IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 282 OF 2007

JOSEPH GITAHI GACHAU …….…….. 1ST APPLICANT

BEATRICE WANGECHI GITAHI ……..……..…… 2ND APPLICANT

VERSUS

PIONEER HOLDINGS (A) LIMITED ……..……...… 1ST RESPONDENT

PIONEER ASSURANCE COMPANY LIMITED …...…...… 2ND RESPONDENT

EVELYN WALEGHWA NG'ANG'A ……...…..…….. 3rd RESPONDENT

(Application for extension of time to file and serve record of appeal out of time in an intended appeal from a ruling and order of the High Court of Kenya at Nairobi (Ang'awa, J) dated 9th May 2007)

in

H.C. Elc. No. 1715 (Formerly C. Suit No. 1402 of 2005)

****

R U L I N G

On or before 11th November 2005, Joseph Gitahi Gachau and Beatrice Wangechi Gitahi were the registered owners of property LR. No. 14970/49 situated at Evergreen Estate off Kiambu Road in Nairobi. This property was secured through a Housing Loan Scheme introduced by the second respondent, **Pioneer Assurance Company Ltd.** which later after change of name assumed the name of the first respondent namely **Pioneer Holdings (Africa) Limited**. The applicants acquired the same property through the same loan scheme and thus secured the property through a mortgage. Later, it would appear, differences arose on the repayment of the same loan and on 11th November 2005, the subject property was sold to the third respondent, **Evelyn Waleghwa Ng'ang'a** at a public auction held on that day. The applicants were not amused as they felt that the first and second respondents in causing the property to be sold had failed to consider salient conditions that obtained when the loan was granted and particularly, that they had not considered the mode of repayment of the loan which had been agreed upon and further that the property was sold at a price far below the actual market value of the property. They filed a suit in the superior court vide a plaint dated 18th November 2005 and filed on the same date. In that suit, they sought permanent injunction, a declaration that the purported sale of the suit property was unlawful and fraudulent and was thereby *null* and *void*, and an order that the first applicant's commission

through which, he was repaying the loan be reinstated. Together with that plaint, the applicants herein also filed chamber summons seeking temporary injunction and removal of the third respondent from the suit property.

That application came up before the superior court (Ang'awa J.) who after full hearing, dismissed it stating vide a ruling delivered on 9th May 2007 as follows:

"III. Findings.

11. There indeed has been a non disclosure of facts by the plaintiffs. There along (sic) has been a fall of the hammer which facts would be passed in the main suit.

12. In the case I do not think that injunction should issue. The plaintiffs' remedy may be in damages which in effect part (sic) of the main suit.

13. I hereby dismiss this application dated 18th November 2005 on grounds of material disclosure. The plaintiff misled the court that he was being evicted from his house and would be rendered homeless where (sic) the house was only 45% complete.

There will be costs to the defendants 1 and 3. There will be no costs on 2nd defendant as they are defended."

The applicants felt aggrieved by that decision and they state in their affidavit before me that they instructed their former advocates Messrs G.M. Muhoro to lodge an appeal on their behalf against that decision. This allegation is not disputed. On 14th May 2007, a notice of appeal dated 14th May 2007 was lodged in the High Court Registry by G.M. Muhoro, Advocate. That notice of appeal was however not served upon the respondents until 22nd, 26th and 27th June 2007 when the respondents were served respectively. This was clearly out of time required by the rules of this Court for service of the notice of appeal. Further, on 4th May 2007, the applicants state that G.M. Muhoro, advocate applied for copies of the proceedings. These were ready for collection from the registry by 28th May 2007 as stated by Zool Nimji, a director of the first respondent in his replying affidavit which has not been controverted. However, they were not collected by G.M. Muhoro advocates and so the record of appeal which would have otherwise been filed well in time was not so filed. In the intervening period, the applicants state that on 10th June 2007, the second applicant was involved in a road traffic accident as she was knocked down by a matatu and she sustained multiple rib fractures which required hospitalization and subsequent out patient treatment. Thus, the applicants say it became difficult for them to fast track the progress of Muhoro's action on the matter. On 31st October 2007, the applicants retrieved the file from G.M. Muhoro, advocates as they felt frustrated on the slow progress of the intended appeal. They instructed their present advocates, Messrs Kairu & McCourt, to take over the conduct of the matter on their behalf. On perusing their file at the superior court registry, their present advocates discovered that the notice of appeal was filed well in time but was served late and that the letter from G.M. Muhoro, Advocate to the court registry bespeaking the proceedings was not copied to the respondents and finally that it was clear the intended appeal would be filed out of the time allowed by the Court of Appeal Rules ("**the Rules**").

The above is the genesis of the application before me dated 16th November 2007 in which the applicants are seeking the following four orders namely:

"1. That the time limited for service of the notice of appeal on the respondents be extended.

2. That the notice of appeal served on the respondents out of time be deemed to have been duly served.

3. That the time limited under rule 81 of the Court of Appeal Rules for the institution of the intended appeal be extended.

4. That the applicants be at liberty to institute an appeal against the order of the Honourable Lady Justice Ang'awa given on 9th May 2007 in H.C.C.C No. 1402 of 2005 out of time."

There are eight grounds cited in support of the application but a close look at them reveals that grounds marked as a, b, c and d are mainly on the historical factors of the matter all of which I have stated in the introductory part of this ruling. I would not repeat them here. The main reasons are covered by grounds e, f, g and h which are in that order as follows:

"(e) The applicants were under the mistaken belief that the record of appeal had been instituted in accordance with rule 81 of the Court of Appeal Rules but have recently learned that the appeal was not instituted.

(f) The omission to serve the notice of appeal and to institute the appeal in time was occasioned by circumstances beyond the control of the applicants.

(g) The applicants intend to institute an appeal against the decision of the High Court as their matrimonial home is under threat of being irregularly transferred to the third defendant and the applicants risk eviction from their matrimonial home.

(h) The applicants' intended appeal is strong and not frivolous and has high chances of success."

Mr. Kairu, the learned counsel for the applicants, appreciates in his submission that the proceedings were ready in good time and concedes that had the applicants and their former advocates taken action in time, there would have been no necessity for filing this application. He readily accepted that there was lax in that regard but blames it all on the former advocates of the applicants who, he said, failed to serve the notice of appeal in time; failed to serve the letter bespeaking the copies of proceedings, failed to file a record of appeal including memorandum of appeal in time despite the record having been prepared and availed in time to the applicants' former advocates. He however, reiterates that that former advocates declined, despite persistent requests, to offer any explanation or reasons for his failure to do all that. Secondly, he submitted that the applicants on their side could not put pressure on their former advocates to act quickly because, the second applicant had an accident on 10th June 2007 and was hospitalized and so could not physically visit their former advocates' chambers whereas the first applicant being the second applicant's husband was duty bound to attend to his wife during her hospitalization and thereafter. These were, according to Mr. Kairu, the explanation for the delay for serving the notice of appeal in time as required by law and in mounting the appeal.

On points of law, Mr. Kairu submitted that the courts had discretion on deciding the application and such discretion was unfettered. He cited several authorities in support of his contention and lastly submitted that the second applicant's commission money was still being deducted to pay for the subject property and so the respondents would not be prejudiced if this application is allowed.

Mr. Desai, the learned counsel for the first respondent, relied on the replying affidavit sworn by Zool Nimji, a director of the first respondent and contended that no adequate explanation had been advanced by the applicants as to why G.M. Muhoro, advocates, had failed to comply with the strict time limits set down by the Rules. He maintained that the applicants had ample time to comply with the requirements of the Rules and thus they deserved no indulgence from the court. He referred me to the case of **Ramesh Shah vs. Kenbox Industries Ltd - Civil Application No. Nai. 340 of 2004** which was a decision of a full bench of this Court on a reference to it on a similar matter and submitted that in law the court must first be satisfied as to the explanation for delay before the court can consider other aspects such as merit of the appeal or intended appeal as the case may be, prejudice and all other matters. He also cited several other cases and stated that if the application is allowed, the first respondent would suffer prejudice as the property had been sold at the fall of the hammer and thus had gone past the equity of redemption. He had no knowledge of the allegation that the second respondent's commission was still being deducted towards the payment of the subject mortgage, but he finally conceded that that allegation was true. However, he pleaded for dismissal of the application as the applicants had not gone past the first hurdle of adequately explaining the delay.

The second respondent, though served, did not attend court.

Mr. Kimani, the learned counsel for the third respondent, while associating his views with those of Mr. Desai, felt, however, that there was no merit in the intended appeal as to him, the applicants indeed went to court with unclean hands and so do not deserve the equitable remedy of injunction they were seeking. That, he added, meant that the intended appeal had no chances of success. In any case, Mr. Kimani felt, the conduct of the case amounted to clogging the conduct of the main suit and, lastly, he submitted that as the applicants have other remedies, the application could not succeed.

I have considered the application, the grounds in support of it, the affidavit sworn by Joseph Gitahi Gachau in support of it, the annextures to that affidavit, the replying affidavit sworn by Zool Nimji, the annextures to it, the submissions by the learned counsel, the record including the ruling of the superior court and the law. The principles guiding the court on an application such as the one before me premised upon **rule 4** of the Rules is now a well beaten path as there are several well documented authorities on it. It is that the powers of the court in deciding such an application are discretionary and unfettered. However, there are guidelines which are also contained in several pronouncements of this Court, as to what the court needs to consider in exercise of such discretionary powers. These are the length of the delay, the explanation or sometimes called the reasons for the delay, whether the intended appeal is arguable (without going into the merits of the appeal or intended appeal as the case may be), the prejudice that the respondents would suffer if the application for extension of time is allowed and several other matters that a particular case may raise. The matters to be considered are not exhausted and each case may very well raise matters that are not in other cases for consideration. In the case of **Major Joseph Mweteri Igweta vs. Mukira M'Ethare and another – Civil Application No. Nai. 8 of 2000**, Lakha, J.A (as he then was) stated, *inter alia*, as follows:

"The application made under rule 4 of the Rules is to be viewed by reference to the underlying principles of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini appeal), the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind the time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance with them."

The same legal sentiments were echoing and expanding the principles enunciated in the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** – **Civil Application No. Nai. 251 of 1997** (unreported) in which this Court had laid down the principles as follows:

"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 this Court takes into account in deciding whether to grant an extension of time are first, the length of the delay; secondly, the reason for 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."

As I have stated, the list of matters to be considered is never exhausted and indeed cannot be exhausted by the dint of the powers of the Court being unfettered discretion when considering the application under **rule 4** of the Rules.

Mr. Desai, relying on the decision of this Court on a reference in the case of **Ramesh Shah vs. Kenbox Industries Ltd**. – **Civil Application No. 340 of 2004** (unreported) (supra) submitted that once there is no satisfactory explanation given for the delay, the court must down its tools and dismiss the application without considering other matters such as are cited in the two cases above and several other cases. I have perused the **Ramesh Shah** case (supra) carefully and considered it against the submission of Mr. Desai. With respect, I do not agree that in that case, the full bench in a reference did establish such

a principle which, if it were established as Mr. Desai suggested, would have meant fettering the discretion of this Court. In my humble opinion, the full bench in that reference was dealing with a case where a single judge had made a definite finding that the reasons for the length of the delay were totally inadequate and that the evidence before him was insufficient to satisfy him that there was an arguable appeal against the superior court's ruling, yet he (the single judge) went a head to allow extension purely because he felt the grounds for the intended appeal as advanced by the counsel before him were arguable and so he felt that despite the unsatisfactory reason for the lengthy delay, the extension would be granted. The full bench felt, and rightly so in my mind, that generally, the arguability alone of an intended appeal would not outweigh all other relevant factors open for consideration in an application under **rule 4**. The Court in coming to that conclusion was also aware that there may be exceptional and limited cases where other matters such as arguability of the intended appeal may be given serious consideration but such cases were far between. It did not, however, lay down any principle that once the court was not satisfied as to the reason for the delay, it would stop considering any other factors when considering an application for extension of time brought under **rule 4** of the Rules. A reference to two parts of that ruling will demonstrate what I am saying -

"It is clear to us, and both counsel readily appreciate as much, that the only ground upon which the application under rule 4 was granted was because the intended appeal was arguable. The issue therefore arises as to whether the arguability of an intended appeal would outweigh all other relevant factors open for consideration in application under rule 4. For our part we think, that except in very exceptional and limited circumstances, that proposition is not acceptable and is not borne out by authority. Indeed it is open to abuse."

After considering the history as to how the factor of the arguability of the intended appeal came to be considered as one of the factors to be considered when considering an application under **rule 4** of the Rules and the weight that was intended to be attached to it when it was considered, the Court concluded thus:

"As stated earlier, it would be a rare case where the arguability of the intended appeal would outweigh all other conditions, and it would at best, in our judgment, be considered in borderline cases."

and it cited one such rare cases.

I am not persuaded that in law, once the Court does not feel fully satisfied as to the reasons for the delay, it must proceed to dismiss an application for extension. It is clear to me that, as stated in the **Ramesh Shah** case (supra), one of the reasons why other matters are considered is when the court is faced with a borderline case on the reason for the delay. In such a case, matters such as arguability of the intended appeal, prejudice and others may come handy to supplement an otherwise weak explanation of the delay. I agree that in a case such as was before the single judge, in the **Ramesh Shah** case where there was completely no satisfactory explanation there was nothing to be supplemented and therefore arguability alone could not suffice but even in such a case, the full bench in that case still left a window for the court to consider whether the circumstances of such a case made it exceptional or not but as stated there, such cases were far between.

In this matter before me, the superior court delivered the subject ruling on 9th May 2007. The applicants' former advocates lodged a notice of appeal on 16th May 2007. That was timeous and there is no dispute over that aspect. That notice of appeal was supposed to be served within seven days of its filing pursuant to **rule 76(1)** of the Rules. It was not so served. It was served on 22nd June 2007, 26th June 2007 and 27th June 2007 upon the first respondent, second respondent and third respondent respectively. Their same former advocates also applied for proceedings and ruling on 14th May 2007 but that letter was apparently not sent to the respondents so that the applicants cannot benefit under the proviso to **rule 81** of the Rules. The proceedings were ready by 28th May 2007, but were not collected and the appeal was not mounted within the time specified in the Rules, hence the application before me. Thus, as to service of the notice of appeal, there was a delay of thirty (30) days in respect to service upon

the first respondent; thirty four (34 days) in respect of service upon the second respondent, and thirty five (35) days in respect of service upon the third respondent. As to the record of appeal, the delay is over four months as the appeal should have been filed by 15th July 2007, but this application seeking extension for filing it was filed on 16th November 2007.

What explanation is advanced by the applicants for that delay? The applicants' first explanation is that they were represented by an advocate G.M. Muhoro in the superior court and that immediately the superior court's ruling was delivered, they felt dissatisfied and instructed that advocate to appeal against the decision on their behalf. G.M. Muhoro filed a notice of appeal in time and wrote a letter bespeaking the proceedings and ruling in time. That letter however, was not sent to the respondents. They were, thereafter, following up the conduct of the matter until 10th June 2007, when the second applicant was involved in an accident in which she suffered injuries and was hospitalized for sometime. I do take judicial notice of the fact that the first applicant, though was not himself involved in the accident, nonetheless, as husband to the second respondent, had the marital responsibility of taking care of his wife during the time she was sick, both when hospitalized and soon thereafter. After sometime, they felt frustrated by lack of progress or information from their advocate and on 31st October 2007, they decided to change the advocates. They retrieved their file from G.M. Muhoro, advocates and instructed their present advocates, Messrs Kairu & McCourt, advocates, to proceed with the appeal. It is their present advocates who discovered that the respondents were not served with the notice of appeal in time and that the proceedings were ready as early as 28th May 2007 but the same were not collected and no appeal was mounted in time as required by the Rules. Thus, the delay upto 31st October 2007 which included delay in serving the notice of appeal upon the respondents and in mounting the appeal in time is blamed on the former advocates for the applicants. The same advocates are also blamed for failure to send to the respondents the letter bespeaking the proceedings and ruling of the superior court. I may state here that, in my opinion, the failure to send copy of the letter bespeaking the proceedings to the respondents is neither here nor there because, the proceedings were in any event ready well in time, i.e. by 28th May 2007, so that the applicants could not rely on that letter even if they had sent it in time save in respect of few days i.e. twelve days between 16th May 2007 when the notice of appeal was filed to 28th May 2007 when the proceedings were ready for collection. However, the blame for that failure to send a copy of that letter to the respondents was also on the former advocates. As to the delay of fifteen days between 31st October and 16th November 2007, the present advocates submit that that was the period taken for preparing this application. The applicants state that their former advocates, G.M. Muhoro failed and/or refused to tell them what caused him to delay in serving the respondents with the notice of appeal and what caused the delay in filing the appeal as well as the reason for failure to send the letter seeking copies of proceedings to the respondents. Mr. Desai submits that no reason has been adduced for the delay. I am not certain as to why he feels that way, but I would imagine that he feels that as Mr. G. M. Muhoro, the former advocate was the applicants' agent, his principals, being the applicants, can be blamed for his indolence. I would generally agree with that approach, but in this case, it is clear to me that actions such as the requirement that a notice of appeal be served upon the respondents within seven days from the date of its lodgment or filing, are matters that the applicants, being laymen, had to rely on their advocates as their following up the matters with their advocates, even as they said they did before the second applicant was involved in an accident, would not have yielded much for they would not in the normal course of events have known those legal requirements. Indeed, lack of knowledge of such legal technicalities are some of the reasons why parties and even lawyers seek legal representation. The applicants have said and it has not been challenged that they relied on their former advocates and only sought to change the advocates when even them, though laymen, felt they were not getting any proper information as to the progress of their appeal that they became frustrated or perhaps suspicious. I cannot blame the applicants for not knowing that proceedings were ready for collection on 28th May 2007. It is their former advocates who had that knowledge and also knew the period required for filing the appeal once proceedings were availed. Neither could I blame the applicants for failing to forward the letter seeking proceedings to the respondents. That is a highly legal technical matter which only his former advocates knew the effect of. Further, even if I were to blame the applicants for not ensuring that their former advocates acted expeditiously on the matter, I would have to stop blaming them for the delay that extended beyond 10th June 2007 when the second applicant got involved in an accident and had to be hospitalized. It would be sadistic to expect the applicants, faced with such a situation, to visit their

advocates and press for early action. I note from the discharge form that the discharge date was 14th June 2007, but I also note that she was required to go back to the hospital for review at the General Surgical Clinic. I observe also that the applicants have not stated when the second applicant finally recovered fully and when they resumed visiting their advocates to ensure early progress of their appeal. However, they stated that by 31st October 2007 they got frustrated by lack of progress or information from their advocates. I understand that to mean that they resumed seeing their advocates not long after the first applicant recovered. In my view, a combination of the above explanations satisfies me as to the reason why the delay did occur. Further, I note that the applicants do not seem to have slept on their desire to file their intended appeal, even though their former advocate let them down. Further, the intended appeal involves land, which as I have stated was acquired by the applicants through a mortgage. The land had been put up for sale and was at the fall of the hammer sold to the third respondent. The applicants seek to challenge such sale but in the meanwhile, they seek injunction to stop transfer of the property to the third respondent. The applicants claim that the subject property is a matrimonial property and they attach sentimental value to it. In the case of **Wasike vs. 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. John Kuria vs. Kalen Wahito, Nairobi Civil Application Nai. 19 of 1983 April 10 1984. 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."

Thus, in this case where, as I have stated, the applicants were clearly determined to proceed with action in Court to stop their would be loss of the land and the subject matter is land, I cannot shut my eyes to those aspects.

I have perused the ruling of Ang'awa, J. Without saying much, as it is not mine to do so here, I do not feel the intended appeal is frivolous. As to prejudice, I was told from the bar that the applicants' commission payment part of which was being deducted and remitted for the repayment of the loan in dispute is still being so deducted and remitted so that the first and second respondents are not prejudiced in any way. Mr. Desai, in response to that submission first stated, again from the bar, that he was not aware of that, but later he conceded that that allegation was founded. Under these circumstances, I do not see prejudice suffered by the first and second respondents. As to the third respondent, the necessity of a final decision on the entire matter would ascertain her title if she gets the land or would enable her know once and for all that the land is not hers if she loses. Thus, either way, she needs a final decision on the matter.

In conclusion, in my view, Mr. Desai's legal point that once I am not satisfied as to the explanation advanced for seeking extension of time, then I down the tools and dismiss the application without considering other factors, is not, in my mind, tenable. However, even if it were tenable, in this particular case, it would not be applicable as I am satisfied as to the reasons or explanations given for the delay to serve the notice of appeal in time upon the respondents and as to the delay in filing the appeal in time. Secondly, in my opinion, the intended appeal is not frivolous and the respondents would not suffer prejudice and, lastly, the intended appeal involves land and the record shows, and I am satisfied, that the applicants have been anxious all along to lodge an appeal against the superior court's decision.

In the circumstances, the application is merited and I grant it. The time for service of the notice of appeal dated 14th May 2007 and lodged at the registry on 16th May 2007 is extended to such time that the notice of appeal served upon the first respondent, second respondent and third respondent on 22nd June, 26th June and 27th June 2007 respectively are deemed to have been duly and properly served. The applicants have **30 days** from the date hereof to file the record and memorandum of appeal. As the records were ready in time and the notice of appeal was not served in time due to reasons which the applicants' former advocates never revealed to the applicants, the applicants will pay costs of this

application to the first and third respondents. Order accordingly.

Dated and delivered at Nairobi this 4th day of April, 2008.

J.W. ONYANGO OTIENO

…….……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR