Chesire v County Government of Uasin Gishu (Civil Application E045 of 2023) [2025] KECA 701 (KLR) (25 April 2025) (Ruling)

Neutral citation: [2025] KECA 701 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPLICATION E045 OF 2023

JM MATIVO, GV ODUNGA & PM GACHOKA, JJA

APRIL 25, 2025

BETWEEN

ISAAC KIMUTAI CHESIRE ..... APPLICANT

AND

COUNTY GOVERNMENT OF UASIN GISHU ..... RESPONDENT

(Being a reference from the decision of a single Judge of Appeal (Sichale, JA) delivered on 12th April 2024 being an application extension of time for the filing of Memorandum and Record of Appeal from the judgment/decree of the Employment and Labour Relations Court at Eldoret (J.N. Abuodha, J) delivered on the 15th day of March 2021 in ELRC No. 21 of 2020)

RULING

1. On 12th April 2024, a single Judge of this Court (Sichale, JA) dismissed the applicant's application dated 15th September 2023. The said application was brought, substantially, under rule 4 of the *Court of Appeal Rules* (the Rules) seeking:

> "i. Spent
>
> ii. be granted leave to enter appearance/act in person after judgment had been entered.
>
> iii. That the Honourable Court be pleased to extend time limited for filing the Memorandum of Appeal and the Record of Appeal and that the Memorandum of Appeal and the Record of Appeal filed herein be deemed duly filed.
>
> ii. That cost be in the cause."

2. The applicant intended to appeal against the judgement of the Employment and Labour Relations Court (ELRC) delivered on 15th March 2021 by Abuodha, J. The reasons advanced for the delay in filing the Memorandum and Record of Appeal were that:

> "...he was unable to instruct his aforesaid advocates on time to lodge an appeal owing to financial constraints and that he opted to request the Uasin Gishu County Public Service Board through a letter dated 3rd March 2021 to honour the decision of the Public Service Commission."

3. The applicant further averred that his efforts to enforce the decision of the Public Service Commission were futile following the rescission of the decision by the said Commission. His further efforts to petition the Senate, on his employment status, did not yield fruits as his petition was found to be inadmissible and in violation of some Standing Orders. These efforts, the applicant contended, are what occasioned the delay in filing the Memorandum and Record of Appeal. According to him, he had an arguable appeal deserving of a hearing by this Court.

4. The respondent opposed the application on the grounds that the applicant was aware of the judgement and was duly represented by counsel. His act of seeking redress before the Court while lodging an appeal with the Public Service Commission without disclosing the same, it was contended, amounted to forum shopping.

5. The learned Single Judge in her ruling found that the delay spanned a period of 2½ years from 15th March 2021 when the judgement was delivered to 15th September 2023 when the application was made. That period, according to the learned Judge, was inordinate. The learned single Judge found the applicant's reasons for the delay implausible since: there was no evidence of the applicant's financial constraints; the applicant seemed to be an enlightened person well versed in the procedures of the Court and the law as indicated by the way he drafted his application and the fact that he ably presented his case before the Public Service Commission and the Senate; that the applicant did not explain the delay of 2 months to file the application, once his efforts to enforce the orders of the Public Service Commission "hit a rock on 13th July 2023, when the Senate declined to admit his Petition"; that there was no evidence of prejudice to the applicant if the application was not allowed. The application was thereby dismissed.

6. Dissatisfied with the decision, the applicant, as he was entitled to, by his letter dated 18th April 2024 addressed to the Deputy Registrar of this Court requested that the matter be referred to the full bench of the Court.

7. We heard this application on the Court's virtual platform on 11th March 2025 when the applicant appeared in person while there was no appearance for the respondent despite due service of the hearing notice. The applicant relied entirely on his written submissions.

8. According to the applicant, based on the decision in the case of *Simeon Okingo & 4 Others v Benta Juma Nyakako* [2021] eKLR, the learned single Judge by holding that due to his enlightenment he ought not to have sought for services of an advocate, took into account an irrelevant and discriminatory matter; that he discharged the burden of laying a basis for the delay; that the appeal was arguable and raised germane issues for consideration and determination; and that no prejudice would be occasioned to the respondent.

9. We have considered the issues raised in this reference. 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"

10. 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* [2005] eKLR 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 part of the applicant. Instead of focusing on the appeal, the applicant embarked on other avenues such as petitioning the Public Service Commission and the Senate, options which he ought to have embarked on even before instituting his case. If he was financially constrained, in terms of filing fees, the Rules provide for parties to seek to file documents without the necessity of paying filing fees where they are able to prove their inability to pay fees. The applicant's case, however, is that he was unable to get funds to instruct counsel. Whereas every litigant has the right to appoint counsel of own choice, such right ought not to be exercised to the prejudice of the other party.

15. The single Judge considered the manner in which the applicant agitated his case before the Public Service Commission and the Senate and concluded that he was fairly enlightened to file the appeal himself. This finding was based on the material on record and we have no basis for interfering with it.

16. Apart from that, the learned single Judge found that after his efforts hit the rock, the applicant took two months before making his application. That delay was not explained. We agree that a party who finds himself out of time in taking a necessary step in the proceedings should move to rectify the mistake as soon as he realizes the mistake and each day of the delay counts. Where there is a delay, that delay must be explained. There was no explanation forthcoming from the applicant regarding the said delay of 2 months and the learned single Judge was entitled to take it into account in exercising her discretion.

17. We have considered the reference and we have no basis for finding that the learned single Judge took into account an irrelevant matter or that she failed to take into account a relevant one. Nor are we satisfied that the learned single Judge misapprehended or did not properly appreciate some point of law or fact applicable to the issues. We are not satisfied 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 applicant has failed in his duty to satisfy us that we should interfere with the discretion of the learned single Judge.

18. Accordingly, we find no merit in this reference which we hereby dismiss but with no order as to costs.

19. It is so ordered

DATED AND DELIVERED AT NAKURU THIS 25TH DAY OF APRIL, 2025

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR