IN THE COURT OF APPEAL

AT NYERI

CORAM: OTIENO-ODEK J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NYR. 14 OF 2014

BETWEEN

JOSEPH GACHUHI MUTHANJI ……………..…………...APPLICANT

AND

MARY WAMBUI NJUGUNA

(SUBSTITUED DAVID NJUGUNA NYORO….…………RESPONDENT

(An application for leave to file and serve record of appeal out of time from the judgment/order of the High Court of Kenya at Nyeri (Sergon, J.) dated 16th December, 2013

in

H.C.C.C. No. 150 of 1974)

****

R U L I N G

1. The plaint in this appeal was filed at the High Court in Nyeri in 1974. The original 2nd plaintiff was David Njuguna Nyoro and the original defendant was George Muthanji Wangige. Both the original 2nd plaintiff and defendant are deceased.
2. The respondent in the present application, Mary Wambui Njuguna, by a Notice of Motion dated 28th February, 2011, moved the High Court to substitute herself for the deceased 2nd plaintiff and for orders that the applicant herein, Joseph Gachuhi Muthanji, do substitute the deceased defendant George Muthanji Wangige. By a ruling dated 16th December, 2013, the High Court *(Sergon, J.)* granted the orders to substitute the original deceased 2nd plaintiff and defendant. The applicant herein is aggrieved by the decision of the High Court to order substitution of the deceased parties. His argument is that the plaint filed in 1974 has abated against both the original plaintiff and defendant who were not substituted within one year from the date of their deaths as per ***Order 24 rule 2*** of the ***Civil Procedure Act*** and ***Rules (Cap 21 of the Laws of Kenya).***
3. Aggrieved by the ruling of the High Court delivered on 16th December, 2013, the applicant filed a

notice of appeal on 23rd December, 2013; he is yet to file the record of appeal.

4. By a Notice of Motion dated 6th June, 2014, the applicant moved this Court seeking leave for extension of time to file and serve the record of appeal out of time. In the case of ***Nicholas Kiptoo arap Korir Salat –v – IEBC & 7 Others***, ***Supreme Court Application No. 16 of 2014***, it was stated that extension of time being a creature of equity, one can only enjoy it if he acts equitably: *he who seeks equity must do equity*.
5. The instant application is brought under ***Rule 4*** of the rules of this Court. The application is supported by an affidavit deposed by the applicant. The grounds upon which the application is premised is that the time to lodge and serve the record of appeal has lapsed; that the delay in making the application for extension of time is not inordinate; that the delay has been explained; that both parties are on the suit land; that no prejudice will be caused to the respondent and that the appeal raises an issue of law.
6. In the supporting affidavit, the applicant explains that the reason for delay is that he advised his counsel on record to obtain certified copies of the proceedings which were supplied on 12th March, 2014, and a certificate of delay issued; that upon his advocate obtaining the certified copy of proceedings, a letter was written to him dated 21st March, 2014, and a reminder on 25th April, 2014. That the letter dated 21st March, 2014 did not reach the applicant because his post office box number is 45886 Nairobi but the letter was erroneously addressed and mailed to post office box number 45888 Nairobi; that on receipt of the 2nd letter which was a reminder he visited his advocate on record on 15th May, 2014, and gave instructions for the present application to be filed and a record of appeal to be prepared. The applicant deposed that he resides in Nairobi and his advocate on record is based in Nyeri and the distance hinders him from making regular follow up on the matter; the applicant deposes that the sixty days for lodging the record of appeal lapsed on 26th April, 2014, and the delay for 39 days is not inordinate; that he did not get instruction fees until 26th May, 2014, and thereafter gave his advocate full instructions to file the present application. In support of his application the applicant has attached a draft memorandum of appeal, a certificate of delay and the letters dated 21st March, 2014, and 25th April, 2014.
7. The respondent in opposing the application filed a replying affidavit stating that the application as well as the intended appeal have no merit; that the application at the High Court which is the subject of the instant application was for substitution of deceased parties; that it was and is in the interest of justice that substitution is necessary to enable the suit filed by the original deceased parties in 1974 to proceed for trial; that the suit would not have proceeded without substitution of the deceased parties; that the present application is meant to delay the hearing and determination of the suit filed in 1974.
8. At the hearing, learned counsel H.K. Mahan represented the applicant while learned counsel Mohoho Gichimu represented the respondent.
9. Counsel for the applicant elaborated on the grounds in support of the application and explained the averments in the supporting affidavit. It was submitted that the delay in filing the record of appeal had been explained; that the applicant has an arguable appeal that has merit; that no prejudice will be suffered by the respondent since both parties are on the disputed land which is the subject of the intended appeal; that the ruling against which the High Court substituted the original deceased parties is wrong in law as the respondent did not demonstrate sufficient cause for the judge to substitute the parties; that the application to substitute the deceased parties was made out of time and the learned judge erred in law in failing to appreciate that under ***Order 24 rule 2*** of the ***Civil Procedure Act*** and ***Rules***, it was incumbent upon the respondent to seek extension of the one year period to substitute the deceased parties and then make a formal application to substitute the deceased parties; that there was no application made to the High Court to extend the one year time to make an application to substitute the deceased parties; that the replying affidavit filed in the present application does not address the issues raised in support of the application; that the respondent has not controverted that there has been no inordinate delay in bringing the current application; that the pertinent issue that the application for substitution at the High Court was made out of time has not been addressed in the replying affidavit. The applicant has also attached draft grounds of appeal and it was submitted that the intended appeal has merit. Counsel submitted that the record of appeal has been prepared and if leave is granted; it can be filed and served within a short period.

10. Counsel for the respondent submitted that there has been inordinate delay in making the present application; that the certificate of delay was issued on 12th March, 2014, and the present application was filed on 6th June, 2014; that the applicant has not demonstrated what transpired between the period of March to June, 2014, after the certificate of delay was issued; that this Court should not come to the aid of the indolent and the intended appeal has no merit. It was submitted that the learned judge did not err in making an order for substitution of the original deceased parties; that there is no time limit in the ***Civil Procedure Rules*** within which a party can be substituted; that the learned judge properly exercised his discretion in substituting the deceased parties; that through this appeal and the intended appeal, the applicant is keen to delay the final hearing and determination of the High Court suit which was filed in 1974.
11. This Court in ***Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR***, stated that the discretion to extend time under ***Rule 4*** is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I have considered the present application, the affidavits on record and the submissions by counsel. There can be no doubt that the discretion I have to exercise under ***Rule 4*** is unfettered and does require establishment of *"sufficient reasons"*. Nevertheless, the exercise of the discretion ought to be guided by consideration of the factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others **–** See ***<u>FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS</u>, Civil Application Nai. 332 of 2004*** (unreported).
12. The applicant was represented by counsel at the High Court when judgment was delivered on 20th February, 2013. As was stated by Tunoi, J.A. *(as he then was)* in ***<u>Njoka Muriu & another – vs- Evans Githinji Muriu & Another</u>- Civil Appl. No. Nai. 356 of 2003,*** a notice of appeal is a one page formal piece of paper whose lodgment is a matter of course. In the instant case, a Notice of Appeal was filed on 23rd December, 2013. In the case of ***Silverbrand vs County of Los Angeles (2009) 46 Cal. 4th 106, 113*** as cited by the Kenya Supreme Court in ***Nicholas Kiptoo arap Korir Salat –v – IEBC & 7 Others, Supreme Court Application No. 16 of 2014,*** it was stated *inter alia*:

> ***"...<u>the filing of a timely notice of appeal is a jurisdictional prerequisite</u>. Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal". (Sic)***

13. In this case, counsel for the applicant being a careful advocate lodged a notice of appeal to safeguard his client's interest. Despite the fact that certified proceedings were availed to the applicant on 12th March, 2014, the record of appeal was never filed. The Supreme Court in ***<u>Nicholas Kiptoo arap Korir Salat –v – IEBC & 7 Others</u>, Supreme Court Application No. 16 of 2014*** laid down the following as the under-lying principles that a Court should consider in exercise of discretion to extend time:

- ***Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***
- ***A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
- ***Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
- ***Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
- ***Whether there will be any prejudice suffered by the respondents if the extension is granted;***
- ***Whether the application has been brought without undue delay; and***

- ***Whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

14. I have considered the reasons given for delay and note that the letter dated 21st March, 2014, was written by counsel to his client; the error or mistake in writing the correct postal address is an error on part of counsel for the applicant; whether this error should be visited upon the client is an issue that I have considered. I am aware of dicta that errors of counsel should not always be visited upon the client.
15. The period for delay in this matter is not 39 days as submitted by the applicant; the delay is from 12th March, 2014, when the certificate of delay was issued to 6th June 2014 when the instant application was made; the period of delay is over 85 days. The applicant explains the delay by stating that an error occurred when the letter dated 21st March, 2014, was mailed to the wrong postal address; he also state he did not have funds to give full instructions to counsel, no affidavit of means was attached to support the lack of funds. With reluctance, I find that the 85 days period of delay has been albeit satisfactorily explained. I have taken into account that the respondent did not challenge the submission that no prejudice will be suffered by either party if leave is granted. The applicant submitted that the intended appeal has merit while the respondent submitted that the intended appeal has no merit; this is an arguable point which needs submission and canvassing before an appellate court. There is also a duty now imposed on the Court under ***Sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** to ensure that the factors 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. For these reasons, I am inclined to exercise my discretion in favour of granting leave to the applicant to file the memorandum and record appeal out of time. I am of the view that in the present case, the errors on the part of counsel in wrongly addressing the letter dated 21st March, 2014, should not be visited upon the client.
16. The upshot is that the Notice of Motion dated 6th June, 2014, is hereby allowed. The applicant shall have 14 days from the date hereof to file and serve the memorandum and record of appeal. The cost of this application shall abide by the outcome of the intended appeal.

Dated and delivered at Nyeri this 16th day of July, 2014.

OTIENO-ODEK

……………………..…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR