IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, JA (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 41 OF 2014 (UR 31/2014)

BETWEEN

SAMIYAN KAUR DEVINDER SINGH …….....…..…….. APPLICANT

AND

SPEEDWAY INVESTMENT LIMITED ……..…….1ST RESPONDENT

CFC STANBIC BANK LIMITED…….2ND RESPONDENT

(Application for extension of time to file and serve the Notice of Appeal out of time and for an order directing that the status quo obtaining as at the date of the High Court's ruling delivered on 5th December, 2013 (Ogolla, J) in Nairobi High Court (Commercial & Admiralty Division) Civil Case No. 553 of 2010 be maintained pending the lodging, hearing and determination of an intended Appeal from the said Ruling delivered by the Ogolla J) dated 5th December,2013 when he dismissed the applicant's chamber summons applicants dated 16th August, 2010.

in

H.C.C.C. No. 553 of 2010)

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RULING

1. The applicant moved to the High Court, Milimani Commercial and Admiralty Division and presented Civil Case No. 553 of 2010. On the plaint, she anchored an interim application brought under the then order XXXIX Rule 1 and 9 of the repealed Civil Procedure Rules, seeking preservatory orders for the preservation of the applicants quiet possession, use and ownership of apartment No. C.6 erected on LR.No.330/667, pending the hearing and determination of the interim application in the first instance, and the hearing and determination of the main suit in the second instance. Interim orders were granted exparte in the first instance.

2. That interim application was opposed by a replying affidavit and grounds of opposition of ***Eric Mungai*** of 14th September, 2010. Parties were then heard on the merits of the application. In a ruling

delivered on the 5th day of December, 2013 ***E.K.O. Ogolla J*** dismissed the interim application. The applicant was aggrieved by that dismissal order and desired to appeal against it. She was however late in filing the notice of appeal for the intended appeal in time, hence the presentation of the application under review.

3. The application is dated the 24th day of February, 2014 and lodged on 3rd March, 2014. It is predicated on Rules 1(2) 42(1) 47(1) and 49(1) of the Court of Appeal Rules 2010, and all other enabling provisions of the law. Only one substantive relief is sought namely:-

> 2. ***That this Honourable Court be pleased to extend the time within which the applicant herein can file and serve a notice of appeal against the whole of the ruling and consequential orders of the High Court of Kenya (the Hon. Justice E.K.O. Ogola) delivered at Nairobi on the 5th of December, 2013 in Nairobi High Court Civil Case No. 553 of 2010 and in the circumstances of this case, this Honourable Court be pleased to order that the notice of appeal lodged by the applicant in the Superior Court be deemed as duly filed and served, notwithstanding that the same was filed out of time.***

4. The application is grounded on the grounds in the body of the application, the content of the supporting affidavit of ***Samiyan Kaur Devinder Singh*** and oral submissions before me. In his oral submissions to me, ***Mr. Naeku T.T.,*** learned counsel for the applicant reiterated the content of the grounds in the body of the application, and the applicants supporting affidavit, to the effect that the applicant had sought preservatory orders to protect her proprietary interest in apartment No. C.6 on the suit property which she had purchased from the 1st respondent long before the 1st respondent entered into a loan transaction agreement with the 2nd respondent, without disclosing the applicants interest in the said apartment.

5. Mr. Naeku went on further to submit that, during the granting of the interim orders, the learned trial Judge made a finding and or observation that the 1st respondent's conduct appeared to be shrouded in a mystery and or fraud, and instead of granting a preservatory order at the conclusion of the interpartes hearing, the learned trial Judge dismissed the interim application and yet sufficient grounds for the granting of the preservatory order had sufficiently been demonstrated to exist.

6. Mr. Naeku continued to state that the ruling was delivered in the applicant absence without her notice and by the time she came to learn of the delivery of the said ruling and moved out to lodge a notice of appeal, the statutory period permitted for the lodging of such a notice of appeal had lapsed; hence her current move to regularize the notice of appeal already lodged. Alternatively leave be granted to the applicant to lodge and serve a fresh notice of appeal.

7. On preparedness for the intended appeal, ***Mr. Naeku*** contends that the applicant has applied for a typed copy of the proceedings and copied the application letter to the respondents; that their intended appeal is not frivolous as they intend to raise serious issues for interrogation.

8. On arguable points, ***Mr. Naeku*** stated that they intend to argue that, since the applicant's rights over the suit property crystallized before the loan transaction between the respondents was executed and that the learned trial Judge having found that the 1st respondent's actions were shrouded in mystery and appeared fraudulent he should have granted the preservatory order sought in favour of the applicant.

9. The application has been opposed by both respondents on points of law. ***Mr. Masika*** for the first respondent urged me to be cautious in the exercise of my Judicial discretion in deciding whether to grant or withhold the relief sought; that I should not loose sight of the guiding principles on the exercise of such a Judicial discretion which are now trite. To ***Mr. Masika,*** the applicant has not brought herself within the ambit of the principles applicable for the granting of such a relief.

10. Paul Wanjohi for the 2nd respondent submitted that the second respondent was not party to the arbitration agreement between the applicant and the first respondent and as such, it should not have been drawn into these proceedings; that these proceedings are highly prejudicial to the 2nd respondent it as

these have exposed it to multiple litigation and decisions from multiple forums over the same subject matter.

11. Mr. Ogunde, on the other hand also urged me to disallow the applicants application on the grounds that the one and half month (1½) delay in presenting the applicants application after the delivery of the ruling sought to be impugned has not been sufficiently explained by the applicant; that a delay of one month disentitled a claimant to such a relief in the case of ***Barclays' Bank of Kenya Limited versus Martha Karwirwa Antony [2010] eKLR***; that for purposes of consistence, this Court should follow suit and dismiss the application under review with costs to them.

12. In response to the respondents' submissions, ***Mr. Naeku*** reiterated his earlier stand and added that they have sufficiently explained the reasons for the delay, namely, that the deponent of the supporting affidavit resided outside the jurisdiction of this Court, and had to be contacted to depone the supporting affidavit before presentation of the application; that this explanation is not only reasonable but also execusable; that they have an arguable appeal as demonstrated in the grounds raised in the body of the application; that these grounds warrant the interrogation of the Court of Appeal and the applicant should therefore be allowed to ventilate these on appeal.

13. On case law, the applicant relied on the decision in the case of ***Paul Wanjohi Mathenge versus Duncan Gichane Mathenge [2013] eKLR*** for the proposition that where the applicant is a lay man and may not have very well been aware of the rules of Court; and secondly where the respondent will not suffer any prejudice incapable of compensation by way of costs, the applicant should be accorded a right to be heard. The case of ***ALS versus CTS[2014] eKLR*** for the proposition that where the applicant is demonstrated not to be invoking the Courts' powers donated by Rule 4, of this Court to frustrate the course of justice in one way or another, the exercise of the Courts' discretion in favour of such a litigant should not be withheld. The case of ***Total Kenya Limited versus Kenya Revenue Authority [2013] eKLR*** for the proposition that existence of a specific relief under the rules does not preclude the Court in specific circumstances from making any other orders under its inherent jurisdiction for ends of justice to be met to both parties. The decision in the case of ***Law Society of Kenya versus Commissioner of Lands & 2 others [2003] eKLR (E&L)*** for the proposition that this Court will not hesitate to intervene and grant a preservatory order pending the hearing and determination of either an intended appeal or appeal in instances where the applicant has demonstrated sufficient interest in the property sought to be preserved, and secondly, where there is demonstration that indeed the intended appeal or appeal is arguable.

14. The respondents on the other hand relied on the decision in the case of ***Dickson Muricho Muriuki versus Timothy Kagendo Muriuki and 6 others [2013] eKLR*** for the proposition that the inherent power of the Court is the authority possessed by a Court implicitily without it being derived from the constitution or statute; it is the unwritten power of the Court without which, the Court is unable to function with justice and goodfaith. The case of ***Barclays Bank of Kenya Limited versus Martha Karwirwa Antony [2010] eKLR*** for the proposition that the exercise of this Courts' discretion under Rule 4 has followed a well- beaten path since the stricture of "***sufficient reason"*** was removed by the amendment in 1985. It is unfettered, save that where the entire period comprising the delay has not been sufficiently or satisfactorily explained, the relief will not be granted.

