Mbugua & 85 others v Ministry of Lands & 59 others (Civil Application E096 of 2023) [2024] KECA 1698 (KLR) (22 November 2024) (Ruling)

Neutral citation: [2024] KECA 1698 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E096 OF 2023

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

NOVEMBER 22, 2024

BETWEEN

PAUL NDIRANGU MBUGUA & 85 OTHERS & 85 OTHERS & 85 OTHERS & 85 OTHERS ..... APPLICANT

AND

THE MINISTRY OF LANDS & 59 OTHERS & 59 OTHERS & 59 OTHERS & 59 OTHERS ..... RESPONDENT

((An application for extension of time to file a memorandum of appeal and record of appeal from the judgment of the Environment and Land Court at Nakuru (D.O. Ohungo, J.) delivered on 25th February 2021 in ELC Case No. 338 of 2014 as consolidated with Nakuru ELC Case No. 334 of 2014)

RULING

1. Before us is a reference to a full Court pursuant to Rule 57 (1) (b) of the Court of Appeal Rules 2022. The respondents seek a variation or reversal of the decision of the single Judge (Korir, JA.) dated 12th April 2024. The Judge heard and determined an application filed by the applicants under Rule 4 of the Court of Appeal Rules. The same sought for extension of time to file and serve the record of appeal out of time. The learned Judge dismissed the application with costs to the 4th to 60th respondents.

2. Aggrieved by the decision of the learned Judge, the respondents, by letter dated 19th April 2024, applied for a reference for determination of the matter by a three-Judge bench of this Court.

3. By way of background, the dispute in the Environment and Land Court, (ELC) related to parcels of land in Moi Ndabi Settlement Scheme. The applicants claimed that they were allocated the disputed parcels of land in the year 1994 and were issued with letters of allotment. They subsequently built permanent and semi-permanent houses. It was their position, which was disputed by the respondents, that the allocation of the same parcels of land to the respondents was irregular and unlawful. This

precipitated the filing of the two suits in the ELC. Upon hearing the parties, the learned Judge dismissed the applicant's case, ELC Case No. 338 of 2014 and allowed the respondent's case.

4. The applicants filed a notice of appeal dated 3rd March 2021 on 5th March 2021. They also wrote a letter dated 8th March 2021 requesting for typed proceedings. The record shows that the parties filed several applications in the ELC. The important point to note is that in the meantime, the time for filing the record of appeal lapsed. This unreservedly led to the filing of the application for the extension of time that is the subject of the impugned ruling.

5. The learned single Judge, upon hearing the parties, was not satisfied that the applicants deserved the Court's exercise of discretion to extend time. It was his finding that the delay of 3 years was inordinate and no plausible reasons were advanced to find that the delay was venial. Resultantly, he dismissed the application which triggered the filing of the reference before us.

6. We have considered the written and oral submissions, the documents as well as the authorities cited by the parties. This application falls under Rule 57 of the Court of Appeal Rules which provides as follows:

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

        a. in a criminal matter, wishes to have his or her application determined by the Court; or

        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.

    2. At the hearing by the court of an application previously decided by a single judge, no additional evidence shall be adduced."

    On the face of it, the rule does not provide the considerations which a full bench should take into account in deciding whether to uphold or rescind the decision of the single Judge. However, many have walked down this path over the years and reasons that a full bench should consider are now well settled. In determining a reference under Rule 57 of this Court's Rules, the guiding star at all times is that the full bench has to take into account that the mandate under Rule 4 is discretionary, unfettered, and does not require the establishment of sufficient reasons. The discretion given to a single Judge is unfettered, there is no limit to the number of factors that the Judge should consider so long as they are relevant to the issues falling for consideration before the Court.

7. In an application for reference as the one before us, a full bench would only interfere with the exercise of such discretion if it is apparent that the single Judge took into account an irrelevant matter, which he or she ought not to have taken into account, or failed to take into account a relevant matter; or that there was misapprehension of the law applicable, and the evidence presented; or that his or her decision was plainly wrong.

8. The above position was reiterated by this Court in African Airlines International Ltd vs. Eastern & Southern African Trade & Development Bank (PTA BANK) eKLR where the Court stated inter alia:

    > "It is thus clear that the learned judge failed to consider all the necessary factors before he exercised his discretion to refuse an extension of time. That being so, we now turn to consider whether we should interfere in any way with the exercise of that discretion.

Since the grant of the extension is discretionary, this Court would not normally interfere with the exercise of that discretion. The circumstances in which this Court will disturb the exercise of a discretion of a trial judge were stated by the Court of Appeal for East Africa in the case of Mbogo v Shah [1968] EA 93 which has been applied on numerous occasions by this Court. In his judgment in that case Sir Clement de Lestang VP said at page 94:

"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

Applying these principles to the present case, we are satisfied that this is one of those cases where, with the greatest of respect, we have no hesitation in interfering with the exercise of the discretion of the learned judge."

9. In the case of *John Koyi Waluke vs. Moses Masika Wetangula & 2 others, Civil Appeal Application No. 307 of 2009*, (unreported), the Court pronounced itself on the same issue 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... 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."

10. Taking into account the principles that this Court should consider before interfering with the decision of a single Judge, we now turn to the reasons that have been advanced by the applicants. The applicants do not deny that there was a delay but contend that it was 1 year and 3 months and not 3 years as was contended by the respondents. In their written submissions dated 11th November 2024, the applicants submitted that the learned single Judge misapprehended the evidence that was presented to explain the delay and as a consequence, he arrived at an erroneous decision. The applicants maintain that the delay was satisfactorily explained and that we should reverse the decision of the single Judge.

11. The main issue that was before the single Judge was whether there was inordinate delay on the part of the applicants. We have carefully read the ruling of the single Judge. The learned Judge took into account the four reasons that had been advanced by the applicants namely; that the application for stay took a long time to determine; that there was a delay in supply of the typed proceedings;, that the local leadership had engaged in the parties in resolving the dispute; and that the parties tried to reach a consent in court in filing the record of appeal out of time.

12. Having considered the arguments by the parties and the decision of the learned Judge, the question that we should now answer is: did the single Judge consider any irrelevant matters or disregard any relevant matters that would have influenced his decision? We note that the single Judge extensively examined all the reasons that had been advanced for and against extension of time. It is important for parties to note that the test in a reference is whether the single Judge exercised the discretion donated

by Rule 4 properly. If we are satisfied that the learned Judge considered all the relevant matters; that no irrelevant matters were considered, and that the decision is not plainly wrong, then there is no basis for disturbing such a decision.

13. We are satisfied that the learned Judge acted within the parameters set in exercising discretion. There is no basis for interfering with his decision. Therefore, this reference is devoid of merit and is hereby dismissed with costs to the 4th -60th respondents.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF NOVEMBER 2024

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb.

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR