IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYAMU, J.A. (IN CHMABERS)
CIVIL APPLICATION NO. NAI 173 OF 2011

BETWEEN

MWIHANGIRI FARMERS LIMITED…….....……..…APPLICANT

AND

ECUMENICAL DEVELOPMENT
CO-OPERATIVE SOCIETY (E.D.C.S) ……..…….RESPONDENT

(An Application for extension of time to file and serve a Notice of Appeal and a Record of Appeal out of time in an intended Appeal from the Ruling of the High Court of Kenya at Nairobi (Hon. Justice Martha Koome) dated 12th November, 2010
in

H.C.C. NO. 2026 OF 2000)
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RULING

This is a ***Rule 4*** application seeking an extension of time for filing of Notice of Appeal and a Record of Appeal in respect of a ruling delivered on 12th November 2010 given against the applicant company. However, at the outset I think that the first prayer is misconceived in that in the supporting affidavit of Mr. Njoroge he has clearly deponed that the Notice of Appeal was filed on 18th November 2010 which is well within the fourteen days prescribed in ***Rule 75 (2)*** of this Court's Rules. It is however apparent to me that the applicant does not depone to having served the Notice of Appeal within 7 days of lodging the Notice as stipulated in ***Rule 77 (1)*** of this Court's Rules.

The appeal ought to have been filed 60 days after the lodging of the Notice of Appeal which according to my calculation should have been on 18th January 2011. However, perusal of the annexed certificate of delay shows that 177 days were expended in the preparation of the proceedings and it is also common ground that an application for proceedings had been served in terms of the proviso to ***Rule 82*** on institution of Appeals. The last day for institution of the appeal was therefore 24th May 2011 and this is conceded by the respondents but they have argued that the certificate of delay notwithstanding, no good reasons have been given in not instituting the appeal and the application should not be granted for this reason. Mrs. Lele for the respondent has further argued that since the intended appeal is aimed at challenging a consent judgment recorded by the parties, such an appeal has no chance of success.

Concerning chances of appeal, Mr. Njoroge, learned counsel for the applicant submits that in the intended appeal the applicant shall contend that there was a mistake capable of vitiating the consent judgment. In addition, the consent judgment has not been enforced and it involves not only one parcel of land but many

parcels of land belonging to other farmers who were clients of the respondent in a venture which did not take off and the said securities have not been discharged to date. In addition the owners of these other parcels were not parties to the proceedings which have given rise to the intended appeal. Mr. Njoroge further indicated that he intends to challenge the consent judgment on the ground that although parcel Nyadarua/Karati/2352 was charged to the respondent, as a matter of fact there is no liability at all between the chargee and chargor and that is the reason the statutory power of sale referred to in prayer 1of the consent judgment in the High Court ruling has not been exercised.

After taking into account the affidavit in support of the application and the affidavit in reply, it is clear to me that this application was filed on 5th July 2011, approximately 41 days from the date the appeal is supposed to have been instituted. It is also clear to me that no challenge has been mounted as per the rules by the respondent to have the notice of appeal struck out although the respondent appears to have been aware that there had been some delay in instituting the appeal. It is also evident that the applicant has not satisfactorily explained the delay. Ordinarily, this should have been the end of the matter and a rejection of the application should have been the norm since delay had not been explained. However, it is clear to me that the respondent's main challenge to the application is principally aimed at challenging the merits of the intended appeal on the ground that an appeal challenging a consent judgment cannot succeed and it would be futile to allow the application. With respect, it is for the Court hearing the appeal to adjudicate whether or not the veil behind the consent can be lifted.

Am aware of the factors I ought to take into account in adjudicating in a rule 4 application – these are length of delay, reasons for the delay, chances of the intended appeal and prejudice to the respondent. Although the delay of 41 days has not been satisfactorily explained by the applicant, in my view, what is at stake in the intended appeal includes a possible mistake in the negotiating the consent judgment and the effect of the judgment on the ownership of parcels belonging to owners who were not parties to the proceedings yet form part of the consent order. These are not frivolous grounds and therefore the factor of the unexplained delay has to be put on the scales with the applicant's right of appeal and the need for it to be determined on merit so as to meet the ends of justice. Furthermore, the respondent has not shown that it might suffer prejudice. In other words, I must remind myself that the exercise of any power under the Appellate Jurisdiction Act such as the rule invoked in this matter must be done with a sense of proportionality so as to achieve the objective of attaining justice in the situation before me. In this regard, I think I must do much more that a consideration of the four factors which the courts have hitherto considered. The additional factor in the situation before me is to take a broad view of what justice entails considering the special circumstances of this case. In this case I think the need not to stifle the right of appeal and to have the same heard on `merit would serve the interests of all the parties including the property owners who were not party to the proceedings.

In answer to the respondent's counsel response on the merits of the intended appeal, this should be left to the court hearing the appeal. What falls for consideration are the chances of success and on this all I can say at this stage is that there is a long shadow of arguability and since all that the applicant seeks is to articulate its undoubted right of appeal, this should be facilitated by the Court. I think that one of the hallmarks of the overriding objective is broadmindedness in attaining justice in every situation before the Court. In the special situation before me, on the one hand is the undoubted right of appeal and on the other, is an element of delay in failing to articulate that right as prescribed by the rules. In my view the axis of justice in this particular matter turns on the hub of the principle of proportionality, an important aim under ***section 3B*** of the Appellate Jurisdiction Act. The aim of proportionality in the circumstances of this matter can only be achieved by tilting the balance in favour of the applicant's right to pursue the intended appeal. It is gratifying to note that like the "***small biblical mustard seed***" planted slightly over two years ago, the overriding objective continues to grow and is about to mature into a big tree with many branches under which wellsprings of justice spring and find shelter. The applicant herein deserves that shelter.

The upshot is that there is still a valid notice of appeal, I grant the application by extending time of its service. I accordingly order that the Notice of Appeal be served within 14 days and the record of appeal be filed and served within 7 days thereafter. Costs of the application to be in the intended appeal. It is so ordered.

Dated and delivered at Nairobi this 3rd day of February, 2012.

J.G. NYAMU
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JUDGE OF APPEAL

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

DEPUTY REGISTRAR