IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: M'INOTI, J.A. (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 395 OF 2017

BETWEEN

IMPERIAL BANK LIMITED (IN RECEIVERSHIP)..................1ST APPLICANT

KENYA DEPOSIT INSURANCE CORPORATION..................2ND APPLICANT

AND

ALNASHIR POPAT....................……...1ST RESPONDENT

ANWAR HAJEE...2ND RESPONDENT

JINIT SHAH... 3RD RESPONDENT

HANIF MOHAMED AMIRALISMJI...................................4TH RESPONDENT

MUKESH KUMAR PATEL..5TH RESPONDENT

VISHNU DUTIA...6TH RESPONDENT

ESTATE OF ABDULMALEK JANMOHAMED..................7TH RESPONDENT

ERIC BENGI GITONGA..8TH RESPONDENT

OMUREMBE IYADI...9TH RESPONDENT

CHRISTOPHER ANGELO DIAZ.......................................10TH RESPONDENT

IMARAN LIMITED...11TH RESPONDENT

JANCO INVESTMENTS LIMITED....................................12TH RESPONDENT

REYNOLDS & CO LIMITED.. 13TH RESPONDENT

EAST AFRICAN MOTORS INDUSTRIES

(SALES & SERIVCES) LIMITED.......................................14TH RESPONDENT

MOMENTUM HOLDINGS LIMITED...............................15TH RESPONDENT

ABDULMAL INVESTMENTS LIMITED..........................16TH RESPONDENT

KENBLEST LIMITED... 17TH RESPONDENT

REX MOTORS LIMITED..18TH RESPONDENT

THE CENTRAL BANK OF KENYA...................................19TH RESPONDENT

(An application for extension of time to file and serve a Record of Appeal out of time from the ruling and order of the High Court at Nairobi (Tuiyott, J.) dated 17*th January 2017* in HCCC No. 392 of 2016)

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RULING

In this ruling, I am called upon to decide whether I should exercise my unfettered discretion under ***rule 4*** of the ***Court of Appeal Rules*** in favour of ***the applicants***, ***Imperial Bank Limited (In Receivership)*** and ***Kenya Deposit Insurance Corporation***, to the end that their appeal, ***Civil Appeal No. 395 of 2017*** is deemed to have been filed on time. It is common ground that when the applicants filed the said appeal on ***24th November 2017***, it was out of time, the dispute, on that score, being only the length of the delay. It is apt to point out from the outset that the ***19th Respondent,*** the ***Central Bank of Kenya*** and some seven other parties who were defendants to a counterclaim filed by some of the respondents do not oppose extension of time in favour of the applicants. However, the rest of the respondents vigorously oppose the application, contending that the applicants have neither been candid nor established any basis for exercise of discretion in their favour.

The discretion of a single judge under rule 4 is wide and unfettered. (See ***Leo Sila Mutiso v. Rose Wangari Mwangi, CA No. Nai. 255 of 1997).***

However, it is equally trite that the discretion must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment

(See. ***Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 Others, CA. No. 14 of 2013).*** A look at the legislative history of rule 4 will readily show that before 1985, the rule required an applicant to show *"sufficient reason"* why discretion to extend time should be exercised in his or her favour. After an amendment of the rule in 1985, that *"sufficient reason"* stricture was removed and the Court was henceforth allowed to extend time on such terms as it though just. As the subsequent decisions consistently show, however, the amendment did not mean that the Court will extend time merely on the asking; the party seeking extension of time has to establish the basis upon which the court should exercise its discretion in his favour.

Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court

exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. In ***Athuman Nusura Juma v. Afwa Mohamed Ramadhan, CA No 227 of 2015,*** this Court stated thus, on that issue:

"This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word "possibly".

The above catalogue of considerations is not closed and it possibly cannot be, because exercise of discretion also depends on the circumstances of each case, which human experience tells us differ from case to case. A closed catalogue of considerations would in any event be the very antithesis of unfettered discretion. (See ***Mongira & Another v Makori & Another [2005] 2 KLR).***

This then is the background to the application determined by this ruling. After the 1st applicant, a bank within the meaning of the ***Banking Act***, was placed under receivership on 13th October 2015, the 1st and the 2nd applicants, together with the 19th respondent, filed a suit in the High Court on 30th September 2016, against the other respondents, who are the 1st applicant's directors or shareholders. The applicants pleaded that through fraud, theft, money laundering, fraudulent false accounting, bribery, corruption, diversion of funds, negligence and breach of fiduciary duty, the said respondents had, in the management and conduct of the affairs of the 1st applicant, occasioned loss of assets and deposits held from members of the public, running into billions of Kenya shillings. They accordingly prayed for judgment for ***Kshs 44.9 billion*** and transfer to the 1st applicant of shares held by some of the respondents in various companies.

The respondents duly entered appearance and filed defences to the claim as well as a counterclaim by the 11th, 13th, 14th, 15th, 16th and 17th respondents. On or about 26th October 2016, the 1st applicant applied for an order to prohibit an advocate, ***Njoroge Nani Mungai***, and two law firms, **Ahmednassir Abdikadir & Company Advocates** and ***Coulson Harney Advocates,*** from acting for their respondent clients, as well as an order expunging from the record documents filed by the two law firms. The prayers were sought on the basis of averments that the said advocate and law firms suffered conflict of interest, held or were privy to the 1st applicant's confidential information, which they could use to its detriment or prejudice, and were in any event potential witnesses in the suit.

Tuiyott, J. heard the application, and by a ruling dated 13th January 2017, the subject of Civil Appeal No. 395 of 2017, dismissed the same because he was not satisfied that there was any basis for excluding the advocate and the two law firms. Aggrieved by the ruling, the applicants filed a notice of appeal on 24th January 2017 and on 26th April 2017 the High Court stayed further proceedings pending the hearing and determination of the applicant's intended appeal. Ultimately the applicants filed the record of appeal on 24th November 2017, which, as I earlier intimated earlier, was out of time.

Mr. Murgor and ***Mr. Ouma***, learned counsel, appeared for the applicants to agitate the application for extension of time. Relying on an affidavit sworn on 24th November 2017 by ***Mohamud Ahmed***, the 1st applicant's receiver manager, Mr. Murgor submitted that the applicants applied for proceedings on 17th January 2017, and subsequently sent a reminder to the Deputy Registrar, High Court, on 13th September 2017. The Deputy Registrar notified the applicants' advocates that the proceedings were ready for collection on 15th September 2017. He relied on the certificate of delay dated 21st September 2017, which indicated that the proceedings were ready on 15th September. In counsel's view therefore, the appeal ought to have been filed on or before 15th November 2017, but was filed on 24th November 2017 which was 10 days out of time.

Learned counsel explained that the delay in filing the appeal was occasioned by the time taken in effecting corrections to the proceedings and preparing the voluminous record of appeal, which runs to 6 volumes and 2,557 pages. Due to the large number of parties who had to be served with the record of appeal, counsel added, it required making 33,505 copies of size A4 papers. For good measure he noted that all this was taking place at a time when the city of Nairobi was in constant shutdown and anxiety arising from the post August and October 2017 election riots and protests. Counsel therefore urged me to find that the delay of 10 days was not inordinate and that it was adequately explained.

On the public interest aspects of the appeal and chances of its success, it was submitted that the appeal raises substantial and novel issues on when an advocate is conflicted to warrant barring him or her from representing a party in proceedings. The applicants added that the appeal involves colossal sums close to Kshs 50 billion and raises issues of great public interest. That the High Court had stayed further proceedings was cited as evidence that the intended appeal was not frivolous. Lastly, the applicants urged me to find that the respondents would not suffer any prejudice if I extended time because the record of appeal was already filed and served and the hearing of the appeal could be fast-tracked.

As I earlier indicated, ***Mr. Chege*** for the 19th Respondent and ***Mr. Oduor***, for parties likely to be affected by the appeal, supported the application and associated themselves with the applicants' submissions. Mr. Oduor added that deserving parties like the applicants ought not to be driven from the seat of justice, even after filing their appeal. Adverting to the words of ***Apaloo JA*** (as he then was) in ***Chemwolo & Another v. Kubende [1986] eKLR***, counsel surmised that blunders will continue to be made from time to time and that alone should not disentitle a party from having its dispute determined on merit.

Mr. Wandabwa, learned counsel for the ***11th, 12th, 13th, 14th, 15th, 16th,*** and ***17th respondents*** and who also held brief for ***Terry Mwongo*** learned counsel for the ***1st, 2nd, 3rd, 4th, 5th, 6th, 8th***, and ***9th, respondents***, opposed the application as totally bereft of merit. Relying on a replying affidavit sworn on 19th February 2018 by the 2nd respondent, counsel submitted that the applicant were not candid because on 17th January 2017, they applied in writing to the Deputy Registrar of the High Court to be allowed to make photocopies of the handwritten proceedings for typing by themselves and certification by the court. The applicants however did not photocopy the proceedings and on 23rd May 2017 the Deputy Registrar notified their advocates that the proceedings were ready for collection. Accordingly, it was submitted that the applicants were obliged to file the appeal within 60 days from 23rd May 2017, and having failed to do so, their notice of appeal was deemed to have been withdrawn pursuant to ***rule 83*** of the rules of this Court. The decisions of this Court in ***Bivac International v. Chieni Enterprises Limited & Another [2015] eKLR*** and ***Charles Wanjohi Wathuku v. Githinji Ngure & Another [2016] eKLR*** was cited to explain the rationale behind deeming a notice of appeal as withdrawn, which is to foster efficiency and deter abuse of the court process.

In learned counsel's view, the applicants' letter of 17th January 2017 was not an application for proceedings as contemplated by ***rule 82(1)*** of the Court of Appeal Rules, and that the applicants woke up from their slumber and belatedly wrote to the Deputy Registrar on 13th September 2017, after his clients applied on 7th September 2017, for the High Court to vacate the order staying further proceedings. Although the certificate of delay was *prima facie* evidence of the truth of the information contained therein, I was urged to find that in view of the notification to the applicants that the proceedings were ready on 23rd May 2017, the certificate of delay did not contain correct information and that I should therefore ignore it. In support of that proposition counsel relied on the ruling in ***Michael Mwalo v. Board of Trustees National Social Security Fund [2014] eKLR***.

Lastly I was urged to find that there was no basis for extending the time for filing the appeal because there was no notice of appeal, the one on record having been deemed withdrawn after the applicants failed to file the appeal within the prescribed period. Counsel concluded by submitting that the appeal and the order staying further proceedings were prejudicial to the respondents, some of them being keen to urgently prosecute their counterclaim.

Continuing the respondents' opposition to the application, ***Mr. Busaidy*** for the 7th and 12th respondents relied on two replying

affidavits sworn by those respondents on 5th March 2018 and associated himself with the submissions made by Mr. Wandabwa. He submitted further that in the circumstances of this case, extending time would be very prejudicial to his clients and in violation of their constitutional right to expeditious determination of the dispute. In counsel's view the applicants' appeal was filed out of time by 34 days, which showed that they were indolent. Relying on ***Patrick Kiruja Kithinji v Victor Mugira Marete [2015] eKLR,*** he submitted that failure to file the appeal on time went to jurisdiction. Counsel also complained that the record of appeal was served upon them on 25th January 2018 in violation of rule 90 of this Court's rules. On the authority of ***Julia Wanjiru & 4 Others v Jacinta Wairimu Njoroge [2013] eKLR,*** it was submitted that failure to serve the record of appeal within the prescribed time rendered the same fatally incompetent. Taking into account all the circumstances, counsel urged, the applicants' delay in filing the appeal was not explained because there was adequate time to prepare and photocopy the record of appeal. He concluded by submitting that the appeal did not have any chances of success and was only calculated to delay the resolution of the dispute in the High Court.

In a brief reply, the applicants maintained that their letter of 17th January 2017 was an effective application for proceedings because there is no prescribed latter or form provided for that purpose. They also contended that letter of 23rd May 2017 related to proceedings applied for by the respondents rather than by themselves and that they were obliged to await to hear from the Deputy Registrar regarding their application for proceedings. They argued that they were diligent as was proved by their reminder letter to the Deputy Registrar dated 13th September 2017 and that there was no justification for ignoring the certificate of delay. Lastly it was submitted that the notice of appeal was validly on record as no order of this Court had struck it out or deemed it to have been withdrawn.

I have carefully considered the application and the submissions by learned counsel. All that I am now called upon to do is to apply the principles on the exercise of discretion under rule 4, which I have already set out at the beginning of this ruling, to the facts of this application. But before I do that I must dispose of two arguments, firstly, that I cannot consider this application for extension of time because the notice of appeal on record is invalid or is deemed by rule 83 to have been withdrawn, and secondly that the applicants' letter of 17th January 2017 does not amount to an application for proceedings within the meaning of rule 82.

The issue whether there is a valid notice of appeal on record or whether it has been deemed as withdrawn is a matter for the full court, not a single judge. That is the express declaration of the proviso to ***rule 53***. The issue arose in ***Dolphin Palms Ltd v. Al-Nasibh Trading Co. Ltd & Others, CA No. 112 of 1999*** where ***Omolo JA***, sitting as a single judge stated -

"The prayer is that I should extend time to enable the applicant to file a fresh notice of appeal. There is, in fact a notice of appeal on record. Whether or not that notice is a valid one cannot be a decision to be made by a single Judge; that is the province of a full bench. Mrs. Gudka at first told me that I should treat the notice of appeal before me to be deemed to have been withdrawn pursuant to rule 82. I do not know that a single Judge of the Court can validly deem a notice of appeal to have been withdrawn and then proceed to act as though there was no notice of appeal." (Emphasis added).

Following a reference to the full Court, the Court upheld the above reasoning and emphasized that it had to make an order before a notice of appeal on record was deemed to have been withdrawn. In the pertinent part of the ruling, the Court expressed itself thus:

"As rightly pointed out by Mr. Khatib, for the first respondent, the court must be moved to make the order declaring a notice of appeal "deemed to have been withdrawn". Rule 82, in pertinent part, provides that -

'If a party who had lodged a notice of appeal fails to institute an appeal within the appointed time,

a. he shall be deemed to have withdrawn his notice of appeal and shall, unless the court otherwise orders, be liable to pay the costs arising therefrom of any of persons on whom the notice of appeal was served'.

We concede that there is no express provision requiring a party to move the Court in that regard, however, a careful reading of rule 82 clearly reveals that such an application is necessary. The phrase "unless the court otherwise orders" clearly shows that a court order is necessary and such order can only be validly made by a full bench in an application brought under rule 80 of the Court of Appeal Rules. That is the conclusion the single Judge came to. We have no basis upon which to fault him on that. The reference therefore fails and is dismissed with costs". (Emphasis added).

(See also **Trimborn Agricultural Engineering Ltd v David Njoroge Kabaiko** ***(2000) eKLR).***

In **Edward Charles Nginyo v. Hans Jurgen Zahlten & Others**, ***CA No. 17 of 2015***, the Court noted that although the wording of rule 83 has slightly changed from that of the former rule 82 quoted above, there was no fundamental difference to justifying a view different from that expressed by the Court in ***Dolphin Palms Ltd v Al-Nasibh Trading Co. Ltd & Others*** (supra). Accordingly, in the absence of a ruling by the full Court deeming the Notice of Appeal as withdrawn or striking it out as invalid, it would be remiss of me as a single judge to declare the notice of appeal invalid or to deem it as withdrawn. As a matter of fact, even the respondents appreciate that it is not for me to strike out or deem the notice of appear withdrawn because they have already filed applications seeking those orders from the full court.

As regards the question whether the applicant's letter dated 17th January 2017 amounts to an application for proceedings within the meaning of rule 82, I do not have any illusion that it does. As pointed out by the applicants, in the absence of any prescribed form, a party can apply for proceedings in any form so long as the mode of application meets the conditions set by the rule, namely it has to be made within 30 days of the decision intended to be appealed, it has to be in writing, and it must be served upon the respondents. The application in question was in writing and leaves no doubt that the applicants were applying for proceedings (photocopies) for purposes of preparing a record of appeal. It was made on the same day that the ruling was delivered and was duly copied to the respondents' advocates. I take that to amount to service as none of the respondent has contended they were not served with a copy of that application.

Back to the merits of the application, I am satisfied that the appeal as filed is not frivolous or a waste of the parties' and the Court's time. It also involves substantial sums of money and engenders great public interest in the issues raised as regards conflict of interest on the part of advocates and legal advisers. Perhaps the strongest indication that the appeal is not a mere frivolity is the fact that the High Court, even after dismissing the applicants' application, nevertheless stayed further proceedings to enable them to prosecute their appeal in this Court. It is not necessary to say more regarding the prospects of the appeal lest I trespass into a province that is strictly reserved for the full court.

The real sticking question is the extent of the delay and the reasons therefor. Between them, the respondents who opposed the application contend that the applicants have not been candid and that the delay in filing the appeal is unreasonable and unexplained because the Deputy Registrar notified the applicants way back on 23rd May 2017 that the proceedings were ready for collection. On their part the applicants respond that although copied to them, the notification of 23rd May 2017 was addressed to ***Wandabwa & Company Advocates*** and in their view spoke to proceedings applied for by that firm of advocates, rather than the proceedings applied for by their advocates. They add further that if it was otherwise, they could not have bothered to inquire from the Deputy Registrar the status of their application for proceedings on 13th September 2017.

It is possible that a different person could have interpreted the notification of 23rd May 2017 differently from the applicants. That in itself however does not make the applicants' explanation implausible, given the fact that after the inquiry of 13th September 2017, the Deputy Registrar found it necessary to respond, advising the applicants that the proceedings were ready for collection and after that readily issued a certificate of delay certifying that the proceedings were ready for collection on 25th September 2017

rather than the earlier date cited by the respondents. In ***Michael Mwalo v. Board of Trustees National Social Security Fund*** (supra), this Court declined an invitation to ignore a certificate of delay after it found that there was no evidence that it was a forgery or that it was obtained fraudulently or that the party impeaching it had raised the issue with the Registrar who had issued the same. I do not in the circumstances of this application perceive a deliberate or calculated attempt on the part of the applicants to mislead, which would otherwise have disinclined me from exercising my discretion in their favour. (See ***James Waweru Muturi v Paul Thuo Njambi****, CA. No. Nai. 159 of 2017*). Accordingly, I would rather err on the side of caution by relying on the certificate of delay.

Going by the certificate of delay, the record of appeal was filed 10 days late, which I would not consider inordinate in the circumstances of this case. That delay has been explained on the ground of further corrections to the proceedings, the sheer bulk of the record of appeal, and the more than 20 copies of each volume that had to be prepared for the Court and the 19 respondents. I accept the applicants' explanation for the delay of 10 days.

Under rule 4, a party may apply for extension of time either before or after taking the action in respect of which extension of time is sought. In this case, the appellants have already filed the appeal and seek extension of time to the end that the appeal is deemed to have been filed on time. It is therefore possible to list the appeal for hearing and determination on priority basis and without further delay, which in turn will obviate or alleviate prejudice to any of the parties. Taking into account all the forgoing, I am persuaded that this is a suitable case for exercise of discretion in favour of the applicants. I accordingly extend time and order that the applicants' appeal filed on 24th November 2017 be and is hereby deemed to have been filed on time. Costs of this application shall abide the outcome of the intended appeal. It is so ordered.

Dated and delivered at Nairobi this 23rd day of March, 2018

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

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