



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, AKIWUMI & PALL, J.J.A.

CIVIL APPLICATION NO. NAI 260 OF 1996 (98/96 UR)

BETWEEN

SAMAKI INDUSTRIES (NAIROBI) LIMITED APPLICANT

AND

SAMAKI INDUSTRIES (K) LIMITED RESPONDENT

**(An intended appeal from the judgment and decree of the High
Court of Kenya at Mombasa (Justice Mbaluto) dated 25th
February, 1993**

in

H.C.C.C. NO. 482 OF 1990)

RULING OF THE COURT

There is no merit in this reference and it must fail. A single judge of the court was asked under Rule 4 of the Court's Rules to exercise his unfettered discretion under that rule and enlarge for the applicant, Samaki Industries (Nairobi) Ltd., the time within which to lodge its notice of appeal and record of appeal from the decree of the High Court at Mombasa made on the 15th February, 1993. The applicant had lodged two previous appeals against that decision but the first appeal was struck out on the ground that it was filed by a person not qualified to practise as an advocate. The applicant thereafter obtained extension of time to file another appeal but that appeal too suffered the fate of the first one due to some other technical problem. The applicant then came to the court a second time seeking further extension. Shah, J.A. granted the extension sought and the respondent, Samaki Industries (Kenya) Ltd, now comes before us with this reference under Rule 54 (1)(b) so that we may vary, discharge or reverse the decision of the single Judge. As Mr. Muthoga who led for the respondent rightly appreciated, under Rule 54(1)(b), the full bench of three judges does not exercise appellate jurisdiction over the decision of the single Judge. The powers the single Judge exercises under Rule 4 are exercised on behalf of the Court and the discretion given to him is unfettered though like all judicial discretion, it must be exercised on sound principles. Because the single Judge is exercising a discretion, a full bench of three judges can only interfere with that exercise if it be shown that in the exercise of the discretion the single Judge failed to take into account a relevant matter which he ought to have taken into account or that he took into account

an irrelevant matter which he ought not to have taken into account, or, short of these two, that the decision he arrived at is so plainly wrong that no reasonable judge, properly directing himself as to the law and the facts, could possibly arrive at the same decision. The decision of the single Judge, the subject of the reference, runs into some eight typed pages. It is clear to us that the single Judge took into account all the relevant factors put before him. He considered the chequered history of the litigation and the unfortunate circumstances which had led to the striking out of the two previous appeals. Having considered all these points, he came to the conclusion that:-

"... The circumstances of this case call for exercise of my undoubted discretion granted by rule 4 of the Court of Appeal Rules and I do exercise my discretion in favour of the applicant."

We think there can be no basis for our interference with that exercise of discretion. The point regarding the question of what further delay would be caused by prolonging the litigation which was strongly pressed upon us by Mr. Muthoga, was not put before the single Judge and he could not have dealt with it. It was equally not raised in any part of the material which was put before him. It cannot be raised before us now but even if it has been raised as was done, it cannot be a reason to make us interfere. As we said at the very beginning, there is no merit in this reference. Our order on it is and shall be that it be and is hereby dismissed with costs to the applicant.

Dated and delivered at Nairobi this 27th day of February, 1997.

R. S. C. OMOLO

JUDGE OF APPEAL

A. M. AKIWUMI

JUDGE OF APPEAL

G. S. PALL

JUDGE OF APPEAL

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

DEPUTY REGISTRAR