



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Nyota v Kuria & 20 others (Civil Application E059 of 2023)
[2025] KECA 377 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KECA 377 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E059 OF 2023
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
FEBRUARY 28, 2025**

BETWEEN

HARRISON MWANGI NYOTA APPLICANT

AND

EDDY KURIA 1ST RESPONDENT
CHRISTOPHER M KAMAU 2ND RESPONDENT
MARGARET WANJIRU 3RD RESPONDENT
DAVID ADAMS MBUGUA 4TH RESPONDENT
DAVID MBURU GITHERE 5TH RESPONDENT
WK KIBET 6TH RESPONDENT
CATHERINE KOSKEI 7TH RESPONDENT
BEATRICE WANGARI 8TH RESPONDENT
AUGUSTINE LOMONGIN 9TH RESPONDENT
JACQUELIN ADHIAMBO. 10TH RESPONDENT
MOHAMMED OSMANI HASSAN 11TH RESPONDENT
STEPHEN NJOROGE KANYORA 12TH RESPONDENT
GLADYS WAIRIMU GICHAGA. 13TH RESPONDENT
EMMANUEL J NJAU 14TH RESPONDENT
JANE CHAKU NDIGA 15TH RESPONDENT
SUSAN K CHESIALE 16TH RESPONDENT
EVERLYN NYAMBURA 17TH RESPONDENT



SK KOSGEY	18 TH RESPONDENT
AGNES WANJIKU KARIUNGI	19 TH RESPONDENT
LEAH NJERI KARANJA	20 TH RESPONDENT
NAIVASHA MUNICIPAL COUNCIL	21 ST RESPONDENT

*(Being a reference from the ruling and order of
this Court (W. Korir, J.A.), dated 12th April 2024)*

RULING

1. Before us is a reference to a full Court pursuant to Rule 57 of the Court of Appeal Rules, 2022. The Applicant seeks a variation or reversal of the decision of the single Judge (Korir, J.A.) dated 12th April 2024. The Judge heard and determined the applicant's application hinged on Rule 4 of the Court of Appeal Rules seeking extension of time to file and serve the record of appeal out of time. The learned Judge, upon considering the application, found that it lacked merit and dismissed it with costs to the respondents. Aggrieved by the learned Judge's decision, the Applicant, vide a letter dated 2nd May 2024, applied for a reference before a three- judge bench of this Court.
2. By way of background, the applicant filed Civil Suit No. 110 of 1998 in the Nakuru High Court seeking inter alia, an order of mandatory injunction to restrain the 21st Respondent from allocating all that parcel of land namely Naivasha/Municipality Block 5/235 in favor of the 1st to 20th Respondents. The suit was heard and dismissed by Wendoh, J. on 20th December 2018.
3. The applicant avers that he instructed his then advocates, P.K. Njuguna and Co. Advocates to appeal against the entire judgement. He states that the said advocates filed a notice of appeal on 24th December 2018 and that all along the said advocates assured him that they had filed and served the notice of appeal upon the respondents. He further states that he changed advocates in September 2019 and that his new advocates, Waiganjo & Co. Advocates, filed the record of appeal on 20th February 2020. He later learnt the respondents had filed an application dated 7th March 2019, seeking to strike out his notice of appeal. That application was heard on 27th March 2023 in his absence as he was not served with the hearing notice. The same was subsequently allowed.
4. Upon striking out of the notice of appeal, the applicant filed an application under rule 4 of this Court's Rules for extension of time to lodge a notice of appeal and record of appeal out of time. This application was heard and determined by a single judge (Korir, J.A.), who dismissed it with costs. This triggered the filing of this reference.
5. Rule 57 of the Court of Appeal Rules provides as follows:
 1. Where under the proviso to section 5 of the Act, any person, being dissatisfied with the decision of a single judge—
 - a. in a criminal matter, wishes to have his or her application determined by the Court; or
 - b. in a civil matter, wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, that person may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.



2. At the hearing by the court of an application previously decided by a single judge, no additional evidence shall be adduced.”
6. On the face of it, the Rule does not set out grounds that a full bench should consider in upholding or rescinding the decision of the single Judge. However, many have walked down this path over the years and reasons that a full bench should consider are now well developed. In determining a reference under Rule 57 of the Court of Appeal Rules, the guiding star at all times is that a full bench has to take into account that the mandate under Rule 4 is discretionary, unfettered, and does not require the establishment of sufficient reason(s). The discretion given to a single Judge is unfettered. There is no limit to the number of factors that the Court should consider so long as they are relevant to the issues falling for consideration before the Court.
7. In an application for reference as the one before us, a 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 or she ought not to have taken into account, or failed to take into account a relevant matter; or that there was misapprehension of the law applicable, and the evidence presented; or that his decision was plainly wrong.
8. In the case of *John Koyi Waluke vs. Moses Masika Wetangula & 2 others*, Civil Appeal Application No. 307 of 2009, (unreported), the Court pronounced itself on the same issue as follows:

“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... 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.”
9. Taking into account the principles that this Court should consider before interfering with the decision of a single Judge, we now turn to the reasons that have been advanced by the applicant. The main reason advanced is that the delay was caused by his erstwhile advocates and that he should not be punished for a mistake that squarely falls on his advocate.
10. The main issue that was before the single Judge was whether there was inordinate delay on the part of the applicant. We have considered the applicant’s written submissions dated 4th October 2024 which were orally highlighted at the hearing. The applicant has cited several authorities supporting the notion that extension of time is discretionary. He urges us to apply the principles of substantive justice and disregard technicalities. With respect, the applicant has completely missed the mark. The test is not that a party is unhappy with the decision of a single judge as in an adversarial system, such dissatisfaction is expected. The test is not whether we would have reached a different decision if we were sitting in the place of the single judge. The test is that an applicant has to demonstrate improper exercise of discretion by a single judge.
11. Having considered the arguments by the parties and the decision of the learned Judge, the question that we should now answer is: did the single Judge consider any irrelevant matters or disregard any relevant matters that would have influenced her decision. We note that the single Judge extensively



examined all the reasons that had been advanced for and against the extension of time. The judge noted that whereas the applicant blames his previous advocate, there was inordinate and unexplained delay even after the change of advocates.

12. We are satisfied that the learned Judge acted within the parameters set out in the exercise of discretion. Accordingly, there is no basis for interfering with his decision. It therefore follows that this reference is devoid of merit and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF FEBRUARY 2025.

M. WARSAME

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

