IN THE COURT OF

APPEAL AT NAIROBI

(CORAM: MUSINGA (P), MUMBI NGUGI & ODUNGA,

JJ.A.) CIVIL APPLICATION NO. NAI. E015 OF 2021

BETWEEN

DELMONTE KENYA LIMITED.....APPLICANT

AND

PATRICK NJUGUNA KARIUKI.....RESPONDENT

(Being an application for extension of time to file and serve the Notice of Appeal and Record of Appeal out of time, from the Judgment of Ongaya,J. dated 26th October, 2012

in

Nairobi Industrial Cause No. 953 of 2011)

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RULING OF THE COURT

1. This is a reference from a decision of a single judge of this Court (Laibuta, JA.) dated 9th July 2021. The decision was on an application dated 15th January 2021 in which the applicant sought, at prayers 3 and 4 of the application, orders:

…

> ***3.THAT this Honourable Court be pleased to Order an extension of time within which to file and serve the Notice of Appeal and the Record of Appeal in respect of the Judgment/Award made against the Applicant, DEL MONTE***

KENYA LIMITED in Industrial Court Cause No 953 of 2011, Patrick Njuguna Kariuki vs. Del Monte Kenya Limited on the 26th October 2012.

4. THAT this Honourable Court be pleased to Order extension of time within which to take any requisite action required to be taken by the Applicant that would facilitate lodging an Appeal in respect of the Judgment/Award made against the Applicant, DEL MONTE KENYA LIMITED in Industrial Court Cause No 953 of 2011, Patrick Njuguna Kariuki vs. Del Monte Kenya Limited on the 26th October 2012.

2. The single judge dismissed the application, noting that the judgment the applicant was seeking to appeal against was delivered on 26th October 2012; the decretal amount of Kshs. 8,863,282.20 previously deposited in court was released to the respondent in satisfaction of the decree; there was no material before the Court to suggest that the respondent was taking any steps to execute the decree in relation to the order for re-engagement; the applicant had not lodged a notice of appeal since the striking out of its notice of appeal and record of appeal on 18th December

2020; the applicant did not require leave of this Court to lodge a notice of appeal; and that

the application for extension of time to file a notice of appeal and record of appeal would serve no useful purpose.

3. In its letter seeking a reference under rule 55 of this Court's Rules (2010) (now rule 57 of the 2022 Rules), the applicant argues that the single judge did not consider the factors that should be considered on an application for extension of time, namely, whether the proposed appeal is arguable; the length and explanation for the delay; and the possible prejudice to the parties, especially the respondent.

4. The applicant argues that the impugned ruling did not address itself to the question of whether or not there was an arguable appeal, which is a material factor, and as a result, the decision to decline the application translates to denying the applicant access to justice. In the applicant's view, this was a serious error of law and fact. Further, that in **Civil Application No 4 of 2013**, this Court had found that the applicant has an arguable appeal.

5. The applicant is also aggrieved that the single judge concluded that the respondent having collected the entire decretal sum, and since the applicant has not

demonstrated that the respondent is keen on enforcing the re-engagement

order, its appeal would serve no useful purpose. The applicant contends that this was an error that leads to oppressive consequences for it since the re-engagement order technically remains alive. Its case is that were it to succeed in its appeal, the respondent can and should pay back the judgment sum, and the re-engagement order would be reversed. Its contention is that for the single judge to conclude that once a judgement sum is collected renders the appeal nugatory is an error of law amenable to reversal in this reference.

6. The applicant further notes that in his decision, the single judge did not take into account the fact that the application was lodged within a month or so of the applicant's record of appeal being struck out, and there was no inordinate delay at all. The applicant also observes that in **Civil Application No 321 of 2013**, this Court declared that the applicant did not require leave to apply for proceedings out of time, *'yet this was the technical reason relied (on) by this Court in striking out the Record of Appeal'*. We observe that this final argument does not seem to have any relevance, so far as we can see, to the reference from the decision of the single judge. The

applicant

asks this Court to give it redress and allow its application, in consideration of Article 159 2(d) of the Constitution.

7. At the hearing of the reference, learned counsel, Mr. Maruti, appeared for the applicant, while learned counsel, Mr. Mwangi, appeared for the respondent. Counsel highlighted the parties' submissions dated 18th March 2025 and 31st March 2025 respectively.

8. In his submissions for the applicant, Mr. Maruti contended that the single judge misdirected himself in three respects. First, in concluding that there was no material placed before him, such as a memorandum of appeal, to persuade him that there was an arguable appeal. He submitted that contrary to this finding, it had been averred in the affidavit in support that this Court in **Civil Application No. 321 of 2012** had found that there was an arguable appeal. It was the applicant's submission, therefore, that the single judge did not require a memorandum of appeal to be persuaded in this regard, this Court having already concluded that there was an arguable appeal.

9. The second misdirection, according to the applicant, was in the single judge's finding that there had to be a notice of

appeal on record before extension of time could be sought. Counsel's submission was that the single judge erroneously concluded that it was a mandatory prerequisite requirement for there to be a notice of appeal. He submits, however, that a plain reading of rule 4 of this Court's Rules is clear that a party can seek extension of time before or after doing the act in question.

10. The third misdirection, in the applicant's view, was the single judge's conclusion that the applicant had not explained the period running from 2012, the date of the judgment of the trial court, to the filing of the application the subject of the reference. Contrary to this finding, however, according to the applicant, the period had been fully explained in the application: that in September 2013, this Court allowed an application for stay of execution; that in May 2014, a single judge of the Court (Musinga, JA.) allowed an application for extension of time to serve the notice of appeal out of time; that in October 2015, the said decision of a single judge was upheld by a full bench on a reference by the respondent; and that accordingly, in the period from 2012 that the single judge found to be unexplained, the applicant was not doing nothing

but was taking steps, including filing a record of appeal in 2017. It is the applicant's submission that in view of these misdirections, interference with the exercise of discretion by the trial court was merited.

11. The response from the respondent as articulated by learned counsel, Mr. Mwangi, is that the applicant has been unable to demonstrate any misdirection by the single judge; that the findings of the single judge had not been contradicted by the applicant; that the judgment at issue was delivered on 26th September 2012 (the correct date is 26th October 2012), some 9 years prior to the application in 2021; that the financial part of that judgment had already been settled by the applicant, and therefore the issue of litigation continued after 13 years arises, and in the single judge's view, such an extended delay should not be permitted; that the litigation sought to be extended by the applicant by way of appeal was not tenable, a position that the applicant was not able to contradict.

12. According to the respondent, in view of the fact that by the ruling dated 18th December 2020 this Court struck out the applicant's notice of appeal and the record of appeal, there is currently no notice of appeal before this Court. In the

absence

of a notice of appeal, in the respondent's view, there was no basis for the Court to exercise discretion in its favour. Further, the applicant, an indolent party not interested in pursuing its rights having paid the decretal sum, there was no reason to perpetuate this matter, and the single judge was correct in so finding.

13. The third argument advanced by the respondent in opposing the reference was that the applicant was relying on a previous ruling by the court in a rule 5(2)(b) application in which the Court stated that the applicant had an arguable appeal. According to the respondent, such a finding did not mean that a party was not required to take diligent steps to pursue its appeal, including filing a notice of appeal, obtaining the proceedings, and filing a record of appeal, which the applicant had not done. The respondent urged us to dismiss the reference.

14. In submissions in response, Mr. Maruti maintained that the single judge had made a finding that there was no arguable appeal before him, yet this Court had made an unequivocal finding that there was an arguable appeal, a misdirection that cannot be ignored. With respect to the submission that there

was no basis for granting the orders sought as the respondent had collected the decretal amount, the applicant's response was that this does not take away the injustice as it has an arguable appeal; that there is still in force an order for re- engagement of the respondent arising from the judgment; and that therefore not appreciating that there was an arguable appeal makes this a classic case of injustice should its reference not be allowed.

15. We have considered the reference before us and the ruling of the single judge that it emanates from. On a reference before a full bench under rule 55 (now rule 57) of this Court's Rules, the Court is required to consider, on the material that was before the single judge, whether the judge properly exercised discretion in allowing or declining the application before the Court. The principles governing the exercise of this Court's mandate on a reference are well settled. The full Court will not interfere with the decision of a single judge unless it is shown that in arriving at his decision, the single judge misdirected himself in some matter, took into account an irrelevant factor, failed to take into account a relevant factor, or that his decision

is plainly wrong in light of all the circumstances.

16. In its decision in ***Peninah Mongina & another v Walter Masese Makori & another*** [2005] KECA 298 (KLR), this Court stated:

> ***"In a reference to the full court before we can interfere with that discretion, we must be satisfied that the learned single Judge misdirected himself in some matter and as a result arrived at a wrong decision or, that the learned single Judge misapprehended the law or failed to take into account some relevant matter. In MBOGO AND ANOTHER VS. SHAH***
> ***[1968] E.A. 93 at P. 95 Sir Charles Newbold P put it thus:-***
> ***…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….."***

17. The reference arises from an application to extend time under rule 4 of this Court's Rules. In considering whether

the single judge exercised his discretion judiciously, therefore, we need

to bear in mind the factors to be considered in exercise of the Court's discretion under the said rule, which is wide and unfettered, but must be exercised judiciously. The factors to be considered on such an application include the length of the delay, the reason for the delay, whether the intended appeal is arguable, and the degree of prejudice to the respondent if the application is allowed-see ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi*** [1999] 2 EA 231; ***Fakir Mohamed v Joseph Mugambi & 2 others*** [2005] KECA 340 (KLR) and ***Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet*** [2018] KECA 701 (KLR).

18. We have set out above the reasons on the basis of which the single judge dismissed the application: that the decretal amount had been released to the respondent in satisfaction of the decree; there was no material before the Court to suggest that the respondent was taking steps to execute the order for re-engagement; the applicant had not lodged a notice of appeal since the striking out of its notice of appeal and record of appeal on 18th December 2020; and that the extension of time to file a notice of appeal and record of appeal would serve no useful

purpose.

19. We have also set out the factors to be considered on such an application, and we find that in this case, the single judge failed to consider relevant factors on an application for extension of time. Release of the decretal sum to the respondent is not a factor for consideration, nor is the question whether or not the respondent wishes to execute the order for re-engagement. Of relevance, first, is the length of the delay in lodging the application, and whether the delay has been satisfactorily explained. This Court (Waki, JA), dealing with an argument that extension of time would serve no useful purpose, execution having taken place, held in ***Seventh Day Adventist Church East Africa Ltd & 2 Others v Masosa Construction Company*** [2006] KECA 194 that:

> ***"At all events, and the main reason for favourable consideration of this application, the respondent has already recovered all the decretal sum and costs attendant to the litigation so far. The right of appeal is a strong right. It is only rivalled by the right to enjoy the fruits of judgment, and a proper balance has to be struck between the two. The respondent has enjoyed his right in full. I see no***

prejudice if an opportunity was given to the

applicants to enjoy theirs too, even if, as they state, it is on a matter of principle."

See also ***Machakos District Co-operative Ltd. v Nzuki Kiilu***

[1997] KECA 192.

20. In addressing the question of delay, the single judge observed that *"no reasonable explanation has been furnished for the inordinate delay in taking appropriate steps in the proceedings since 2012*." We have considered the averments in the affidavit of **Harry Onyango Odondi** sworn on 15th January 2021 and noted the detailed averments with respect to the steps it has taken since the delivery of the judgment of the trial court, culminating in the appeal that was struck out in the ruling of this Court dated 18th December 2020. We are satisfied that the trial court misdirected itself in considering that there had been a delay since 2012. We agree with Bosire, Ag. J.A. (as he then was) in the case of ***Jedida Alumasa & 3 others v S.S. Kesitany,*** [1997] KECA 248 where he stated that:

"It is now established that a litigant whose appeal has been struck out has the liberty to restart the appellate procedures, provided he can be able to come to court

promptly for an

order extending time, at least to lodge a fresh notice of appeal. That is what the applicants did in this matter. Their appeal was struck out on 11th October, 1996, and on 8th November, 1996, they brought this application. The delay in bringing the application cannot, in the circumstances of this case, be regarded as inordinate.**"**

21. The record indicates that various steps had been taken since the decision in 2012, including the filing of the notice of appeal, an application for stay of execution; an application for extension of time, and ultimately, the appeal that was struck out on 18th December 2020, on the basis that though a notice of appeal had been filed on time, the letter bespeaking proceedings had not been copied to the respondent. The application the subject of this reference is dated 15th January 2021, and taking judicial notice that the preceding period fell within the Court's recess, there was no delay to speak of.

22. The single judge found that there was nothing before him to demonstrate that the applicant had an arguable appeal. We note from the affidavit in support of the application that the applicant had made various averments with

regard to its intended appeal and had annexed two rulings of this court in

which the arguable points had been noted, including the question whether the award of exemplary damages was retrospective; and whether an order for the reinstatement of the respondent was justified in the circumstances of this case.

23. We find that, in the circumstances, the single judge, probably inadvertently, failed to note the rulings of this Court annexed to the affidavit in support of the application, and thereby failed to consider a relevant factor. We appreciate that the decision of the trial court was rendered many years ago; the decretal amount deposited in court was accessed by the respondent years ago also. Whether the respondent has an interest in pursuing execution of the order for re-instatement is not a relevant factor for consideration. Of relevance is whether the applicant, which, at least at the time of filing the application and the reference, was intent on pursuing its appeal, satisfied the conditions for grant of orders of extension of time; and whether the single judge failed to exercise his discretion judiciously in finding that it had not, and in dismissing the application dated 15th January 2021.

24. We are, accordingly, satisfied that in the circumstances of

this

case, interference with the exercise of the single judge’s

discretion is justified. We allow the reference dated 12th July 2021 and allow the application dated 15th January 2021 in terms of prayers 3 and 4 thereof.

25. We make no order as to costs.

26. In closing, we express our regrets to the parties for the delay in delivering this ruling, which was occasioned by a failure to diarise the matter so that it fell through the cracks.

Dated and delivered at Nairobi this 13th day of February, 2026.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF

APPEAL MUMBI

NGUGI

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.