



REPUBLIC OF KENYA



**Zaverchand v Guaranty Trust Bank (Kenya) Limited (Civil Application
16 of 2018) [2024] KECA 589 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 589 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 16 OF 2018**

LA ACHODE, JA

MAY 24, 2024

BETWEEN

DINESH KUMAR ZAVERCHAND APPLICANT

AND

GUARANTY TRUST BANK (KENYA) LIMITED RESPONDENT

*((Being an Appeal from the Ruling and Order of the High Court of Kenya at
Nairobi (Grace Nzioka J), given on the 30th of October 2017) in HCC 438 of 2016)*

RULING

1. Dinesh Kumar Zaverchand Jetha (the applicant) filed this Notice of Motion dated 23rd of October 2023, seeking a substantive order that leave be granted for a reference from the decision of a single Judge to a full bench, under Article 57(1)(b) of the [Court of Appeal Rules](#) 2022. Guaranty Trust Bank (Kenya) Limited is the Respondent.
2. The application is premised on the grounds on its face and a supporting affidavit of even date sworn by the applicant.
3. The chronology of the case is that the applicant's current advocates discovered that critical documents attached to the applicants supporting affidavit sworn on the 26th October 2016 and the Replying Affidavit sworn on 11th January 2017 had been inadvertently left out of the Record of Appeal dated 11th January 2018. The applicant sought and was granted leave to file a Supplementary Record of Appeal to include those documents. He however failed to file it. It was further noted that the Record of Appeal was lodged on 25th January 2018, after the statutory time for filing the Supplementary Record of Appeal without requiring leave had lapsed.
4. Subsequently, M/S Andrew & Steve Advocates, the applicant's current advocates notified the Respondent's advocates of their intention to include the missing documents by a letter dated 12th



- November 2022, and inquired whether the Respondent would object. The Respondent replied through a letter dated 16th November 2022, signifying their intention to object to the filing of the Supplementary Record of Appeal.
5. The objection necessitated the filing of the application dated 18th November 2022. The Applicant urged that the mistakes of their Advocates should not limit their ability to seek leave to file their Supplementary Record of Appeal, and that the documents sought to be introduced were not prejudicial to the Respondents. Therefore, in the interest of justice, leave to file the Supplementary Record of Appeal should be granted.
 6. The Respondent opposed the application through a replying affidavit dated 26th January 2023. In their written submissions dated 3rd February 2023, they stated that the application to file the Supplementary Record of Appeal was time barred. That the delay of five years after filing of the Record of Appeal was inordinate and the reasons advanced were not sufficient to justify the granting of leave. The Respondent submitted that the time lapse was sufficient evidence to demonstrate the level of disinterest on the Applicant's part to litigate the matter and the lack of initiative by the Applicant to mitigate, as there was no evidence of the any action to follow up on the suit during that period.
 7. The application dated 8th November 2022 was placed before Hon Ole Kantai JA sitting as a single judge for determination. On 6th October 2023 the learned judge delivered his ruling and held that the explanation provided was not sufficient to justify the omission to comply with the timelines of the initial leave granted on 17th October 2018 to file the Supplementary Record of Appeal. Therefore, the applicant did not deserve the exercise of discretion in his favour. He dismissed the motion and awarded costs to the Respondent.
 8. Consequently, the Applicant filed a Reference dated 23rd November 2023 for the decision of the single judge to be placed before a full bench under rule 57 (1) of the Court of Appeal Rules. However, the Reference was filed outside the seven days statutory time frame. He attributed the delay to late communication by the advocate on record, who was away on leave and only got sight of the instructions on, or about 26th October 2023. In the Reference the applicant outlines his dissatisfaction with the decision of the single judge declining to grant leave to file and serve the Supplementary Record of Appeal.
 9. The Applicant filed submissions dated 15th December 2023, and argued that a delay of 24 days to file the reference was not inordinate or unreasonable, thus the Court should exercise its discretion in his favour and extend time to file the reference. He attributed the delay to his advanced age, which slowed the pace at which he was able to issue instructions. He stated that he issued instructions to his advocate on 19th October 2023 but was only able to appear before the Commissioner for Oaths for execution of the Affidavit on, or about 31st October 2023.
 10. The Respondents did not file any documents in opposition to the Application dated 26th November 2023, nor did they comply with the directions of the Deputy Registrar issued on 8th December 2023, on the mode of disposal of the application. Therefore, the application stands unopposed.
 11. I have carefully considered the arguments in support of the application, those against it and the applicable law. The applicant is essentially seeking extension of time to file a reference of the decision of a single judge to a multiple bench.



He approached the Court under rule 57(1)(b) of the Court of Appeal Rules 2022, which provides that:

“Rule 57(1) Where under the proviso to section 5 of the Act, any person, being dissatisfied with the decision of a single judge-

a.

b. in a civil matter, wishes to have any order,

Direction 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.”

12. It is now settled that extension of time is not an automatic right to a party. Rule 4 of the Court of Appeal Rules, 2022, clothes this Court with the jurisdiction and the discretion to determine whether the extension is deserved. Rule 4 provides that:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

13. In determining whether or not to exercise my discretion in favour of the applicant, I considered factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent, if any, if the application is granted, and whether the matter raises any issues of public importance. See- Paul Wanjobi Methane v Duncan Gichane Mathenge [2013] eKLR.

14. In the end I find that the delay is not inordinate, the reasons proffered by the applicant for the delay are reasonable and there is no indication that the respondent stands to suffer prejudice if the leave is granted. As to whether the reference is arguable that is for the bench that will seized of it to determine. I am therefore, persuaded to exercise my discretion, as I hereby do, in favour of the Applicant and give the following orders:

i. The Notice of Motion dated 23rd October 2023, is allowed.

ii. The timeline for lodging the reference is extended.

iii. The reference shall be placed before 3-Judge bench for determination

iv. There is no order as to costs since the respondent did not participate in the proceedings.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2024.

L. ACHODE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed



DEPUTY REGISTRAR

