



**JMM v GNJ (Civil Appeal (Application) E014 of 2022)  
[2023] KECA 99 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 99 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E014 OF 2022  
HM OKWENGU, LA ACHODE & JM MATIVO, JJA  
FEBRUARY 3, 2023**

**BETWEEN**

**JMM ..... APPELLANT**

**AND**

**GNJ ..... RESPONDENT**

*(Being a reference under Rule 55 of the Court of Appeal Rules, 2022 from  
the Ruling of a single Judge (Sichale, J.A.) dated 3rd December, 2021)*

**RULING**

1. On December 3, 2021 a single judge of this court (Sichale, JA) dismissed an application dated May 24, 2021 in which the applicant was seeking leave for her appeal to be admitted out of time and costs of the application to be in the cause. Aggrieved by the dismissal, by a letter dated December 7, 2021 the applicant initiated this reference to have the said decision placed before a full bench under rule 55 of the then [Court of Appeal Rules, 2010](#) (now rule 57 of the [Court of Appeal Rules, 2022](#)).
2. In support of the reference, the applicant's counsel Mr Mutunga submitted that the case involved division of matrimonial property in which the court at Kajiado contrary to this court's precedent set aside the court's decision that article 45(3) of the [Constitution](#) does not mean parties will share matrimonial property equally upon dissolution of the marriage. Counsel argued that the applicant lodged a notice of appeal and requested for typed proceedings on the December 13, 2019 two days after the delivery of the judgment signifying her eagerness to appeal. He attributed the failure to pursue the court proceedings at Kajiado to the Covid-19 movement restrictions which limited movements to essential service providers only. Counsel faulted the learned Judge for raising the issue of the certificate of delay, 15 months after the delivery of the judgment.
3. To buttress his argument, he cited this Court's decision in [Hezekiah Michoki v Elizaphan Onyancha Ombongi](#) [2015] eKLR that a full bench must bear in mind that the single Judge was exercising



- unfettered discretion, though exercisable judicially, and it has to be shown that the single Judge took into account irrelevant factors or failed to take into account relevant factors and that the Judge failed to apply correct principles to the issue at hand, or taking into account all the circumstances of the case, his decision was plainly wrong.
4. Further, counsel submitted that the single Judge took into account irrelevant factors because lack of a certificate of delay is not a sufficient factor for consideration when determining a litigant's rights in court. To him, the single Judge not only failed to appreciate the facts involved but she also ignored a letter written by the Judiciary's I department admitting the mistake and giving the advocate a new password. To him, denying the applicant an opportunity to ventilate her case due to problems attributed to the Judiciary's Information and Communication Technology (ICT) system is a perpetuation of unfairness.
  5. Lastly, counsel submitted that no prejudice will be suffered by the respondent if the extension is granted. He relied on *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR in which this court (Nambuye, JA) allowed extension of time where the delay was 14 months which he argued is comparable to the instant case.
  6. Mr Shadrack Wambui, the respondent's counsel submitted that because the single Judge was exercising discretion, the question is whether the discretion was improperly exercised. To him, the single Judge took into account all the relevant matters and properly found that a delay of 15 months was inexcusable. He submitted that the applicant's argument that she did not have a car is new evidence as it was not raised during the hearing of her application, so it offends rule 57 of the *Court of Appeal Rules, 2022*. He cited *William Njibia Kimani v Francis Waweru Mbocho* [2020] eKLR in which this court cited *Donald O Raballa v Judicial Service Commission & another* [2018] eKLR which held that the onus of demonstrating that the single Judge took into account irrelevant factors or failed to take into account relevant factors or misapprehended or failed to properly appreciate points of law or fact applicable to the issues at hand, or that the decision on the available evidence and law is plainly wrong, lies on the applicant. He submitted that the decision arrived at by a single judge in exercise of discretion under Rule 4 ought not to be easily dislodged unless the above factors are established.
  7. Further, Mr Wambui cited *Eva Wangui Murua v Kigerua Motors & 3 others* [2020] eKLR in support of the proposition that a reference is not an appeal against the ruling of the single Judge and it matters not that the full court could have arrived at a different result had it heard the matter. He relied on *Ethics and Anti-Corruption Commission v George Joshua Okungu & 3 others* [2020] eKLR in support of the holding that in dealing with a reference, the full court is not concerned with the merits of the decision because it is not sitting on appeal against the decision, rather the full court is only required to investigate whether or not the single judge misdirected himself on matters of fact or law in exercising his unfettered discretion. Lastly, counsel cited this court's holding in *Phillomena Mwangeli Nicholas v National Police Service Commission* [2021] eKLR that in considering whether or not the exercise of judicial discretion by the single Judge should be interfered with, the court does not substitute its discretion for that of the single Judge, but has to consider whether that discretion was exercised judicially.
  8. Undeniably, the authorities cited by the respondent's counsel and the decision in *Hezekiah Michoki v Elizaphan Onyancha Ombongi* [2015] eKLR cited by the applicant's counsel represent the law and the applicable principles in determining applications of this nature. Both parties were in agreement that the single Judge in rendering the ruling under rule 4 of this court's *Rules* was essentially exercising unfettered judicial discretion. Also, both parties were in agreement on the circumscribed circumstances under which this bench can interfere with the decision of a single judge. Their point of divergence is whether in the circumstances of this case there is any basis for this court to interfere with the single judge's decision.



9. The discourse of exercise of judicial discretion reminds us the words of Benjamin Cardozo, in his seminal work "*The Nature of the Judicial Process*" New Haven: Yale University Press, 13<sup>th</sup> Edn 1946 pg 141 who opined that a Judge derives his strength from hallowed principles. He wrote:

“... The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains....” (Emphasis added)

10. In the simplest terms, judicial discretion is the exercise of judgment by a Judge or court based on what is fair under the circumstance and guided by the rules and principles of law. The exercise of discretion may either be judicial or judicious. It is judicial, if it is exercised in accordance with the enabling statutes while it is judicious when it carries or conveys the intellectual wisdom or prudent intellectual capacity of the judge. However, whichever of the two approaches, the exercise must be based on a sound and sensible judgment with a view to doing justice to the parties. (See Aduaka, Charles E, *Judicial Discretion and its application under the Nigerian Legal System*, International Journal of Innovative Legal & Political Studies 6(4):38-49, Oct-Dec, 2018)
11. Therefore, discretion is that freedom or power to decide what should be done in a particular situation. The general meaning of the word “discretion” includes analysis, appraisal, assessment, choice, consideration, contemplation, designation, determination, discrimination, distinction, election, evaluation, examination, free decision, free will, freedom of choice, liberty of choosing, liberty of judgment only to mention but some. Judicial discretion then is the exercise of judgment by a Judge or court based on what is fair under the circumstances and guided by the rules and principles of law. Every discretion be it judicial and judicious must be based on prudence, rationality, sagacity, astuteness, considerateness and reasonableness. There is no hard and fast rule as to the exercise of judicial discretion by a court because if it happens then, discretion will become fettered.
12. There is always the need for a court exercising discretion to give reasons in justification of the exercise. There can hardly be any justifiable reason for exercising discretion upon imprecise facts. It is the nature and strength of facts made available to the court that provide the tonic for the proper exercise of discretion. Admittedly, the exercise of discretion upon known facts involves the balancing of a number of relevant considerations upon which opinions of individual judges may differ as to their relative weight in a particular case. But that will not necessarily affect the justness of the exercise of the discretion, so long as the facts are available and reasonably appreciated.
13. Now, the question is whether the single Judge properly exercised her discretion. A preview of the impugned ruling will assist in appreciating whether there is any merit in the applicant’s invitation to this Court to interfere with the ruling. In the ruling, the single Judge observed as follows:

“The applicant’s motion is brought, under rule 4 of this court’s Rules. The said Rule provides:

“4. Extension of time 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 of 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.”

The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No Nai 251 of 1997* where the court stated:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons 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.”

In the instant case, the impugned judgment was delivered December 11, 2019 whereas the appeal and the instant application was filed on May 24, 2021 approximately 15 months after the appeal was due for filing. The delay herein therefore is certainly inordinate. The applicant contends that the delay in filing the appeal was due to technological challenges posed by Covid- 19 directions on filing of appeals and other suits and delay in receiving the typed proceedings. It is imperative to note that the applicant has not disclosed when the proceedings became ready and neither has she annexed a certificate of delay to the application.

Be that as it may, save for a letter dated December 13, 2019 requesting for proceedings, there is no other evidence on record to show the steps taken up by the applicant to follow up on the proceedings. The contention by the applicant that she had requested for typed proceedings but they delayed for the reason that there was no enough staff to handle most of the work due to Covid-19 is not supported by any evidence, as indeed this Court is aware that notwithstanding the challenges posed by Covid-19, court operations were still ongoing albeit on a limited scale. Similarly, the contention by the applicant that the e filing portal was non responsive is not supported by any evidence since the applicant only complained on November 2, 2020, 11 months after the impugned Judgment had been delivered and there is no evidence on record to show that she had tried to file the appeal at any other time and failed.

On the other hand, the respondent contended that certified copies of the proceedings were ready on May 19, 2020 a fact that has not been controverted by the applicant and it has not been shown to the satisfaction of this Court, the steps that the applicant took from May 19, 2020 when the proceedings were said to be ready up to July 7, 2021 when memorandum of appeal and record of appeal were prepared.

From the circumstances of this case and in my considered opinion, the delay herein is inordinate and unreasonable and the same has not been explained to the satisfaction of this Court.

Taking into totality all the circumstances in this case, I find that the applicant has not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of the court as laid out in *Leo Sila Mutiso case (supra)*, to extend time and therefore decline to extend time within which to file the appeal.”



14. In determining this reference, this Court is not sitting on appeal nor can it purport to replace the findings of the single Judge even if it had heard the application it would have arrived at a different conclusion. A discretionary order can only be justifiably disturbed if the court acts capriciously or in disregard of any legal principle in the exercise of its discretion.
15. A reading of the above excerpt leaves no doubt that the single Judge properly appreciated the facts before her, took into account all the relevant facts and correctly applied the law to the facts and properly exercised her discretion. Notably, the applicant never annexed a copy of the certificate of delay. This is one of the reasons upon which the application collapsed. Also, there is uncontroverted evidence that the proceedings were ready as at May 19, 2020 yet the applicant filed her application on May 24, 2021. The learned Judge correctly found that this delay was inordinate.
16. The approach is that the single Judge has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness and the explanation therefore only to mention but some. What is needed is an objective conspectus of all the facts. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. The omission to obtain a certificate of delay which helps the court to determine the period required for the preparation of the record is also fatal. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.
17. We have carefully read the ruling by the single judge. We find no basis upon which we can disturb the decision of the single Judge. This reference lacks merit. We therefore dismiss it with costs to the respondent.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

