



Mereka & Co Advocates v New Cooperative Kenya Creameries Limited (Civil Appeal (Application) E034 of 2021) [2024] KECA 189 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 189 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E034 OF 2021
MA WARSAME, K M'INOTI & HA OMONDI, JJA
FEBRUARY 23, 2024**

BETWEEN

MEREKA & CO ADVOCATES APPLICANT

AND

NEW COOPERATIVE KENYA CREAMERIES LIMITED RESPONDENT

(In the Matter of Reference on the single Judge's Ruling dated 21st October, 2022 (Justice A. K. Murgor, JA) in the Application dated 25th October, 2022)

RULING

1. This ruling is in respect of a reference to the full Court under Rule 55 of the Court of Appeal Rules from the Ruling of a single Judge of this Court (A.K. Murgor, JA.) dated 21st October 2022 declining to exercise discretion in favour of the applicant's Notice of Motion application dated 8th January 2021. The applicant had sought extension of time to file an appeal out of time against the Ruling and Orders of the High Court at Nairobi (Njuguna J) delivered on 22nd November 2018 in Misc. Application No. 499 of 2012.
2. The reference emanates from the letter dated 25th October 2022 by the applicant addressed to the Hon. Deputy Registrar of the Court in the following terms:

“We refer to the above matter and pursuant to Rule 55 of the *Court of Appeal Rules*. We request for reference to a full court, the decision of a single bench judge delivered by Hon. A. K. Murgor, JA on 21st October 2022 in so far as it relates to the dismissal of our application seeking leave to file our appeal of time.

We look forward to hearing from you.”
3. The applicant filed an application under Rule 4 of the *Court's Rules* seeking extension of time for filing of a memorandum and record of appeal out of time. The applicant filed a notice of appeal dated 3rd



- December 2018 against the ruling of the High Court delivered on 22nd November 2018, applied for and obtained the certified proceedings and was provided with a certificate of delay dated 9th August 2019.
4. The applicant contended that it was unable to file a record of appeal within the 60-day period from the date of certificate of delay firstly, due to absence from the office of the applicant's proprietor for medical reasons in the years 2019 and 2020, as evinced by two letters from Park Eye Center and Urology Center where it was stated that he underwent a prolonged medical procedure and only resumed duty on 2nd February. Secondly, that his assisting counsel went to South Africa for further studies between January 2019 and December 2019. Thirdly, the onset of the Covid-19 pandemic from March 2020 kept senior persons with pre-existing conditions, like the applicant's deponent, David Mukii Mereka, out of the office, which was then temporarily closed. It was further contended that the intended appeal was arguable with a high probability of success and that it was only fair and just that leave be granted to enable it to prosecute the appeal.
 5. The application was undefended as the respondent neither appeared nor filed submissions despite being served with a hearing notice.
 6. In her decision, the learned Judge (Murgor, JA). underscored the tenor and effect of Rule 4 of the [*Court of Appeal Rules*](#). She noted that the Court has unfettered discretion, exercisable judiciously having regard to the guiding principles including the length of the delay, the reason for the delay, the chances of success of the appeal and whether or not the respondent will suffer prejudice. The learned Judge computed the delay as a period of 24 months between the date of the ruling on 22nd November 2018 and the date of filing the motion on 18th January 2021.
 7. In interrogating the explanation for the delay, the learned Judge was satisfied with the explanation of 237 days accounted for in the Certificate of Delay as between 4th December 2018 when the certified proceedings were sought and 29th July 2019 when the same were availed. As for the further 536 days between 29th July, 2019 to 18th January, 2021 when the application was filed, the Judge was not persuaded by the explanation proffered. The Judge pointed out that save for the evidence by the letter from Park Eye Center advising the deponent to take sick off from work until the end of October 2020, the deponent did not attach the letter dated 15th January 2021 from the Urology Centre. The deponent had averred that he resumed work in February 2021 and did not demonstrate why he could not have filed the record of appeal after October 2020.
 8. The second and third reasons relating to the assisting counsel having proceeded to South Africa for further studies and the covid-19 pandemic that disrupted office operations of the applicant's counsel, respectively, did not persuade the learned Judge. This was because no evidence was adduced to on the further studies and the practice directions on electronic case management issued by the Chief Justice on 4th April 2020 permitted e-filing and e-service system to be adopted by the courts.
 9. The learned Judge indicated that she was unable to ascertain whether the intended appeal would succeed in the absence of the draft memorandum of appeal referred to in the affidavit, but not included amongst the attachments. She then concluded that the greater period of delay had not been explained and that the delay was inordinate as to occasion the respondent undue prejudice.
 10. Having set out the background and considered the applicant's submissions and list of authorities all dated 21st February 2021, we now turn to ponder whether the reference under Rule 55 of the [*Court of Appeal Rules*](#) is meritorious. The Rule provides:

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



- (b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, he 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. While dealing with a reference from the decision of a single judge in *John Koyi Waluke v. Moses Masika Wetangula & 2 Others* [2010] eKLR the Court observed 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 under Rule 4 of this *Court’s Rules*, 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.”

12. The upshot of the above position is that in interfering with discretionary decision made by a Judge, it has to be evident that the Judge exercised discretion injudiciously or was outrightly wrong. Needless to add, the fact that a different Judge would have arrived at a different conclusion is not of itself sufficient to warrant interference with the court’s discretionary decision. (See *Philomena Mwangeli Nicholas v. National Police Service Commission* [2021]eKLR). As already stated, the parameters to be considered in considering the application for extension of time under Rule 4 of the *Court’s Rules* are well settled as the learned Judge rightly observed.
13. Upon considering the evidence before her, we find it difficult to fault the learned Judge for her conclusion that the delay was not explained. Indeed, apart from the letter from Park Eye Centre which was produced, no further evidence was forthcoming and the learned Judge was left with mere averments set out in the affidavit in support of the application, akin to submissions made from the bar. Moreover, the letter from the Park Eye Centre refers to the duration between 28th July 2020 the date of diagnosis, the surgery on 4th September 2020 and the post-surgery sick off ending on 30th October 2020. Again, there is an unexplained gap between the date of issuance of the Certificate of Delay on 29th July 2019 and the date of diagnosis, a period of about 1 year.
14. Additionally, the applicant refers to correspondence between it and the respondent. In the absence of the evidence of response from the respondents, the onus remained on the applicant to discharge the burden of proof to the required standards which it has failed. No such correspondences between the Advocates were annexed despite the deponent making reference to such correspondence. At any rate the said correspondence was only made on 15th January 2021 as stated in paragraph 9 of the affidavit, barely three days to the filing of the application.
15. The irrefutable inference to be drawn is that the unexplained delay was inordinate. This in turn results in injustice and prejudice to the respondent if such delay is excused in the manner in which it has been presented.



16. As for the success of the intended appeal, we have sighted the draft memorandum of appeal. We have also had the advantage of reading the impugned ruling by the High Court. As rightly noted by the learned Judge of Appeal, the applicant's grievance relates to a decision concerning a reference from the taxation of an Advocate-Client Bill of costs and in particular on the instruction fees component. The Taxing Master is clothed with discretion on determining instruction fees within the given parameters set out in the *Advocates Remuneration Order*. The applicant's preliminary objection was not sustained allowing the taxed bill of costs to stand. The applicant's grievance, as discerned from the grounds of appeal, is the exercise of discretion to extend time within which to entertain the reference, the High Court Judge having dismissed the applicant's preliminary objection in that regard.
17. In the end, it is our decision that the reference under Rule 55 of the *Court of Appeal Rules* lacks merit and the same is disallowed with no orders as to costs, the respondent not having participated in the proceedings.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

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

Signed

Deputy Registrar

