Ngeno & 13 others v Kenya Investment Authority (Civil Application 99 of 2016) [2025] KECA 528 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KECA 528 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 99 OF 2016

F TUIYOTT, AO MUCHELULE & GV ODUNGA, JJA

MARCH 21, 2025

BETWEEN

JOSEPH KIPLANGAT NGENO ..... 1ST APPLICANT

WILLIAM LOKORIO ..... 2ND APPLICANT

JOSEPH BETT ..... 3RD APPLICANT

JOSEPH CHUMO ..... 4TH APPLICANT

ROBERT KADASIA ..... 5TH APPLICANT

DAVID ONYANGO ..... 6TH APPLICANT

WALTER JUMA ..... 7TH APPLICANT

IBRAHIM LUKHONI ..... 8TH APPLICANT

JOSEPH KIRUI ..... 9TH APPLICANT

JACINTA KOECH ..... 10TH APPLICANT

NANCY BITTOK ..... 11TH APPLICANT

CAMILITA WABWIRE ..... 12TH APPLICANT

ANN CHEPTANI SUGUT ..... 13TH APPLICANT

ROSALIND MURAGURI ..... 14TH APPLICANT

AND

KENYA INVESTMENT AUTHORITY ..... RESPONDENT

(Reference from the decision of a single Judge of the Court of Appeal, Nairobi (Kiage, JA) dated 25th November, 2016 arising from an application for extension of time to file and serve the Notice of Appeal out of time in an intended appealfrom Employment

and Relations Court at Nairobi against the whole of the judgment and decree (Nduma Nderi, J.) dated 7th November, 2014inIndustrial Cause No. 1760 of 2011)

RULING

1. On 25th November 2016, a single Judge of this Court (Kiage, JA) dismissed the applicants' application dated 19th April 2016. The said application was brought under rule 4 of the Rules of this Court seeking leave to file and serve a notice of appeal and record of appeal out of time against the judgement of the Employment and Labour Relations Court (Nduma, J) dated 7th November 2014.

2. The application was supported by the affidavit of Joseph Bett, one of the applicants, in which he averred: that the applicants were in the employment of the defunct Invest Promotion Centre, the legal predecessor to the respondent; that on 30th September 2008, the respondent unfairly, illegally and unprocedurally terminated their employment when they were all placed on compulsory early retirement; that they moved to the High Court seeking judicial review remedies which eventually led to the impugned judgment; that their advocates accordingly filed a notice of appeal on 19th November 2014, which was within time; that they also wrote to the Deputy Registrar of that court on 10th November 2016 requesting for certified copies of the judgment and proceedings which were received on 21st July 2015; that they were required to pay a court fees deposit of Kshs. 100,800 in accordance with an assessment by the Court dated 21st October 2015 but, due to financial constraints, they were unable to raise the money; and that it was not until 9th February 2016 that they had managed to raise some Kshs. 99,000 which they deposited in their advocate's account; that as a result, they were unable to file the record of appeal earlier hence the application; that they had a meritorious appeal and would otherwise be shut out of the appeal process completely yet the respondent stood to suffer no prejudice if the application was granted.

3. In urging the Court to dismiss the application, the respondent relied on an affidavit sworn by the respondent's Manager,Human Resources and Administration, Stellah Naikara, on 8th September 2016 in which she deposed: that the applicants were lethargic in proceeding with the appeal; that the letter bespeaking proceedings was unworthy of consideration because it was not copied to the respondent; that the unexplained three-month delay in having the court fees assessed was deplorable; that the applicants failed to make use of the available facility for payment of a lesser or no amount, conditional upon remittance of the balance upon conclusion of the appeal; that considering the applicants are fourteen in number, the sum required to be paid as court fees was a small one and the plea of financial constraints did not lie; and that since litigation must come to an end, it would therefore be prejudicial to the respondent were it to be condemned to live with the anxiety of its pendency.

4. In his ruling dismissing the application the learned single Judge found: that the application was brought nearly a year and a half after the decision intended to be appealed against was rendered, although the notice of appeal itself was filed within time; that the applicants would have benefited from a non-reckoning of the time it took to prepare a certified copy of the proceedings had they copied their letter bespeaking the same to counsel for the respondent; that even after the said proceedings were ready for collection, they were not collected until after one month; that there was also no explanation why the applicants sought assessment of court fees a full two months later on 21st October 2015 and even after that assessment, payment was not made; that instead, what was exhibited before was a deposit slip for Kshs. 99,000 made by the applicants into their advocate's account nearly 100 days later; that had the applicants been genuinely unable to raise the court fees, it was open to them to make an application to the Registrar of the Court for appropriate relief yet no explanation proffered for not doing so; and that

the litany of omissions, defaults and delays was compounded by the fact that, even after the deposit of money was made into the advocates' account, it took about 70 days more to bring the application.

5. The learned single Judge held that the need for substantive justice to be done is not a licence for lethargy. In his view, since justice is a two-way street and it would be sending the wrong signal and unfairly burdening, inconveniencing and prejudicing the parties who try their best to comply with the rules, if the Court excuses every default on the basis only that it should not drive a party from the seat of justice. In concluding the ruling, the learned Judge expressed himself as follows:

> " further held that "as the courts are open and free, inviting all who seek justice to draw nigh and be heard, there are instances when parties literally so drag their feet, or seem to be so indolent that they literally turn their backs on the doors of justice. When they do, their belated change of heart and plea for admission, unless well-explained, cannot be granted without seeming to abuse discretion."

6. We heard the application on the Court's virtual platform on 28th October 2024 when the applicants were represented by learned counsel, Mr Maingi, while learned counsel, Mr Wekesa, appeared for the respondent. Both counsel relied entirely on their written submissions.

7. On behalf of the applicants it was submitted: that the learned single Judge erred by predominantly concentrating on the duration of the applicant's delay, rather than on the material reasons underpinning their application; that the delay ought to have been weighed against the substantive reasons provided; that on the authority of the case of Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR, the Court is not tied to a hard and fast rule in determining such cases and that each case must be decided on its individual merits; that the learned Judge erred in concluding that the applicants "exhibited a belated change of heart" when the applicants filed their Notice of Appeal in time; that the learned single Judge failed to appreciate that the signing of the certificate of delay is wholly dependent on the Registrar; that the learned single Judge failed to consider the circumstances of the applicants who were indigent individuals hence securing Kshs 100,000 was challenging; that demand of Kshs 100,000 as security impeded justice contrary to Article 48 of *the Constitution*; that the applicants could not initiate pauper proceedings under rule 24 (sic) of the Rules because time had already lapsed and such application was bound to lengthen the timeline further; that on the authority of the cases of Muchugi Kiragu v James Muchugu Kiragu & Another Civil Application No. Nai 356 of 1996 and Anti-Counterfeit Authority v Francis John Wanyange & 4 Others Civil Application No. 147 of 2019, the learned single Judge ought to have considered the fact that the applicants have an arguable appeal as well as the degree of prejudice to the respondent.

8. On behalf of the respondent, it was submitted: that on the authority of the case of Hezekiah Michoki v Elizaphan Onyancha Ombongi [2016] eKLR, we can only interfere with the discretion of the single Judge if the same was injudiciously exercised or is plainly wrong; that on the authority of the case of Joseph Muriithi Njiru v Teresa Wanja Raymond [2008] eKLR, it is not necessary to consider other issues such as chances of appeal succeeding once it was found that the delay was unexplained; and that nothing in the ruling or in the applicants' case had any iota of erroneous exercise of discretion by the learned single Judge and hence the reference should be dismissed with costs.

9. The guiding principles, when it comes to the exercise of discretion to extend time under rule 4 of the Court's Rules were restated in Penina Mongira & Another v Walter Masese Makori & Another [2005] 2 KLR 103. We say guiding principles advisedly because, the rule itself does not provide for the considerations to be taken into account in the exercise of the discretion and this is for a good reason. Being a discretionary power, no two cases are exactly alike and, even if they were, the Court cannot be bound by a previous decision to exercise its discretion in a particular way because that would be in effect

putting an end to the discretion. See Evans v Bartlam [1937] AC 473 and Jenking v Bushby [1891] 1 CH 484. In Penina Mongira & Another v Walter Masese Makori & Another (supra) it was held that:

> " In an application under rule 4 of the Court of Appeal Rules, a single judge of the Court is called upon to exercise his discretion which discretion although unfettered must be exercised judicially. It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary and it is also well settled that in general the matters which the Court of Appeal takes into account in deciding whether to grant an extension are: first, the length of the delay; secondly the reason for the 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. These, in general, are the things a Judge exercising the discretion under rule 4 will take into account but it is not to be understood that this list is exhaustive; it was not meant to be exhaustive and that is clear from the words "in general". Rule 4 gives the single Judge an unfettered discretion and so long as the discretion is exercised judicially, a Judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out would be to fetter the discretion of the single Judge and the rule itself gives a discretion which is not fettered in any way... These are, in general, the things a judge exercising the discretion under rule 4 will take into account. This is not to be understood that this list is to be exhaustive as it was not meant to be exhaustive and that is clear from the words "in general". Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out would be to fetter the discretion of the single judge and the rule itself gives a discretion, which is not fettered in any way."

10. We have considered the submissions made by the parties in this reference. Rule 57(1)(b) of the Court of Appeal Rules, 2022 under which a party dissatisfied with a decision of a single Judge of the Court, moves the full bench in a reference, provides that:

> Where under the proviso to section 5 of the Act, any person, being dissatisfied with the decision of a single judge—
>
> (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.

11. The circumstances under which a full bench of this Court interferes with the exercise of discretion by a single Judge are now well settled. This Court in Kenya Canners Limited v Titus Muiruri Doge Civil Application No. Nai. 119 of 1996 held that:

> " A reference to the full court is not an appeal although it is in the nature of one and in exercising the discretion under rule 4, the single judge was exercising the power on behalf of the full court and his discretion would not therefore be easily upset except on sound principles and these are that the single judge took 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; that he misapprehended or not properly appreciated some point of law or fact applicable to that issue; or that the decision, looked at in relation to the available evidence and the relevant law is plainly wrong...A breach of

any or all of such principles would entitle the full court to interfere and the applicant must satisfy the Court that it ought to do so."

12. Dealing with a reference such as the instant one, this Court in Trade Bank Ltd (In Liquidation) v L. Z. Engineering Construction Co. Ltd & 2 Others Civil Application No. Nai. 282 of 1998 agreed that once a delay is not accounted for it does not matter the length whether 3½ or 2½ months which periods are in any event too long to be disregarded without an explanation. That since the rules are to be observed, if there is no compliance (other than of a minimal kind) it has to be explained by a legitimate, good or reasonable excuse. On prejudice, the Court held that there is little prejudice, if any, if a party is refused extension of time particularly if he had an opportunity of appealing but lost it, not through accident or mistake but because of a deliberate act or omission and, in the absence of an explanation, deliberate act or simply inaction is to be inferred.

13. The function of the full bench when dealing with a reference from a decision of a single Judge was explained in Fakir Mohammed v Joseph Mugambi & 2 Others (supra) where it was held that:

> " The function of the Court on a reference is not for the Court to find that the single judge ought not to have believed the evidence before it because even if the Court were to be convinced that the conclusion of a single judge may not necessarily be correct, that would not be a reason for the full Court to interfere with his conclusion, unless, it can be shown that the conclusion is unreasonable that no reasonable tribunal, properly considering that evidence and the applicable law, could ever come to such a conclusion."

14. In this case the learned Single Judge identified the various stages of outright inaction or delay on the party of the applicants. Such delays, which was on the face of it inordinate were not explained to the satisfaction of the learned single Judge. The reason given by the applicants for not taking steps in the matter was on financial constraints. The learned single Judge rightly pointed out that the applicants had recourse to rule 120 of the Rules of this Court but apparently failed to resort to it. No proper explanation was offered why this action was not taken. Similarly, the applicant could have taken advantage of rule 84 of the Rules if they had copied the letter bespeaking proceedings to the respondent but they failed to do so without any explanation. Whereas the applicants contended that the learned single Judge failed to appreciate that the signing of the certificate of delay is wholly dependent on the Registrar, this Court in Mount Builders & Mechanical Engineers Ltd v Karuna Holdings Limited Civil Application No. Nai. 30 of 2006 opined that:

> " The certificate of delay is in practice prepared by the concerned advocate and sent to the Deputy Registrar to verify and sign. The applicant's advocates do not say that they prepared the certificate of delay which the Deputy Registrar failed to sign and the Court cannot speculate on the reasons why the certificate of delay has not been issued although the absence of the certificate of delay is not a bar to the exercise of discretion by the Court to extend time if thought fit."

15. We have considered the reference and we have no basis for finding that the single judge took into account an irrelevant matter or that he failed to take into account a relevant one. Nor are we satisfied that the learned single Judge misapprehended or not properly appreciated some point of law or fact applicable to the issues. We cannot say that the decision, looked at in relation to the available evidence and the relevant law, is plainly wrong. In the absence of evidence of breach of the said principles, the applicants have failed in their duty to satisfy us that we should interfere with the discretion of the learned single Judge.

16. Accordingly, we find no merit in this reference which we hereby dismiss with costs.

17. It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

F. TUIYOTT

JUDGE OF APPEAL

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A. O. MUCHELULE

JUDGE OF APPEAL

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G. V. ODUNGA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.