**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: P. KIHARA KARIUKI, PCA (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 91 OF 2014**

**BETWEEN**

**AGRIDUT (K) LIMITED ….……..…….. 1ST APPLICANT**

**SAMUEL WANJOHI KIMUYU …….……...……. 2ND APPLICANT**

**KIRINYAGA CONSTRUCTIONS LTD ……...…….....…….... 3RD APPLICANT**

**AND**

**JACKSON WAHOME NGATIA ……...…….....……. RESPONDENT**

***(An application for extension of time to file and serve a Notice of Appeal and the Memorandum of Appeal against the judgment and decree of the High Court of Kenya at Nairobi (Waweru, J.) delivered on 4th March 2011 in H. C. C. C. No. 531 of 2004)***

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**RULING**

1. In this application, made under ***Rules 4, 41, 42*** and ***76*** of this Court's rules, Agridut (K) Limited, Samuel Wanjohi Kimuyu and Kirinyaga Constructions Ltd, (hereinafter referred to as "the applicants") seek an order for extension of time for filing and service of a notice of appeal, memorandum of appeal and record of appeal in an intended appeal against a judgment of the High Court made against them in High Court Civil Case No. 531 of 2004. The application is supported by way of an affidavit which was sworn on the 28th April, 2014 by Joseph Muchoki Waigwa, who is in the employ of the 3rd applicant.
2. Jackson Wahome Ngatia, the respondent, sued the applicants, claiming special and general damages arising from a road traffic accident that occurred on the 17th July, 2003. As a result of that accident, the respondent suffered serious injuries. On the 4th March, 2011, Waweru, J delivered a judgment in which the respondent was awarded the sum of Kshs.11,611,700.00 by way of general and special damages, together with interest on the sum at court rates, and costs of his suit.

3. The applicants' case is that they received information on the judgment delivered against them on the 18th March, 2011. On the 21st March, 2011 the applicants instructed their advocates at the time, M/s Ngulli & Company Advocates, to appeal against the said judgment. Taxation

proceedings between the parties commenced on or about the 27th June, 2011 and the applicants instructed the present advocates, M/s Kaplan & Stratton Advocates to appear for them in those proceedings. The taxation proceedings were protracted, and only concluded on the 13th March, 2012. On the 20th June, 2012, the deponent instructed his advocates to file an application for stay of execution of the judgment and decree, as well as to pursue the appeal. All this time, the applicants' former advocates had not handed over the file to the new firm of advocates now on record, which was eventually done sometime in July 2012.

4. It was at this point when counsel for the applicants, Mr. Fred Ojiambo, SC, while perusing the file received from the previous advocates, realized that the previous advocates had in fact not lodged the notice of appeal as required. Counsel therefore lodged a notice of appeal on the 28th September, 2012. The applicants' contention is that they all along believed that their previous advocate had filed the notice as instructed. For these reasons, the applicants submit that the delay in filing of the notice of appeal was not deliberate, but was rather a mistake on the part of the former advocate, and the consequences of this mistake should not be visited upon them.

5. The applicants' further state that this Court, having granted them orders of stay of execution has confirmed that there is an arguable appeal, and submit that it is only just and fair that they be allowed to pursue it. It is for these reasons that the applicants have asked me to enlarge the time within which they can file and serve the notice, memorandum and record of appeal.
6. The application was opposed by way of the respondent's affidavit sworn on the 30th June, 2014. The respondent states that the present advocates took over the conduct of this appeal from the previous advocates on the 11th August, 2011, as shown in the notice of change of advocates filed on the same day. The respondent further avers that the failure to file the notice of appeal cannot be a mistake of the advocate, as the applicants had a duty to ensure that the appeal was filed in time. The respondent further avers that an application for extension of time to file and serve the notice ought to have been made way back in September 2012 when the advocates state that they learnt that the notice had not been filed.
7. The respondent therefore considers that there has been an inordinate delay on the part of the applicants, and that this delay is inexcusable and unexplained. He further avers that the applicants have not demonstrated in what way the appeal is arguable, and that this application is only aimed at denying him the fruits of his judgment, and only serves to prejudice him particularly so as he is a quadriplegic and has been confined to a wheelchair since the year 2003.
8. During the hearing of the application, Mr. Ojiambo for the applicants submitted that there was no neglect by the applicants. Counsel further argued that there would be little prejudice suffered by the respondent, in that there would only be a delay in payment of the decretal amount. Counsel submitted further that in this case, should the order of extension be denied, the prejudice suffered by the applicants would be greater since the law imposes the duty to pay the decretal amount on the insurance company, and not on the applicants. For these reasons, counsel submits, the balance of convenience tilts in favour of the applicants, and this Court ought therefore to invoke the oxygen principles and grant the order sought.

9. Mr. Kioko, for the respondent, submitted that the present application does not meet the threshold for the granting of orders of extension of time. Counsel submitted that the period of time between the time of judgment and the present application was well over three years. Counsel considers this delay inordinate and submitted that it remains unexplained.
10. Mr. Kioko further argued that to allow this application would serve only to prejudice the respondent, who has been confined to a wheel chair since the accident, and further to suspend payment would cause irreparable damage to him. Counsel also submitted that the oxygen rule ought to apply to both parties, and does not aid the applicants in this case because of their glaring omissions. For these reasons, counsel asked that this application be dismissed with costs.

11. The threshold for the exercise of my unfettered discretion under ***Rule 4*** of this Court's Rules is well settled. In the oft-cited case of ***Leo Sila Mutiso v. Rose Helen Wangari Mwangi Civil Application No. Nai 251 of 1997 (unreported)*** the factors that a single judge must consider before the exercise of such discretion were set out in the following manner:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which the court generally takes into account in deciding whether to grant an extension of time are first 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."

12. Bearing in mind these principles, I must now see if the applicants have placed enough material before me so as to merit the benefit from my unfettered discretion. As I have pointed out before, judgment in the High Court was rendered on the 4th March, 2011. By virtue of ***Rule 75*** of this Court's Rules the applicants had fourteen days within which to lodge the notice of appeal with the Registrar of the High Court. Instead, the notice of appeal was eventually filed on the 28th September, 2012, albeit without leave of the Court which is a period of over one year after the delivery of the High Court judgment. The explanation given for this lapse was that it was the failure of the previous advocate that led to the delay. I find this explanation unsatisfactory. I agree with Waki JA when he stated in ***Bi-Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR (Civil Application No. 15 of 2011)*** that:

> ***"The filing of a notice of appeal is a simple and mechanical task and could even have been done … soon after the applicant became aware of the judgment."***

13. An applicant is allowed to regularize the position regarding his notice of appeal, and orders will be granted to allow him to file a competent notice when he demonstrates to the Court that he has been diligent in prosecution of his appeal. This was not the case here. The discovery that the notice had not been filed was made in September 2012. There is no affidavit on record, either from counsel previously on record or from the applicants, to explain why the notice was not filed on time. The present application was not filed until the 28th April, 2014. The applicants have offered no explanation whatsoever as to why it took them a period of one year and six months to bring an application to admit the notice of appeal, and then seek extension of time to file the record of appeal. As matters now stand, the notice of appeal having been filed out of time and without leave of the court is incompetent, and there has been no explanation as to why there has been such delay in seeking a remedy.

14. In ***Waweru & Another v Kirori [2003] KLR 448*** this Court dealing with an application such as the one now before me stated that:

> ***"… Although the Court has unfettered discretion an applicant must explain to the satisfaction of the Court what lead to the delay."***

15. The applicants have not offered any explanation for the delay, and thus, have laid no basis upon which I can exercise my unfettered discretion in their favour.
16. Mr. Ojiambo considers this a fit case for the application of the overriding principles espoused in ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act. In my view, the applicants' will find no solace in these principles. In his ruling in ***Bi-Mach Engineers Limited v James Kahoro Mwangi (supra)*** Waki J.A. stated that an unexplained delay, which in that case was four months, only serves to militate against the overriding objective and the principles of extension of time.
17. In addition, and as has been stated by this Court before, the overriding objectives cannot be invoked to aid litigants who make no effort to comply with the rules of the Court. In ***M. S. K v S. N. K [2010] eKLR (Civil Appeal (Application) No. 277 of 2005)*** this Court stated of the overriding principle:

> ***"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."***

18. While courts are to be guided in the interpretation of the law by the oxygen principles, it must

always therefore be remembered 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*** ***(supra)*** 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."***

19. I think I have said enough to show that this application has no merit. In the circumstances, I hereby order it dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 19th day of September, 2014.**

**P. KIHARA KARIUKI, (PCA)**

**…….……..**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**