15. My jurisdiction to intervene has been invoked under Rules 1(2) 42, 47 and 49 of this Courts Rules. Rule 1(2) enshrines the inherent jurisdiction reservoir of this Court. The other Rules 42, 47 and 49 are merely procedural provisions providing mechanism for the presentation of interlocutory applications to this Court, may they be those under certificate of urgency or otherwise. Rule 4 of this Courts' Rules, which is the bedrock of the jurisdiction to enlarge time for the doing of any act under the Rules of this Court was not cited. However, I have no doubt that this is covered under the general citation "***and all other enabling provisions of law.***" Rule 4 of this Court's Rules is an enabling provision. It provides:-

> ***"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 or of a Superior Court for 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"***

16. As observed by ***Onyango, JA*** in the case of ***Barclays Bank of Kenya Ltd versus Martha Karwirwa Antony (Supra),*** the exercise of this Courts' discretion under Rule 4 has followed a well beaten path. There is now a wealth of case law demarcating the parameters for the exercise of that discretion. I only wish to cite a few in addition to those cited by the parties in order to drive the point home. The case of ***African Airlines International Limited versus Eastern and Southern African Trade and Development (PTA) Bank [2003] KLR 140*** for the proposition that the discretion to extend time is unfettered and should be exercised flexibly with regard to the particular case; and secondly that all the relevant factors pertaining to each particular case should be taken into consideration. The case of ***Githiaka versus Nduriri [2004] 2KLR 67*** for the proposition that under Rule 4, the Court is vested with an unfettered discretion to extend time with the only fetter being that it be exercised judiciously, that is to say, on sound reason, free from whim, caprise or sympathy and in the interest of justice in the case. The case of ***Leo Sila Mutiso versus Rose Hellen Wangari Mwangi Civil Application No. Nai 255 of 1997*** cited with approval by ***Onyango Otieno, JA.*** in the ***Barclays Bank of Kenya Ltd Case (Supra).***

17. From the above case law principles, it is clear that the factors to be considered by me in deciding whether to grant or withhold the relief sought by the applicant herein are, **one**, the period of the delay, **two;** the reason for the delay; **three;** possibly, the chances of the appeal succeeding if the application is granted, **four;** the degree of prejudice to the respondent if the application is granted; **five;** the effect of the delay on public administration of justice; **six**; the importance of compliance with time limits in litigation, **seven;** the resources of the parties; **eight,** whether the matter raises issues of public importance. See also the case of ***Delphis Bank Limited versus Recco Builders Limited and another [2005] KLR 346*** for the proposition that a defaulting party is not precluded from seeking leave to regularize the notice of appeal and where there is demonstration that despite the delay, the applicant had been diligent; that the intended appeal has merit and the extention of time sought would not prejudice the respondent, the Court can still exercise its discretion in favour of such an applicant.

18. Applying the above guiding principles to the rival arguments herein, it is undisputed that the applicant's notice of appeal dated the 15th day of January, 2014 was admittedly lodged out of time. The applicant's explanation for this delay is as borne out by the content of the supporting documents exhibited and annexed to the affidavit of ***Timothy Naeku*** of 24th February, 2014 in support of the certificate of urgency. These correspondences demonstrate clearly that the ruling sought to be impugned had been reserved for delivery by ***Njagi J*** since 17th December, 2010. The file was subsequently thereafter rerouted to the ***Hon. Mr. Justice E.K.O. Ogolla*** for the preparation of the ruling.

19. I have not traced any correspondence vide which the Deputy Registrar High Court notified the parties of the date of the delivery of the said reserved ruling, either before or after its delivery. Vide a letter dated the 4th day of December, 2013, the applicants advocate inquired as to when the reserved ruling would be delivered. The Deputy Registrar reacted to that inquiry vide his letter dated 8th January, 2014 informing them erroneously that the ruling inquired about had in fact been delivered on 5th December, 2012 by notice to all the parties. A copy of the notice allegedly issued to the parties notifying them of the intended or otherwise delivery of the said ruling was not enclosed in the Registrar's communication. Neither was there mention as to the date when the alleged notice was either issued or served on to the respective participating parties or their respective learned counsel was also not disclosed.

