IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NYR. 11 OF 2013

BETWEEN

GEORGE WACHIRA KIRIRA…….…… APPLICANT

AND

JOE MAINA RUTHUTHI ……..……. RESPONDENT

(An application for leave to file and serve Notice of Appeal and Record of Appeal out of time from the Order/Ruling of the High Court at Nyeri (Makhandia J.) dated 15th November, 2007

in

HCCC No. 286 of 1982)

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R U L I N G

1. This is the third time the applicant is making an application for leave to file the appeal out of time before this Court. The first time such an application was made, was *vide* **Civil Application no. 139 of 2008** upon which he was granted leave by **Hon. Justice Githinji, J.A** by a ruling dated 5th December, 2008. The leave that was granted was conditional, in that the applicant had 14 days from the date of the ruling to file and serve the Notice of Appeal; leave was also granted to lodge and serve the Record of Appeal within 30 days from the date of service of the Notice of Appeal. The record shows that the applicant did indeed file the Notice of Appeal. However, the Notice of Appeal that was filed was defective and bad in law.
2. By a Notice of Motion lodged under **Rule 80** of **Court of Appeal Rules** (the Rules), the respondent made an application seeking orders to strike out the applicant's Notice of Appeal that had been filed pursuant to the leave granted by Githinji, J.A. The application was made vide **Civil Appeal No. 32 of 2009** and subsequently, this Court struck out the Notice of Appeal in a ruling delivered on 4th November 2009. In striking out the Notice of Appeal, the learned Justices of Appeal (**Omolo, O'Kubasu & Nyamu JJA**) expressed themselves:

> **"The record shows that a Notice of Appeal was lodged on 18th December 2008; that Notice of Appeal was not served upon the applicant or on his advocates. The respondent intended to appeal against the ruling of the High Court (Makhandia J., as he then was) delivered at Nyeri on 15th November, 2007, but the Notice of Appeal**

lodged on 15th December 2008, stated as follows:

TAKE NOTICE that the appellant GEORGE WACHIRA KIRIRA being dissatisfied with the ruling of the Honourable J.M.S. Makhandia given at NYERI on 5th December 2008 in so far as the same relates to the finding that the Appellant is liable for negligence and subsequent order that the Respondent do pay the Applicant the judgment amount to the Plaintiff intends (sic) to the High Court against the entire ruling….

Clearly, that Notice of Appeal is defective since it refers to a ruling of Makhandia J, dated 5th December, 2008. The ruling of the High Court was not delivered on 5th December, 2008 but on 15th November 2007."

3. The learned Justices of Appeal delivered their ruling on 4th November, 2009 and the present application was filed on 12th June, 2013. This is a delay of 3 years and 7 months. The present application now seeks leave of this Court to file and serve, presumably a fresh Notice of Appeal and to lodge the Record of Appeal. The application is stated to be grounded on **Section 7** of the **Appellate Jurisdiction Act** and **Rules 1 (3) and 4** of the Rules .
4. Before I can exercise my discretion to extend time, the applicant must place sufficient material before me to explain the reasons for delay in filling the Notice and/or Record of Appeal within time. In the case of ***Paul .M. Waweru & 2 others {2003} KLR 361***, it was stated:

'This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under Rule 4 of the Rules of this Court. All that the applicant is required to do is to place sufficient material before the learned Judge explaining the reasons for what was clearly an inordinate delay.'

5. The practice of this Court concerning applications under **Rule 4** is for the Court to consider the following factors:

(a) length of delay

(b) reasons for the delay

(c) the chances of the appeal succeeding if the application is granted and

(d) ***the degree of prejudice to the respondent if the application is granted.***

6. In considering the present application, I am guided by the case of ***Patel – v- Waweru & 2 Others (2003) KLR 361***, where this Court while citing the House of Lords in ***Ratman – v- Cumarasamy (1964) 3 ALL ER 933*** observed that:

"The rules of this Court must prima facie be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would defeat the purpose of the rules which is to provide a time table for the conduct of litigation"

7. The present application to extend time is supported by the applicant's affidavit. The grounds in support of the application as pleaded on the face of the Notice of Motion are that the applicant remains aggrieved by the ruling of Hon. Justice Makhandia made on 15th November, 2007 and is desirous of prosecuting his appeal to its final conclusion; that it is in the interest of justice that the applicant be allowed to file his appeal out of time; and that the respondent will not be prejudiced if the said leave is granted.

8. At the hearing of the Notice of Motion in support of the application, the applicant appeared in person and elaborated on the grounds of appeal. He stated that he believed that the initial Notice of Appeal as filed was dismissed on a technicality and this was due to the mistake of his then counsel on record. He submitted that the mistake of his counsel should not be visited upon him; he further indicated that he had taken up the matter with the Advocate's Complaint's Commission since he had paid his then counsel who failed to lodge a proper appeal; that he believed his intended appeal had high chances of success and that no prejudice will be caused to the respondent if leave were granted. The applicant urged this Court to take into account that the dispute between the parties has been before the courts since 1982 and he intends to appeal to set aside the judgment that led to the sale of the suit property being LR No. Ruguru/Kiamariga/410. He alleged that his appeal has high chances of success as the suit property was sold to the respondent by way of a public auction, which sale was fraudulent. The applicant submitted that he is now destitute and lives as a squatter due to the fraudulent sale of the suit property to the respondent.
9. Learned counsel for the respondent, **S.K. Njuguna,** opposed the application submitting that no satisfactory explanation had been given for the delay in filing the present application and that any appeal had no chance of success. He submitted that the respondent stands to be prejudiced if leave were granted. He submitted that all along since 1982 when the dispute between the parties started, the applicant had been represented by counsel and it was only in the present application that the applicant was in person. Counsel submitted that the Court of Appeal struck out the Notice of Appeal on 4th November, 2009 and the applicant has taken 3 years and 7 months to file the present application; That no explanation has been given for the delay; no action or initiative was taken by the applicant for over 3 years and the delay is inordinate and the law does not assist the indolent. Counsel submitted that no draft or proposed memorandum and Notice of Appeal had been tendered in support of the application. It was submitted that the applicant could not rely on the letter of complaint against his erstwhile counsel as the letter was dated 13th December, 2012; and that it does not explain the inordinate delay of over 3 years and 7 months. Counsel submitted that the respondent will be prejudiced if leave is granted. It was submitted that the cause of action in the suit occurred 31 years ago in 1982 and execution proceedings were levied and the respondent is now the registered proprietor of the suit property; that the respondent is in occupation and possession of the property; and that to re-open the case will cause prejudice to the respondent. The respondent cited the cases of ***George Chege Kamau – v- Esther Wanjira Kamau (2005) eKLR Civil Application No. 280 of 2004*** *and* ***Njoka Muriu (substituted by Susan Wangechi Njoka) – v- Evan Githinj Muriu (2000) eKLR Civil Appeal no. 356 of 2003*** in support of the submission.
10. I have considered the present application, the affidavit in support and opposition as well as submissions by applicant in person and counsel for the respondent. The applicant has attached the rulings by the learned Justice of Appeal, **Githinji, J.A** and the learned Justices of Appeal **Omolo, O'kubasu & Nyamu JJ.A.** The applicant has also attached the judgment of the High Court against which the intended appeal is to be made. However, he has not attached the pleadings and/or proceedings from the High Court and this is not in line with the decision in **Joseph Kirweya Kahwai & 5 others -v - Charles Kirweya & 5 others,** ***Civil Application No. 304 of 2010*** wherein it was stated that pleadings and/or proceedings as well as copy of the judgment and draft memorandum of the intended appeal are important to enable the court ascertain what the issues are in the entire suit. The applicant has neither attached a draft memorandum of appeal or the Notice of Appeal.
11. I am aware that the discretion I have to exercise under the Rules of this Court is unfettered. Nevertheless, it 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 FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS, Civil Application Nai 332 of 2004*** (unreported). 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.
12. The fundamental issue before me is whether the applicants have provided satisfactory explanation for delay in filing the Notice and Record of Appeal within the prescribed time. The reason proffered in explanation for the delay is that the applicant remains aggrieved by the ruling of Hon.

Justice Makhandia, J. made on 15th November, 2007; that the applicant has made a complaint against his erstwhile counsel with the Advocates Complaint's Commission; and that it is in public interest that the appeal should be heard. I do find that these explanations given by the applicant are not satisfactory. The other explanation given by the applicant through his oral submissions is that the cause of action arose in 1982 and his land was fraudulently sold by way of public auction. I have considered this submission and find that it goes to the merits of the intended appeal though no explanation is given for the delay. In **Gachau & another – v- Pioneer Holdings (A) Limited & 2 others {2008} KLR 315**, the Honourable Judge of Appeal Onyango-Otieno stated that:

'I am not persuaded that in law, once the Court does not feel fully satisfied as to the reasons for delay, it must proceed to dismiss an application for extension; when the court is faced with a borderline case, it may grant leave for extension of time. In such a case, matters such as arguability of the intended appeal, prejudice and others may come in handy to supplement an otherwise weak explanation of the delay.'

13. In the present case, the ruling of the High Court against which the intended appeal is to be proffered was delivered on 15th November 2007. To this date, there is no valid Notice of Appeal that has been filed. This is a delay of over 5 years. The Notice of Appeal that had earlier been filed was struck out as defective. I am aware that the intended appeal involves land and in the case of ***Wasike – v- Swala (1984) KLR 591,*** this court stated as follows:

> **"A recent decision of this full court in a reference from a single judge also made it clear that it would, in the circumstances of that case, reverse the decision of the single judge of this court because the intended appeal related to land and because, although the applicant could not technically explain satisfactorily the delay or take advantage of the proviso to rule 81 (1) nevertheless the respondent had sufficient notice that the applicant was resolutely intending to prosecute his appeal. (See John Kuria – v- Kalen Wahoti Nairobi Civil Application no. 19 of 1983). Here again, the subject matter is land and Mucha Swala or his advocate have known all along that Cleopas Wasike is determined to institute his appeal."**

14. In this case, the applicant is seeking to proceed with an action in court in relation to land and I cannot shut my eyes to this aspect. However, the ***Gachau and Cleopas Wasike cases*** referred to above do not establish a principle that where land is involved, leave must be granted. Again, the present case is not a borderline case. The facts of these two cases are distinguishable and are inapplicable to the present case. As to the contention that the respondent cannot suffer any prejudice if leave is grant, I find that the applicant did not make any submission on the issue and the affidavit in support of the application does not address the matter. No information was placed before me to determine if the respondent stands to suffer no prejudiced if leave for extension of time is granted. On the other hand, the respondent submitted that he stands to suffer prejudice. The burden to prove that no prejudice will be suffered rests with the applicant and I find he did not discharge this obligation.
15. The applicant submitted that the intended appeal has a high chance of success and is arguable. There is no draft memorandum of appeal to enable me prima facie evaluate the submission. However, I note with concurrence the sentiments of Hon. Justice of Appeal Bosire JA in relation to the second application by the applicant for extension of time in **Civil Application No. NAI 370 of 2009**. The learned Judge expressed himself:

> **"If I can make out, the applicant's land was sold in execution of decree, the applicant h as not explained whether the decree is still in situ and if so, upon what basis does he hope to convince this Court to set aside the sale in view of the fact that the decree itself will not be the subject of his intended appeal."**

16. There are two legal issues that I need to consider before making my final decision. The first is whether an applicant can make a second, third or further application seeking leave to extend time after a similar application had been granted and or declined or after a Notice and Record of Appeal

have been struck out; this raises the issues of *res judicata.* I have considered the decision in ***Mohammed Osman Malllim – v- Mercedes Sanchez Rao Tussela & 4 Others, Civil Application No. NAI 208 of 1999*** where Justices of Appeal, Kwach, Bosire and Keiuwa, considered a second application for leave to extend time. I have also looked at the decision in ***James Thuo Ndaguri and Kenya Power & Lighting Company Limited (2005) eKLR*** where a second application for leave to extend time was considered. In view of these decisions, I am satisfied that a second or third or a further application seeking leave to extend time to file and serve a Notice and Record of Appeal can properly be placed before a single Judge and such an application cannot be *res judicata.*

17. The second issue for my consideration arising from the facts of the present case is whether a single Judge can sit on appeal and overturn the decision of a three Judge bench. The record shows that the applicant made a similar application seeking leave to extend time *vide* ***Civil Application no. 139 of 2008.*** Leave was granted by the Hon. Justice Githinji, J.A on 5th December, 2008. Subsequent to the leave, the Notice and Record of Appeal that was filed was struck out by a three Judge bench on 4th November, 2009. The question that I pose is that if I were to grant leave in the present application, would I be overturning the decision of my learned brothers, Justices of Appeal, who by their judicious decision ended the litigation in this matter? Is the applicant using the present application asking a single Judge to review or sit on appeal against the orders of the three Judge bench? It is my considered view that there is no provision in the rules of this Court that confer jurisdiction upon a single Judge to review, return or set aside orders made by another single Judge of coordinate jurisdiction or a three Judge bench. It is my considered view that a single Judge cannot exercise any discretion to overturn the learned Justices of Appeal decision to strike out the Notice and Record of Appeal. This Court stated in ***G.E. Okiro – v- Equator Bottlers Limited being an appeal from HCCC No. 17 of 1983,***

> ***"unless the rules of this Court are properly and regularly complied with, there can be no uniformity as regards appeals and the Rules themselves will lose their force and effect".***

17. I have considered that the present application does not seek review or setting aside of the decision to strike out the appeal but to restart the appeal process all over again. It is trite law that a party whose appeal has been struck out as incompetent has the liberty and right to restart the appellate process. It is however also true that he is obliged to explain his failure to take certain essential steps in the struck out appeal, if only to enable the court assess his general conduct. **(See As per Bosire JA in *George Wachira Kirira – v- Joel Maina Ruthuthi* *Civil Application No. Nai. 370 of 2009*).**

18. In the present application, the applicant is inviting the Court to exercise its judicial discretion in his favour and he is obliged to demonstrate utmost candor and good faith. The applicant in his submissions sought to explain the delay in filing the present application since 4th November, 2009 when the Notice to Appeal was struck out. The respondent also submitted that the delay has been for a period of 3 years and 7 months counting from the date of 4th November, 2009. On this aspect, both parties were not candid with the Court. A second application seeking leave to extend time was filed in this matter *vide* **Civil Application No. NAI 370 of 2009** which came before my learned senior brother Justice Bosire, J.A. The learned Judge of Appeal, Bosire JA, declined to exercise his discretion to extend time and by a ruling delivered on 1st December 2011, the application was dismissed with costs. Given that the application was dismissed on 1st December 2011, the applicant has still not explained the delay from 1st December, 2011 to 12th June, 2013 which is a period of 18 months.

19. The applicant in his oral submission stated that he was destitute and lives on a road reserve; he invited the Court to visit the suit property and the road reserve where he resides. The applicant appeared in person before me and I am constrained to comment on his submission for purposes of record. The present application is for leave to extend time to file and serve the Notice and Record of Appeal out of time. Visitation by the Court to the suit property or where the applicant resides is not a

relevant and material factor in determining the outcome of this application. The applicant also made submission outlining the history of the dispute between the parties since 1982 and referred this Court to his incarceration pursuant to Criminal Case No. 962 of 1982 and Criminal Appeal No. 510 of 1982. It is my considered view that the submission on these criminal cases is not relevant to the present application. The applicant submitted that he should not be blamed for the mistakes of his erstwhile counsel. Before me the applicant has not demonstrated when the mistake was occasioned and taking into account that this is the third application seeking leave to extend time; it has not been shown how in all these application, his erstwhile counsel is to be blamed.

20. In totality, taking into account that no satisfactory explanation has been given for the delay of a period of 18 months from 1st December, 2011 when Hon. Justice Bosire, J.A dismissed a similar application; and the applicant was not candid to disclose the existence of **Civil Application No. NAI 370 of 2009**; considering that as a single Judge I cannot review or set aside the decision of my Honourable brother Justices of Appeals, I hereby decline to exercise my discretion to grant leave to file and serve the Notice and Record of Appeal out of time. The Notice of Motion dated 12th June, 2013 is hereby dismissed with costs.

Dated and delivered at Nyeri this 25th day of July, 2013.

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR