IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE , J.A (IN CHAMBERS) CIVIL APPLICATION NO. NAI 219 of 2014

BETWEEN

ASHIT PATANI…….....1ST APPLICANT

SELINA PATANI…….2ND APPLICANT

RAMABEN PATANI……...3RD APPLICANT

AND

DHIRAJLAL V. PATANI……..1ST RESPONDENT

VIJYA DHIRAJLAL VIRPAL PATAN..... 2ND RESPONDENT

AZIZ DEVELOPERS LIMITED..... 3RD RESPONDENT

(Application for leave to file and serve the Notice of Appeal out of time in an intended appeal from a Judgment of the High Court of Kenya at Nairobi (Nyamweya, J) Dated 24th July, 2014)

In ELC Civil Suit No. 613 of 2009)

RULING

The Three (3) applicants ***Ashit Patani, Selina Patani and Ramaben Patani*** sued the three (3) respondents ***Dhirajlal V.Patani, Vijya Dhirajlal Virpaal Patani and Aziz Developers Limited*** in Nairobi High Court Environment and Land Court ELC Suit No. 613 of 2009 over the suit property. In a Judgment of ***P. Nyamweya, J*** dated 24th day of July, 2014, the learned Judge dismissed the applicants claim against the respondents with no order as to costs as the dispute involved family members.

The applicants were aggrieved by that decision and are desirous of appealing to this Court against it. As was required of them, they were lodge their notice of appeal within the time line stipulated in rule 75(2) of this Court's Rules. Fourteen days period from 24th day of July, 2014 lapsed on the 7th day of August, 2014. The applicants seek leave of Court to file and serve the notice of appeal out of time and or time for filing and service of the said Notice of appeal be extended. Alternatively that Notice of Appeal attached to the application be deemed to have been duly filed and properly on the record.

The grounds in support of the application are set out in the body of the application; the content of the supporting affidavit **of Stephen Mwanza Gachie** and oral submission to me. In summary, these are that

the judgment of the Court was read on the 24th day of July, 2014; the learned Judge informed the parties in open Court that the judgment had typographical errors which needed to be perfected before copies of it could be released to the parties; it was not until the 7th of August, 2014 when a copy was accessed by the said advocate; upon receipt of the aforesaid copy of the judgment, he went through it with his clients who gave instructions to appeal; an application to regularize the appellate process was presented 26 days from the date of the judgment and 14 days from the last date they ought to have lodged their notice of appeal, on which date they also accessed a copy of the judgment sought to be appealed against.

Turning to the grounds raised by the respondents in their replying affidavits, ***Mr. Gachie*** concedes that the litigation involves family members; the applicants were aggrieved by the respondents action of moving to dispose of family property without the applicants consent; the property is worthy millions of shillings which is the more reason as to why the applicants should be given an opportunity to be heard on appeal before the same can be divested of them; no prejudice is likely to be suffered by the respondents if the applicants were to be allowed an opportunity to exercise their undoubted right of appeal; the applicants failure to annex a draft memorandum of appeal or specify the intended grounds of appeal in the body of the application is not fatal to the relief sought as it is not a mandatory requirement under rule 43 of this Court's Rules.

On competence of the application, ***Mr. Gachie*** argued that the supporting affidavit is proper as he deposed only to matters of routine within his personal knowledge and not to contentious issues. On delay, ***Mr. Gachie*** argued that the applicants have given satisfactory explanation for the delay; they also rely on the respondent's admission that they respondents accessed a copy on the Judgment on 4th August, 2014 a period of twelve (12) days from the date of delivery, while the applicants accessed a copy on the 7th of August 2014, a period of fourteen (14) days from the date of delivery of the Judgment. In applications of this nature, argued ***Mr. Gachie*** the Court has a wide discretion be to do justice to the parties; justice of the case herein demand that the applicants be accorded an opportunity to ventilate their grievances against the said judgment on appeal.

Mr. Wandago learned counsel for the 1st and second respondents has opposed the application relying on the replying affidavit of ***Dhirajlal V. Patani*** deposed and lodged in Court on the 3rd day of October, 2014. In summary, they concede that the judgment of ***Nyamweya, J*** was delivered on 24th July, 2014; deny any knowledge of typographical errors in the said judgment that needed perfection before copies of the said judgment could be released to the parties; but agree they obtained a copy thereof on 4th August, 2014.

Mr. Wandago went on to argue further that the exercise of my judicial discretion in favour of the applicant should be withheld because, no clear or sufficient reason has been given as to why the applicants failed to lodge their notice of appeal in time; grounds of appeal have not been exhibited; the litigation herein involves family members and it is only proper that the dispute be brought to a close; the decision to dispose the property to the 3rd respondent was unanimous and for this reason, the intended appeal has no chance of success. Alternatively, that if this Court were inclined to grant the relief sought then this should be granted on terms by asking the applicant to provide security for costs pegged on the value of the subject property of 100 million.

Miss Githii for the 3rd respondent reiterated the content of the 3rd respondent's replying affidavit deposed by one James ***Mwangi Kamau*** on the 3rd day of October, 2014. She also fully associated herself with the submissions of ***Mr. Wandago.*** In addition, she maintained that both the application and the supporting affidavit are defective, bad in law and incurably defective as the supporting affidavit was deposed by the advocate instead of the applicants; the applicants have come to Court with unclean hands and should therefore not be indulged. Alternatively if I am inclined to grant the applicants a reprieve, then this should be on terms that security for costs commensurate to the current value of the property which is now in excess of 400 million should be provided by the applicant.

On case law, ***Miss Githii*** relied on the decision in the case of ***George Mwenda Muthuri versus Mama***

Day Nursery and Primary School Limited [2014] eKLR where in **Koome JA,** declined leave to appeal out of time to an applicant who took a whopping 20 twenty months to organize funds for appeal. The decision in the case of ***Moses Odero Owuor and 2 others versus Andronico Otieno Owuor Anindo [2013] eKLR*** wherein ***Azangalala JA*** declined leave to file an appeal out of time where there was a delay of almost two years.

In response to the respondents submissions ***Mr. Gachie*** reiterated the content of his earlier submissions to me.

My jurisdiction to intervene in this matter has been invoked under rules 1(2) 4 and 42 of this Courts rules. Rule 1(2) enshrines the inherent power of this Court. This is the unwritten power of the Court invoked for purposes of making orders necessary for ends of justice to be met to both parties before it. Rule 42 is merely procedural simply describing the mode of approach to the Court by a party seeking an interlocutory relief. Rule 4 is the substantive rule on extention of time. It reads:-

> ***"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 any act authorized or required by these Rules, whether before or after 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"***

The parameters of the powers donated by this rule have been a subject of interrogation in a long line of decisions of this Court. In the case of ***Leo Sile Mutiso versus Rose Hellen Wangari Mwangi Civil Application No. Nai 255 of 1997 (UR)*** the following observations were made:-

> ***"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 matron which this Court takes into account in deciding whether to grant an extention of time are first, the length of the delay, secondly, the reasons 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,"***

In ***Githiaka versus Nderiri [2004] 2KLR67***

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Aj JA as he then was had this to add:-

> ***In the exercise of its discretion the Courts primary concern should be to do justice to the parties. Save that in doing so, the Court should bear in mind the length of the delay in lodging the notice and record where applicable, the delay in lodging the application for extension of time as well as the explanation thereof; whether or not the intended appeal is arguable; the public importance if any of the matter and generally the requirement of the interest of justice in the case.***

Applying the above guiding principles to the rival arguments herein, it is un disputed that the applicants are desirious of ventilating on appeal their grievances arising from the judgment of ***Nyamweya, J***. They were undoubtedly caught up by the requirement in Rule 75 of this Court's Rules in that they failed to lodge their notice of appeal within the stipulated 14 days from 24th day of July, 2014 when the judgment sought to be impugned was delivered.

The applicants explanation for the failure to comply is that the judgment had typographical errors which needed to be perfected before a copy thereof could be released to the parties. It was not until 7th August, 2014 when they accessed a copy. This was the 14th day of the date of the delivery of the judgment and therefore the last day for the lodging of the notice of Appeal as of right. ***Mr. Gachie*** did not lodge the

notice of appeal on 7th August, 2014 because he needed to make an informed decision after consultation with his clients that there was sufficient cause to appeal.

The rule is that, in ordinate delay is frouned upon notwithstanding, the requirement that any form of delay has to be satisfactorily explained. As to whether to accept or decline to accept the explanation given by the defaulting party, is a matter of discretion for the Court seized of the matter. That is why in the decision cited by the 3rd respondent namely ***George Mwenda Muthuri T versus Mama Day Nursery and Primary School Limited (supra)*** and ***Moses Odero Owuor & 2 others versus***

Andronico Otieno Anindo (supra) a delay of twenty (20) months and almost two (2) years were duly explained by the defaulting parties but rejected by the learned single Judges as a basis for granting relief under rule 4 of this Courts Rules.

Herein, the reason advanced by ***Mr. Gachie*** sounds reasonable. This is borne out by the admission on the part of the respondents that they too did not receive a copy of the judgment soon after delivery. They did so twelve (12) days later. As for the explanation that counsel needed to digest it, discuss it with his clients with a view to forming an informed decision to appeal or was not was plausible, because not every decision handed out by a Court of law is appealable.

On in competence of the application, I agree with the applicants contention that the advocate on record deposed only to routine matters within his knowledge and not on contentious matters also exhibition of a draft memorandum of appeal or grounds of appeal in the body of the application is not a mandatory requirement under rule 43 of this Court's Rules.

In the ***Leo Mutiso case (supra)*** demonstration of the arguability of the intended appeal was simply stated to be a "***possibility",*** meaning that it is not a mandatory consideration.

It is also worth noting that the litigation involves family members. The applicant wishes to ventilate on appeal whatever grievances they have against the judgment of ***Nyamweya, J***. They have moved to regularize their position within the shortest possible time being fourteen (14) days from the date of the receipt of the copy of the judgment and 26 days from the date of the delivery of the Judgment. I think they have brought themselves within the ambit of the principles enunciated in the above cited case law to warrant the exercise of my judicial discretion in their favour.

As for conditions to be attached to the exercise of such discretion in favour of a deserving litigant, security for costs is never a consideration under rule 4 of this Courts Rules. That is why it was never mentioned as a condition in all the case law cited above. What is required of me under this rule is simply to decide whether to grant or with hold the exercise of the discretion sought bearing in mind the conditionalities set out in the case law cited. Attendant costs should be limited to those pertaining to the particular proceedings under consideration. The only other relevant consideration that may be of concern to me at this juncture should be the time line within which to comply which should not be beyond that which is stipulated by the rules.

In the result, I am inclined to allow prayer 1 of the applicants' application dated 20th August, 2014.

2. Prayer 2 is declined.

3. The applicant has fourteen (14) days from date of the reading of this ruling to lodge his notice of appeal.
4. Costs of the application to the respondent.

Dated and delivered at Nairobi this 17th day of October, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

12