20. Vide their communication to the Registrar High Court of 14th January, 2014, the applicant's learned counsel expressed concerns at the Registrar's failure to notify them of the date for the delivery of the ruling. This is a clear indication that no notice of the intended or delivery of the said ruling had been served on the applicants. This fact was not controverted either by the Registrar or the respondent to whom the said communication had been copied.

21. It was correctly observed by both sides that from the 14th January 2014 to the 24th day of February, is a period of one month. I take it that the date of 14th January, 2014 is the date when time started running against the applicant as this is the date of their communication to the Registrar High Court expressing displeasure at the court's failure to notify them of the date for the intended or otherwise delivery of the subject ruling. The 2nd respondent submitted that even a delay of two weeks if not sufficiently explained

is sufficient to disentitle a litigant to a relief of extention of time (See the case of ***Barclays Bank of Kenya Limited (Supra).***

22. The reasons for the delay fronted by the applicant are lack of notice for the delivery of the said ruling borne out by the correspondences exchanged between the applicant's learned counsel on record and the Registrar High Court assessed above. Secondly that the applicant who was required to depone a supporting affidavit was outside the jurisdiction, a fact not controverted by the respondent. It is therefore plausible.

The question I have to ask myself is whether on the facts as set out above, the applicant has satisfied the prerequisite necessary to be met before I can exercise my judicial discretion to either grant or withhold the relief sought. With regard to the arguability of the intended appeal, this is not a mandatory requirement. It is just a possibility. That notwithstanding, I am of the view that the applicants argument that the learned trial Judge made findings and or observations that the 1st respondents actions were shrouded in mystery if not fraudulent and yet went a head to decline to grant an injunctive relief in her favour is arguable. The general principle is that, an arguable point need not be one which must succeed. It should simply be one which warrants full argument and or interrogation by Court of law. (See the case of ***Stanley Kangethe Kinyanjui versus Jonny Ketter and five others Civil Application No. 31 of 2012 (UR).*** It is now trite that only one arguable point surfices.

24. As for the degree of prejudice likely to be occasioned to the respondents if leave to appeal out of time is granted; the respondents have neither agitated nor demonstrated any to exist. I therefore find that any prejudice if any, likely to be suffered by the respondents can be sufficiently compensated for by way of costs.

25. Turning to the effect of the delay on the administration of justice, I have no doubt that it is now trite that dispensation of justice should be expeditious. But in a situation, where like in this case, the grinding of the wheels of justices themselves have contributed substantially to that delay, it will be unfair and extremely too harsh and or punitive to punish the applicant by shutting her out and sending her away from the seat of justice empty handed.

26. As regards issues of public importance, it is my finding that where there is demonstration that the applicant's proprietory rights which are at stake herein crystallized before events threatening their intended divestation occurred, it is only proper that these be preserved in the first instance and then be properly adjudicated up on before a decision is taken in one way or the other as to whether to divest the applicant of these proprietary rights or not and give reasons either way.

27. For the reasons given above, I am satisfied that the applicant has brought herself within the proposition in the case of ***Delphis Bank Limited versus Recco Builders Limited and another [2005] KLR 346*** that even where there has been a delay but there is demonstration like in this case, that the applicant has been diligent and that the intended appeal has merit, and also considering that the extention of time sought would not prejudice the respondent, it is only proper that I do exercise my discretion in favour of the applicant to extend the time within which to lodge her notice of appeal out of time. To me sufficient cause has been shown to warrant the exercise of my discretion in her favour.

28. In the result, I allow the applicants application dated 24th day of February, 2014 and lodged on 3rd day of March, 2014 along the following terms:-

1. The applicant has fourteen (14) days from the date of the reading of this ruling to file and serve the notice of appeal.
2. Thereafter to proceed according to law.
3. The costs of this application to abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 20th day of June, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

<u>DEPUTY REGISTRAR</u>

D/O