
4. **MARIAM M. ALI***(suing thro' mother and next friend Khadhirau Isaa Omar)* ..... **APPLICANTS**

AND

1. **MUHIDINI ALI**
2. **SAUD VAVO** **….....**

RESPONDENTS

(An application for leave to file an appeal out of time from the ruling and decree of the High Court of Kenya at Malindi (Meoli, J.) dated 30th August, 2012

in

H.C.C.A. No. 19 of 2012)

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RULING

Before me is a motion on Notice dated 3rd April, 2013. It is expressed to be brought pursuant to **rule 1(2)** of the Court of Appeal Rules and all other enabling provisions of the law. Ideally the application ought to have been mounted under **rule 4** of this Court's rules as opposed to r**ule 1(2)**. The latter rule merely deals with the inherent powers of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Not that this rule is completely out of context though. It is still helpful, in cases however where there is no specific rule of this Court addressing the concerns of a party in a matter before it. In other words, if and where there is a lacunae in the rules to cover a situation, ***rule 2*** will come in handy. However, **Rule 4** is clear and specific. It deals with

extension of time and this is precisely what the applicants are seeking in the instant application. However, I cannot begrudge the applicants as they filed the application in person and in any event the respondents did not raise the issue. Further these are the kind of omissions that are easily cured by the application of the Oxygen Principle.

The gist of the application is for extension of time to enable the applicants to file and serve the Notice of Appeal as well as the record of appeal out of time. The grounds in support thereof are that:-

- **Being aggrieved by the order of the High Court made on 30th August 2012 summarily rejecting their appeal, they wish to prefer an appeal against the said order. They had already filed a Notice of appeal.**

- **There was delay in furnishing the applicants with a copy of the said order. The order was only availed to them on 25th September 2012.**

- **That in the premises they are not guilty of inordinate delay in filing the instant application.**

- **That the intended appeal is not frivolous but arguable.**

The affidavit in support of the application was sworn by **Khadhirau Issa Omar,** the mother and next friend of the applicants. Where pertinent, she deponed that the applicants had lodged an appeal to the High Court from the judgment and decree at **Malindi C.M.C.C.C. No. 2010 of 2009**. However, that appeal was summarily rejected by Meoli, J. on 30th August, 2012. They were unable to trace the court file in which **Meoli, J**. had made the order rejecting the appeal summarily as every time she went to the court registry for the file, she would be told that it was still with the Judge in her chambers. It was not until 25th September, 2012 that the file was availed to her. On perusing, she noted that the appeal had been summarily rejected under **section 79** of Civil Procedure Act on 30th August, 2012. It was then that she on 5th December, 2012 filed a Notice of Appeal. By then however, the time limited under the rules of this Court with regard to the filing and serving the Notice as well as the record of appeal had expired, hence the application.

In opposing the application, the respondents filed a Notice of preliminary objection in which they pointed out that the next friend had no capacity to sue on behalf of the applicants who were adults of sound mind and were under no disability nor the respondents prevent them from suing in their own capacity.

The application came before me for plenary hearing on 30th January, 2014. The respondents had been served with the hearing Notice. However, neither the respondent nor their counsel was present. Satisfied with the affidavit of service on record which indicated that the respondents' counsel had been served with the hearing Notice on 6th January, 2014 and had no reason to be absent nor the respondents, I allowed the applicants who had by then instructed **Mr Otara Richard**, learned counsel, to prosecute the application, the absence of the respondents and or their counsel notwithstanding.

In his brief address to Court with regard to the application, Mr Otara maintained that the respondents had not challenged the application and he had not filed any documents in opposition thereof. The notice of Preliminary Objection though filed by the respondent would not suffice in the absence of counsel to advance the arguments on the same. Counsel further submitted that the applicant had sufficiently accounted for the delay. They could not have taken any steps in the matter for as long as the file remained with the Judge in her chambers. Accordingly, this was a fit and proper case for this Court to exercise its discretion in favour of the applicants and allow the application.

The intended appeal is from the order of the High Court summarily rejecting the appeal. There is therefore a *prima facie* right of appeal to this Court pursuant to the provisions of **section 72(2)** of the Civil Procedure Act since the order of summarily rejecting the appeal was made *ex-parte.* Rule 4 is silent as to what goes into consideration for this kind of application. It simply provides that:-

"The Court may, on such terms as it thinks just, by an order extend the time limited by these rules, or by any decision of the Court or of a superior court, for the doing of an act authorized or required by these rules, whether before or after the doing of the act ..."

However, over the years, the Court has developed some guidelines which are not by themselves exhaustive. First and foremost, it is an exercise in discretion. In exercising that discretion the court has to consider the delay, the reason for the delay, prejudice that may be occasioned to the respondent and if indeed the intended appeal is not frivolous.

From the date when the order that the applicants want to challenge in the intended appeal was made and when they filed the Notice of appeal evidencing such desire is about 3 months, the order having been made on 30th August 2012 and the Notice having been filed on 5th December 2012. Thereafter the applicant mounted the instant application on 4th April, 2013. In total there is a delay of about 7 months. The delay with regard to the first 3 months has been sufficiently explained. It is not uncommon or unheard of for files to be genuinely retained in the chambers of a judicial officer for one reason or another. However, I have a problem coming to terms with delay from 5th December, 2012. That delay has not been explained at all. In the absence of such an explanation, I do not see how I can exercise my discretion in her favour. Certainly the delay is inordinate contrary to the submissions by counsel for the applicants. It matters not that the application is unopposed. Still the applicants have to satisfy this Court that though the delay is inordinate, there were justifiable intervening factors that may have impacted negatively or militated against their good intentions of acting with speed and alacrity in mounting the instant application. This has not been done. To allow this application in the circumstances will in effect fly in the face of the Oxygen Principle and Article 159 of the Constitution. From the judgment of the Magistrate's Court, it is evident that the intended 2nd respondent purchased half of **Maweni Plot No. 411R** from Muhidin Ali, the then father and husband to the applicants. Subsequently, Muhidin Ali and the deponent divorced before the Kadhi. The agreement of sale was signed by the deponent alongside her then husband aforesaid. The intended 2nd respondent pursuant to the said purchase had since developed the portion she bought by putting up a house. With this background, how can the applicant claim that the intended 2nd respondent will not be prejudiced if leave was granted to the applicants?

Other than filing the Notice of appeal out of time, the applicant has not annexed to the application draft memorandum of appeal for this Court to gauge and determine the triviality or otherwise of the intended appeal. In other words, I am saying that in the absence of the draft memorandum of appeal, I am not able to determine whether the intended appeal is serious enough to be allowed to go forward. More so considering the provisions of **section 72(1)** of the Civil Procedure Act which limits appeals to this Court from subordinate courts on the following grounds only:-

"(a) the decision being contrary to law or to some usage having the force of law

(b) the decision having failed to determine some material issue of law or usage having the force of law.

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits ..."

I doubt very much even if the order for summary rejection of the appeal was to be overturned whether the intended appeal thereafter would fit in any of the above goalposts.

For all the foregoing reasons, I find no merit in the application which is accordingly dismissed with no order as to costs.

Dated and delivered at Malindi this 21st day of February, 2014.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR