



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Appeal 172 of 2006**

**JOSEPH KAMAU MUSA**

**JAMES KARIUKI MUCHIRI**

**DAVID MUCHIRI**

**RUIGU NJIRIRI**

**JOSEPH NJEHU BORO & OTHERS ..... APPLICANTS**

**AND**

**ERERI COMPANY LTD**

**GIKONYO NDIRANGU**

**RUIGI KABUCHO**

**DR. GEORGE KAMAU GIKANGA ..... RESPONDENTS**

**(Being a reference to the full Court from the ruling of a single Judge (Tunoi, JA, as he then was) dated 14<sup>th</sup> February, 2007 from an application for extension of time to serve record of appeal out of time in an appeal from the judgment of the High Court of Kenya at Nairobi (Mbitio, J) dated 19<sup>th</sup> November, 1997**

**in**

**H.C.C.C. NO. 3746 OF 1988**

***CONSOLIDATED WITH***

**H.C.C.C. NO. 3200 OF 1990)**

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## RULING OF THE COURT

This is a reference to the full Court from the ruling of a single Judge (*Tunoi, JA as he then was*) under **Rule 55 of the Court of Appeal Rules**. The application has had a somewhat tumultuous history. On 12<sup>th</sup> October, 2001, this Court struck out the applicants' **Civil Appeal No 283 of 2000**. The applicants responded by filing Court of Appeal **Civil Application No. NAI 361 of 2001** seeking extension of time within which to file a fresh notice of appeal and record of appeal.

That application was heard by a single Judge (*Bosire, JA*) who on 29<sup>th</sup> July, 2002 dismissed the same. Aggrieved by the decision of the single judge, the applicants made a reference to the full Court under the then **Rule 54** of this Court's Rules. On 28<sup>th</sup> July, 2006 the full court allowed the applicants' reference on the following terms:

*“(a) The applicants shall file and serve their Notice of Appeal within seven (7) days of the date of this ruling.*

*(b) The applicants shall file and serve their record of appeal within fourteen (14) days from the date they lodge their notice of appeal in Court.*

*(c) If the applicants should fail to comply with the first two orders or any of the term or fail to comply with them or any of them within the stated time, then in the event of such failure, the reference which we have allowed shall automatically stand dismissed with costs thereof to the respondents.”*

The applicants filed and served the notice of appeal within the time specified in the Court order. They also filed the record of appeal (*Civil Appeal No. 172 of 2006*) within the specified time, but the same was not served upon the respondents within the specified time. Instead, it was served 4 days late.

By a Notice of Motion dated 13<sup>th</sup> September, 2006 and filed in Court on 21<sup>st</sup> September, 2006, the applicants applied again under **rules 4 and 42 of the Court of Appeal Rules** to a single judge for extension of time within which to serve the record of appeal on the respondents by four days. In effect the applicants prayed that the record of appeal which was served four days out of time be deemed to have been served within time.

The application was supported by an affidavit sworn by S.M.W. Kinuthia, the advocate who then had conduct of the appeal on behalf of the applicants. The reason why the applicants had not served the record of appeal on the respondents within the time specified by the Court was explained as follows: the record of appeal was filed on time on 17<sup>th</sup> August, 2006; that date fell within the Court vacation; and the applicants were advised at the registry to collect the signed record of appeal the next day. The signed record was duly collected on Friday 18<sup>th</sup> August, 2006 at 5 pm and the applicants were not able to effect service upon the respondents because the signed record was availed well after working hours. The earliest the applicants were able to serve the record upon the respondents (*and which they did*) was the following Monday, 21<sup>st</sup> August, 2006. Mr Kinuthia also deponed in paragraph 7 of the supporting affidavit that even as service was being effected upon the respondents on 21<sup>st</sup> August, 2006, he was labouring under the mistaken belief that the applicants had seven days from the date of the filing of the record of appeal to serve the same on the respondents as provided in **rule 87(1) of the Rules of this Court**.

The application was strongly opposed by the respondents through a replying affidavit sworn on 12<sup>th</sup> October 2006 by Joseph Ndegwa Mwaniki, a director of Eleri Company Limited. The gist of the respondent's reply was that in terms of the orders of the full Court, the default by the applicants had automatically resulted in the dismissal of the reference and therefore there was no appeal in existence in respect of which time could be extended. The respondents also contended that a single Judge had no jurisdiction to extend the time set by the full court.

The application was heard by a single Judge (Tunoi, JA as he then was) who on 14<sup>th</sup> February, 2007 dismissed the same as misconceived. The learned judge held that:

*“The conditions specified in the reference are strictly rigid and there is no room for me to exercise any discretion upon failure by the applicants to observe them. Plainly speaking, it would appear that failure to observe any of the conditions rendered the reference automatically dismissed and such an application as this cannot be lodged once again”.*

Undaunted, the applicants made yet another reference to the full court from the decision of the single Judge. Before us, Mr Ngata Kamau learned counsel for the applicants adopted the same argument as that before the single Judge whilst Mr R. K. Macharia, learned counsel who had since come on record for the respondents did not oppose the application.

The principles upon which this Court proceeds in a reference from a single Judge are well settled. In ***GITETU V KENYA COMMERCIAL BANK LTD [2009] KLR 545***, this Court stated as follows:

*“It is now settled law that in an application under rule 4 of this Court’s rules a single judge of this Court is exercising unfettered discretion but such discretion must be exercised upon proper principles of law. We have stated time without number that in exercising the unfettered discretion as granted by rule 4 of the Court’s rules a single member of the Court is doing so on behalf of the whole Court and the full bench of the Court would only be entitled to interfere with the exercise of the discretion if it be shown that in the process of exercising the discretion the single judge has taken into account an irrelevant matter which he ought not to have taken into account or that he failed to take into account a relevant matter which he ought to have taken into account or that he misapprehended some aspect of the law applicable or that his decision was plainly wrong and could not have been arrived at by a reasonable tribunal properly directing itself to the evidence and the law applicable to it. A reference to the full court is not an appeal and it is not enough to show that the full court would have come to a different result if it had been sitting in the place of the single judge.”*

We have anxiously considered this reference. In our view the conclusion by the learned single judge that there was no room for him to exercise discretion in this application is not borne out by **rule 4 of the Court of appeal Rules**. That rule provides as follows:

*“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.”(emphasis added).*

The time that the applicants sought to be extended had been set by a decision of the Court as contemplated by **Rule 4**. Under **Rule 53** an application to extend the time set by a decision of the Court is to be heard by a single Judge. Consequently we do not think there was any bar to the learned judge considering the merits of the application for extension of time under **Rule 4**. This view is reinforced if it is borne in mind, as we have stated above, that the power exercised by a single Judge under **rule 4** is exercised on behalf of the full bench of the Court. In other words, in the application for extension of time, the learned single judge was being requested, on behalf of the full bench of the Court, to extend the time which had been set by the full bench.

The applicants had candidly explained the circumstances under which they had not been able to serve the record of appeal within set time. That explanation was not disputed or challenged in the respondents’ replying affidavit. At the hearing of this application, the respondents did not oppose the reference. Unfortunately the learned single judge did not consider the explanation, having taken the view that his hands were tied by the time set by the full bench. We are of the view that had the learned single judge addressed his mind to the gist of **Rule 4** and the explanation proffered by the applicants, he would have granted the application.

Taking the foregoing into account and bearing in mind the overriding objective in **Section 3A of**

*the Judicature Act* to facilitate the just, expeditious, proportionate and affordable resolution of the appeals as well as the duty of the Court under **Section 3B** of the same Act, we think this is a suitable matter for our interference with a single judge's ruling.

Accordingly, we allow this application and extend the time for serving **Civil Appeal No. 172 of 2006** by four days, to the intent that the said appeal is deemed to have been served on the respondents on time.

Costs of this application will abide the outcome of the appeal. These are our orders.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of April, 2013.**

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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