



**REPUBLIC OF KENYA**

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

**Civil Application 31 of 2008**

**KINYUA NG'ANG'A ..... 1<sup>ST</sup> APPLICANT**

**PETER MBURU NG'ANG'A ..... 2<sup>ND</sup> APPLICANT**

**RACHAEL WANJIRU NGARITHU ..... 3<sup>RD</sup> APPLICANT**

**AND**

**NAHASHON NJENGA NG'ANG'A ..... 1<sup>ST</sup> RESPONDENT**

**AGNES GATUYA ..... 2<sup>ND</sup> RESPONDENT**

**JOHANA KIMANI ..... 3<sup>RD</sup> RESPONDENT**

***(An application for further extension of time to file and serve the record of appeal in an intended appeal from the Judgment of the High Court of Kenya at Nairobi (Khamoni, J.) dated 5<sup>th</sup> December, 2007***

***in***

***H. C. C. A. No. 662 of 2002)***

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**RULING OF THE COURT**

1. This is a reference to the full Bench from the decision of Okwengu, J.A who, on 2<sup>nd</sup> March, 2012, declined to accede to the applicants' request for an extension of time to file and serve the record of appeal and dismissed the applicants' application dated 6<sup>th</sup> April, 2011.
2. The judgment of the High Court, subject of the intended appeal, was delivered on 5<sup>th</sup> December, 2007. The applicants being aggrieved by the said judgment filed a notice of appeal on 11<sup>th</sup> December, 2007, which was subsequently misplaced in the court registry. As a result, the applicants were unable to file the intended appeal in time and applied to this Court for extension of time to do so.
3. On 25<sup>th</sup> May, 2010 the learned single judge (Tunoi, J.A) (as he then was), granted leave to the applicants to file the notice of appeal within seven days and the record of appeal within 30 days from the date of filing the notice of appeal.
4. The applicants filed the notice of appeal on 2<sup>nd</sup> June, 2010 but failed to file the record of appeal

within the prescribed time frame.

5. The applicants, yet again pursuant to **rule 4** of the Rules, moved this Court by an application dated 6<sup>th</sup> April, 2011 for extension of time to file and serve the record of appeal. That is the application that was heard by a single judge of this Court (H. M. Okwengu, J.A.) and dismissed.

6. In her ruling the learned single judge of this Court stated as follows:

***“I find that the applicants have not been candid. The delay of almost one year is inordinate and the explanation they have given is not acceptable. I am alive to the fact that the subject matter of this appeal involves family land wherein the applicants are residing. Nonetheless, the court having exercised its discretion in favour of the applicants under rule 4 of the Court of Appeal Rules, and the applicants have failed to take advantage of that indulgence, the applicants have only themselves to blame.”***

7. At the hearing of this reference, the applicants appeared in person having filed a notice dated 6<sup>th</sup> March, 2012 to act in person in place of their former advocates. They relied on several grounds in support of their application. They contended that the delay in filing the record of appeal was occasioned by three factors that were beyond their control. Firstly, that they were unable to obtain crucial documents from their former advocates to lodge the appeal. Secondly, that the High Court file could not be traced. Thirdly, that the applicants were unable to raise the requisite court filing fees in time.

8. Mr. Peter Mburu Ng’ang’a, the 2<sup>nd</sup> applicant herein, stated on behalf of the other applicants that they were only able to obtain the necessary documents to prepare the record of appeal sometime in March 2011. He further pointed out that the record of appeal had been prepared and prayed this Court to allow the applicants to file the same.

9. Mr. J. N. Mbuthia, learned counsel for the respondents, in opposition to the reference, submitted that the applicants applied for extension of time, almost one year after the time frame given to them to file the record of appeal had expired.

10. Learned counsel added that the applicants have failed to give any reasonable explanation for the delay. He pointed out that there was no evidence to support the applicants’ contention that the High Court file went missing. He stated that the applicants were guilty of excessive and unexplained indolence. He further submitted that the intended appeal was not arguable and the respondents would be prejudiced if the extension of time is granted.

11. In response to submissions of learned counsel, Mr. Ng’ang’a stated that the applicants’ current predicament is as a result of lack of diligence on the part of their former advocates to follow up on the intended appeal.

12. In an application under **rule 4** of the Rules, a single judge of this Court is called upon to exercise his/her discretion which discretion although unfettered must be exercised judicially.

13. In the case of ***Leo Sila Mutiso vs Rose Hellen Wangari Mwangi –Civil Application No. Nai. 255 of 1997 (unreported)*** this Court set out guidelines for the exercise of its discretion under **rule 4** of the Rules. This Court stated:

***“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 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.”***

14. Before we can interfere with the discretion of the learned single judge of this Court in this matter by varying or reversing her decision of the single judge, we must be satisfied that the learned judge

misdirected herself in some matter and as a result arrived at a wrong decision or, that she misapprehended the law or failed to take into account some relevant matter.

15. In *Mbogo & Another vs. Shah [1968] E.A. 93* at page 95, Sir Charles Newbold P. held:

*‘.....a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....’*

16. Upon considering the application before us in the light of the principles to which we have referred, we observe that Tunoi, J.A (as he then was) granted the applicants leave on 25<sup>th</sup> May, 2010 by to file the notice of appeal and record of appeal out of time.

17. Further the application for extension of time to file the record of appeal, subject of this reference was made almost eleven months after the time granted by the learned single Judge had expired.

18. Having regard to all circumstances we are of the view that the learned single Judge was correct in concluding that the applicants’ explanation for the delay was not acceptable. There was no evidence, as correctly pointed out by the learned single judge, to support the applicants’ allegations that the High Court file went missing for a considerable period of time. The applicants did not attach any letter addressed to the Deputy Registrar requesting for the file or raising an issue regarding the alleged missing file.

19. We are also not persuaded by the applicants’ explanation that the delay was due to ill health or lack of funds. No evidence in that regard was produced.

20. There is also no evidence that the applicants were unable to obtain crucial appeal documents from their former advocates as alleged. The applicants did not attach any letter addressed to their former advocates requesting for any documents or raising an issue over the same. It was also not clear what the crucial appeal documents were.

21. Taking into account the foregoing, we are satisfied that the learned single judge exercised her discretion properly and she cannot be faulted on any account.

22. For those reasons, this reference is dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 1<sup>st</sup> day of March, 2013.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**J. W. MWERA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**