Kenya Muslim Charitable Society v Kenya Revenue Authority (Civil Application 34 of 2017) [2025] KECA 289 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 289 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION 34 OF 2017

SG KAIRU, P NYAMWEYA & KI LAIBUTA, JJA

FEBRUARY 21, 2025

BETWEEN

KENYA MUSLIM CHARITABLE SOCIETY ..... APPLICANT

AND

KENYA REVENUE AUTHORITY ..... RESPONDENT

(An application for extension of time for filing an appeal out of time from the Judgment and Decree of the High Court of Kenya at Mombasa (Kasango, J.) dated 24th September 2015 in HCCC No. 80 of 2001)

RULING

1. In a ruling delivered on 5th July 2018, M. K. Koome, JA. (as she then was) dismissed the applicant's application for extension of time dated 19th June 2017. In that application made under Rule 4 of the Court of Appeal Rules, the applicant sought extension of time within which to appeal the judgment of the High Court (Kasango, J.) delivered on 24th September 2015 dismissing the applicant's suit against the respondent. Dissatisfied with the decision of the single judge to dismiss its application for extension of time, and in a bid to have that decision reversed, the applicant is now before us with a Reference under Rule 55(1)(b) (now Rule 57(1)(b)) of the *Court of Appeal Rules*.

2. The background, in brief, is that the applicant, Kenya Muslim Charitable Society, instituted suit against the respondent, Kenya Revenue Authority, before the High Court at Mombasa, being High Court Civil Case No. 80 of 2001. In the suit, the applicant sought compensation for the value of a consignment of rice that it had imported and which the respondent allegedly detained in its warehouses leading to loss.

3. As already stated, that suit was dismissed by the High Court in its judgment delivered on 24th September 2015. Aggrieved, the applicant lodged Civil Appeal No. 66 of 2016 before this Court. The respondent then moved the Court by an application dated 20th September 2016 to strike out that

appeal on grounds that the Memorandum of Appeal was filed outside the stipulated sixty day period. In a ruling delivered on 25th May 2017, the Court (Asike-Makhandia, Ouko & M'Inoti, JJ.A.) allowed that application and struck out the applicant's said appeal with costs.

4. Still dissatisfied, the applicant moved the Court by the application dated 19th June 2017 under Rule 4 of the Court of Appeal Rules seeking leave to file and serve its Notice of Appeal and its record of appeal out of time. The application was based on the grounds that its record of appeal filed on 19th August 2016 was struck out on 25th May 2017; that its appeal is arguable and had overwhelming chances of success; and that the respondent would not suffer any prejudice.

5. In his affidavit in support of the application, Mohamed Shariff Abdullah, a director of the applicant, in explaining the delay, stated that the applicant did not receive notification from the court that the proceedings were ready for collection by 3rd February 2016 until 15th June 2016; that the certificate of delay issued by the Deputy Registrar of the High Court recorded the date of 3rd February 2016 instead of 15th June 2016 as the date of notification and collection of the proceedings when in fact the applicant had not been notified on 3rd February 2016; that, despite following up, it was not until 15th June 2016 that the advocates for the applicant became aware that the proceedings were ready; that it was on that basis that the applicant's advocates filed the Memorandum of Appeal and Record of Appeal on 19th August 2016; that, on 22nd September 2016, the respondent applied to strike out that appeal, which application was heard on 13th March 2017 and subsequently allowed in the ruling of the Court delivered on 25th May 2017.

6. The application for extension of time was opposed. The respondent asserted that the explanation offered by the applicant for the delay was considered by the Court in its ruling of 25th May 2017; that no justifiable grounds were presented to enable the single judge exercise the court's discretion under Rule 4 in favour of the applicant.

7. Having considered the application, the affidavits and the submissions made before her, the learned Judge, in the impugned ruling of 5th July 2018, and applying the principles articulated by the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat vs. I.E.B.C. & 7 Others* [2014] eKLR, dismissed the application. In doing so, the learned Judge did consider the explanation by the applicant that its advocates were oblivious of the letter of 3rd February 2016 from the court registry notifying them that the proceedings were ready for collection, and that it was not until 30th June 2016 that the advocates received the proceedings and the certificate of delay.

8. The learned Judge was not persuaded that the applicant had explained the delay satisfactorily and concurred with the reasons given by the Court in its ruling of 25th May 2017 as to why the reasons were not persuasive. The learned Judge then concluded as follows:

> " Looking at the sheer amount of the claim, I could not help but wonder why counsel for the applicant would not fastidiously follow the proceeding (sic) and ensure the appeal was filed within time. Judgment was delivered on 24th September 2015, and since the proceedings were ready on the 13th February, 2016 the appeal ought to have been filed within 60 days. The respondent explained that an appeal being filed inordinately out of time impedes on their planning which is prejudicial as they have to factor in the burden of litigation. I agree a good appeal ought to be filed timeously and in accordance with the law otherwise it may cause undue prejudice to other parties who have a legitimate expectation that the litigation had come to an end when no appeal was filed."

9. Hence the reference before us. Learned counsel Mr. Lakicha, orally highlighting the applicant's written submissions dated 26th September 2024, submitted that, other than the letter dated 15th June 2016 notifying the advocates for the applicant that the proceedings were ready, no other communication was received from the court informing the advocates that proceedings were ready for collection on 3rd February 2016; that it was on that basis that the record of appeal which was struck out, was filed on 19th August 2016.

10. It was submitted that the Deputy Registrar of the High Court failed to notify the applicant's advocates promptly when proceedings became ready in February 2016, only informing them via a letter dated 15th June 2016; that, contrary to the representation in the certificate of delay, time for filing the record of appeal began to run in June 2016 (as opposed to February 2016) when the applicant received notification.

11. It was submitted that the delay by the Deputy Registrar of the High Court in notifying the parties that the proceedings were ready should not be visited upon the applicant; and that delays caused by external factors, such as administrative lapses warrant leniency. In support, counsel cited *Wandu Limited vs African Banking Corporation Limited* (2013) eKLR ; *Hass Petroleum (K) Limited vs Nyanza Enterprises Limited & Another* [2021] KECA 290 (KLR), among other decisions.

12. It was submitted further that the applicant's advocates, who are based in Nairobi, had instructed Mombasa based Advocates to collect the proceedings, but that communication delays occurred. It was urged that the learned single judge, in dismissing the application, misapprehended the facts and ignored the explanation for the delay by the applicant prioritizing procedural technicalities over justice.

13. Counsel concluded by urging the Court to reverse the decision of the learned single judge and extend time to file the appeal; that the delay was justified; and that the appeal involves substantial public interest, namely a claim for Kshs. 98 million. On the principles applicable to applications for extension of time, counsel referred to *John Kimanyi Mukuha & Another vs. Margaret Nyokabi Kahihu & Another* [2021] eKLR; and *Vishva Stone Suppliers Company Limited vs. RSR Stone [2006] Limited* [2020] eKLR.

14. Opposing the reference, learned counsel Miss. Almadi holding brief for Mr. Matuku for the respondent orally highlighted her written submissions dated 30th September 2024 and submitted that the circumstances when the Court may interfere with the decision of a single judge are limited. Counsel cited decisions in *Lalji vs Lalji & 2 Others* [2022] KECA 1391 (KLR); *Simeon Okingo & 4 Others vs. Benta Juma Nyakako* [2021] eKLR; *Kenya Co-operative Creameries Limited vs. Films Limited* [2006] eKLR to stress that a reference is not an appeal and that the Court can only interfere with exercise of discretion where the single judge failed to consider relevant matters, or where irrelevant matters were considered.

15. It was submitted that all relevant factors were considered by the single judge, including the reasons given by the Court in its ruling striking out the appeal; that the claim by the applicant that it was only notified that the proceedings were ready in June 2016 cannot in any event be true as the record shows that payment of the proceedings was made on 3rd February 2016; and that this reference, being a regurgitation of matters already considered, should be dismissed.

16. We have considered the reference and the submissions by learned counsel. The mandate of the Court on a reference such as this is limited. In addition to the decisions cited by learned counsel, see for instance decisions of the Court in *Majiwa vs. Otieno* (Civil Appeal (Application) E016 of 2021) [2023] KECA 1485 (KLR); and *Osoro vs. Madzayo* (Civil* Appeal (Application) E008 of 2023) [2024] KECA 636 (KLR).

17. In *Geothermal Development Company vs. Lantech Africa Limited* (Civil Application E029 of 2021) [2024] KECA 269 (KLR), the Court pronounced that a reference for all its intent and purposes is not an appeal per se; that a reference to a full bench from the decision of a single judge requires the full bench to limit itself to consider whether the single judge properly exercised his unfettered and wide discretion under rule 4 of the Court of Appeal Rules, 2022.

18. With that in mind, we observe that in dismissing the application, the learned single judge in applying the yardstick in *Nicholas Kiptoo Arap Korir Salat vs. I.E.B.C. & 7 Others* (above) considered the explanation offered by the applicant for the delay and did not find it satisfactory. The Judge also considered, as she was urged to do by the applicant, the amount of claim, as well as the likely prejudice to the parties.

19. The applicant has not in our view demonstrated that the learned single judge considered irrelevant matters or failed to consider relevant matters, or that her decision is plainly wrong to warrant the Court's interference with the exercise of discretion. As this Court explained in the case of *Kimathi & Another vs. Muriuki & 12* [2023] KECA 666 (KLR):

> "...we underscore that a reference is not an appeal and, as a fully constituted bench, we may only interfere with the exercise of the wide discretion bestowed on a single judge under rule 4 of this Court's Rules on the basis of sound principles. The Court has to consider whether the single judge took into account an irrelevant factor which he ought not to have taken into account; whether he failed to take into account a relevant factor which he ought to have taken into account; whether he misapprehended or failed to appreciate some point of law or fact applicable to the issues at hand; or whether the decision on the available evidence and law is plainly wrong."

20. The applicant has not established, within those parameters, a basis for the Court to interfere with the decision of the learned single judge. The reference fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb.

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR