



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), NAMBUYE & KARANJA, J.J.A)

KISUMU CIVIL APPLICATION NO. 38 OF 2020

BETWEEN

SIMEON OKINGO

RAPHAEL AKENDO OSURO

JAPHETH HAVI KIYAI

ALFRED WANDERA KABAKA

PHILIP OMBIMA SHIKUKU.....APPELLANTS

AND

BENTA JUMA NYAKAKO.....RESPONDENT

*(An application for extension of time to file an appeal against the Judgment*

*and decree of the Environment and Land Court in Kisumu (M.A. Odeny, J)*

*dated and delivered on 24th June 2019) in HC Misc. Application No. 536 of 2004)*

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**RULING OF THE COURT ON REFERENCE TO FULL COURT**

1. This is a reference to the full Court, under **Rule 55** of this Court's Rules, from the decision of a single Judge of this Court (Okwengu, JA) dated 9th October, 2020. The learned single Judge's ruling was made pursuant to an application for extension of time, made under **Rule 4** of this Court's Rules, seeking to file an appeal out of time against the ruling of the Environment and Land Court (ELC) (M. A. Odeny, J) dated 24th June, 2019.

2. In dismissing the application for extension of time the learned Judge expressed herself in part as follows:-

*“[2] The grounds upon which the applicants seek to have time extended are that they applied for certified copies of the proceedings and judgment, but the same were not availed to them in time. A certificate of delay has been attached to the motion. That certificate of delay is confused and does not indicate when the proceedings were ready for collection, nor does it clearly indicate the time that was required for preparation and collection of certified copies. The certificate of delay is however signed by the Registrar of the Environment and Land Court and bears an appropriate stamp.*

*[3] It would appear that there was an intention to certify that copies of proceedings were applied for and that there was delay, but someone appears to have dropped the ball in drafting the certificate of delay. Be that as it may, the applicants have also annexed a copy of a letter dated 1st July 2019 beseeching copies of the proceedings and judgment and that letter was copied to the respondent's advocate. Therefore, the applicants would be entitled under rule 82 of the Court of Appeal Rules to have the time which was required for the preparation and delivery to the applicants of copies of proceedings and judgment, excluded from the computation of time.*

*[4] Giving the applicants the benefit of doubt, and assuming that the time that was required for preparation and delivery of*

*certified copies was from 1st July to 25th October, 2019, this period would be excluded from computation of time. However, judgment having been delivered on 24th June 2019, that period having been excluded, the 60 days within which the applicants were required to file the record of appeal, expired on 19th December 2019. The applicants have not given any explanation for the delay in filing the record of appeal from 19th December, 2019 to 6th March, 2020 when his (sic) application for extension of time was filed. That delay of 76 days is inordinate.*

....

*[7] In her replying affidavit, the respondent has explained that the beneficiaries of the estate of the deceased have already started using the suit property and would therefore be prejudiced by an order extending time to file an appeal. This contention has not been controverted.*

*[8] In the above circumstances, I find that there is no justification for me to exercise my discretion in favour of the applicants. Accordingly, the application is dismissed.”*

3. The above findings by the learned Judge precipitated this reference before us. The application was canvassed through submissions filed by learned counsel for the parties without oral highlights, by way of video link in accordance with this Court’s practice directions made pursuant to the Covid -19 protocols.

4. In his submissions counsel for the applicant submitted that the notice of appeal was filed and served timeously on 8th July, 2019. He contended that the trial court issued a certificate of delay which for one reason or another, and following a typographical error, did not indicate the correct length of time taken to prepare and collect the certified proceedings. He maintained that such mishaps cannot be visited upon the applicants as it was a mistake on the part of their advocate, then on record.

5. Counsel submitted that the learned single Judge computed the length of delay at 76 days without due regard to the period between October and January when time was not running due to public holidays and the Court vacation. In his own calculation, the length of delay was 47 days, which he said is not inordinate, attributing the failure to file within time to advocate’s mistake which he said was excusable.

6. Counsel argued that if leave to file the record of appeal out of time was to be granted, the respondents would not suffer any prejudice as they had not been in use of the disputed properties as the applicants were the ones in physical possession. He maintained that the substance of the intended appeal was capable of being disposed of quickly and with finality hence no prejudice would be suffered by the respondents. Counsel maintained that the respondent’s allegations that the beneficiaries of the suit property had already proceeded to use it was untrue as the same was still the subject in a succession cause whose outcome is dependent on the intended appeal.

7. He maintained that as the proceedings were being processed, the applicants could not access the file as the matter had proceeded to taxation and pending ruling, by the time the proceedings were ready, time to lodge and file their record of appeal had lapsed.

8. He argued that the intended appeal was not frivolous or vexatious and that it had high chances of success as it raises issues of his proprietary interests over the suit property through adverse possession. Moreover, the subject matter being land, which is emotive, the applicants stood to suffer immense loss and damage and denial of the leave sought would leave them without recourse.

9. Opposing the application, learned counsel for the respondent submitted that since the certificate of delay was issued on 25th October, 2019, the applicants ought to have filed their record of appeal on or before 25th December 2019. Counsel submitted that the taxation proceedings commenced on 18th November, 2019, being 24 days after the proceedings were ready for collection and the delay in filing the application for extension of time had nothing to do with the file going for taxation. Further, that the applicants have failed to explain the delay between 25th October, 2019 and 6th March, 2020 when they filed the application for extension of time, and are instead shifting the blame to the Court registry.

10. He urged that the applicants had no arguable appeal as the contract of sale the 1st applicant was relying on to claim adverse possession was null and void for failure to comply with Section 3 of the Law of Contract Act. Counsel posited that whereas this Court is clothed with the discretion to grant extension of time, such discretion should be exercised judicially. He maintained that since the appellants had failed to set out sound factual and legal basis as to why they should be granted an extension of time to file their appeal, a grant of the same would be against justice.

11. We have considered the application in its entirety along with the rival submissions by counsel. We remind ourselves that 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.

12. In an application under Rule 4 of this Court’s Rules, as was the one before the learned single Judge of this Court, the single Judge is exercising unfettered discretion, on behalf of the whole Court; such discretion ought to be exercised based on proper principles of law. Therefore, the full bench would only interfere with the exercise of such discretion if it is apparent that the single Judge took into account an irrelevant matter which he/she ought not to have taken into account or failed to take into account a relevant matter which he/she ought to have taken into account or that he /she misapprehended the law applicable and evidence before him or that his decision was plainly wrong.

13. The threshold required to be met in applications such as the one before us is well settled. The applicant must demonstrate that the learned single Judge disregarded a relevant matter, regarded an irrelevant matter or acted on a misapprehension of evidence or applicable law. In a ruling of this Court on a reference to full Court in **John Koyi Waluke vs Moses Masika Wetangula & 2 Others, Civil Appeal (Application) No. 307 of 2009, (Unreported)** the Court stated *inter alia*:

**“Having considered all that has been urged before us in this reference we would say that we have stated time without number that in exercising the unfettered discretion under Rule 4 of this Court’s Rules, a single judge 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 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 evidence and the law applicable or short of these, 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. It is not enough, for example, to show the full Court that had it been sitting in place of the single Judge, it would have arrived at a different result.”**

Lastly, in **African Airlines International Ltd Vs Eastern & Southern African Trade & Development Bank (PTA BANK)** [2003] KLR 140 at page 143, this Court made the following observation as regards exercise of judicial discretion:-

**“Since the grant of the extension is discretionary, this Court would not normally interfere with the exercise of that discretion. The circumstances in which this Court will disturb the exercise of a discretion of a trial judge were stated by the Court of Appeal for East Africa in the case of Mbogo v Shah (1968) EA 93 which has been applied on numerous occasions by this Court. In his judgment in that case Sir Clement de Lestang V.P. said at page94:**

**“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”**

See also **Mombasa Development Ltd vs Jimba Credit Corporation**, C.A 317 of 2004 (unreported).

14. Did the learned Judge exercise her discretion judicially? From a careful reading of her decision, it is evident that the learned Judge was alive to the parameters and guidelines to be applied when considering an application under Rule 4 of the rules of this Court. The learned Judge appreciated and excused the blame heaped on the court registry by the applicants and took that into consideration when computing the delay. The learned Judge computed time as from the date that the applicants were notified that the typed proceedings were ready for collection to the time when the application before her was filed. She noted that notwithstanding the disputed days, for which she gave the applicant’s a benefit of doubt, they still failed to file their appeal within time and in turn failed to give a satisfactory reason for such delay.

15. We have reconsidered the application placed before the learned Judge. We note that nowhere in the application did the applicants even remotely try to explain the delay, let alone accept responsibility for the same. Nowhere did they attribute the delay to mistake of their counsel. As stated earlier, all they did was exonerate themselves and blame the court registry for the delay. That is what the learned Judge worked with when she made her decision. The issue of computation, the contestation that the delay was by 47 and not 76 or whatever number of days they were, was not placed before the learned Judge. Those are issues that have been canvassed in the reference before us and which issues are not open for our consideration as the law enjoins us to only consider the material that was placed before the single Judge.

16. Based on the material placed before the learned Judge, we are satisfied that she did not consider any irrelevant matters or disregard any relevant matters that would have influenced her decision. We are satisfied that the learned Judge acted within the parameters set in **Mwangi vs Kenya Airways Ltd** (2003) KLR 486 at pp. 489 - 490 where this Court said:-

**“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso V Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of**

**1997) (Unreported), the Court expressed itself thus:**

**“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 the 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.”**

**“These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.”**

17. For the foregoing reasons, we are satisfied that the learned Judge exercised her discretion in a judicial manner as expected of her and as set out in the **Shah v Mbogo** case (*supra*). We have no basis for interfering with the learned Judge’s judicial exercise of discretion. We find this reference devoid of merit and dismiss it with costs to the respondent.

**Dated and delivered at Nairobi this 5th day of February, 2021.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**