Abdalla & another v Temo & 6 others (Civil Application 4 of 2021) [2023] KECA 774 (KLR) (23 June 2023) (Ruling)

Neutral citation: [2023] KECA 774 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION 4 OF 2021

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

JUNE 23, 2023

BETWEEN

SWAFIYA ABDALLA ..... 1ST APPLICANT

FATUMA SWALEH ..... 2ND APPLICANT

AND

BAHATI TEMO ..... 1ST RESPONDENT

WILLIAM MJAPE ..... 2ND RESPONDENT

STEPHEN KAHINDI MWANZANI ..... 3RD RESPONDENT

CHARLES CHARO ..... 4TH RESPONDENT

JOHNSON KOYA ..... 5TH RESPONDENT

KESI MJAPE ..... 6TH RESPONDENT

ROBERT LUGO ..... 7TH RESPONDENT

(Being a reference application arising from a decision by Hon Justice Lesiit dated 18th February, 2022 extending time to file an application to strike out the Notice of Appeal and Record of Appeal from the ruling and order of Hon Justice C. Yano delivered on the 11th day of April 2018 in Mombasa ELC Case No 155 of 1993)

RULING

1. In a ruling dated February 18, 2022, the learned single judge of this court (Hon Lady Justice Lesiit, JA) dismissed the applicants' notice of motion dated January 11, 2021. By the said motion, the applicants sought that time to move the court to strike out the joint notice of appeal dated June 4, 2019 and filed on June 7, 2019, and the record of appeal filed on June 27, 2019 be extended *ex-debito justitiae*, and to have the application filed alongside this application to be deemed to be duly filed. Secondly, they

sought appropriate directions on the hearing of the application to strike out the joint notice of appeal alongside the reference in Mombasa CA Civil Application No 5 of 2019 be given.

2. In dismissing the said application, the learned single judge found that the applicants failed to give a reasonable and plausible explanation for the delay in making an application to strike out the notice and record of appeal. In the learned single judge's view, if there were any extenuating circumstances that could enable the court exercise its discretion in favour of the applicants, they should also have been disclosed. Having considered the length of the delay involved and the applicants explanation for the delay, the learned single judge found that the applicants failed to satisfy the required threshold for the exercise of discretion in their favour.

3. The applicants herein being aggrieved by the said decision preferred a reference dated February 18, 2022 to the full bench as they are entitled to pursuant to rule 57 of the *Court of Appeal Rules, 2022*. We heard the reference vide the court's virtual platform on February 27, 2023 during which Learned Counsel Mr S M Kimani appeared for the applicants while Mr Tamini Lewa appeared for the 1st, 2nd 6th and 7th respondents. Both counsel relied on their written submissions which they highlighted before us. In this reference it is contended that the learned single judge ought to have adjourned the application for consideration alongside the reference in Civil Application No 5 of 2019 or ought to have extended time so that the application for striking out the notice and record of appeal would be heard together with the aforesaid reference. According to the applicants since not all applicants in the said reference were named as appellants in both the notice and record of appeal, lodged in Mombasa Civil Appeal No 85 of 2019, time could not start running for the purposes of rule 85 (now rule 86) of this Court's Rules hence the applicants' right to move the court to strike out the notice and record of appeal has neither crystallised nor dissipated. It was submitted that the application ought to have been allowed in order to afford an opportunity to the unnamed applicants to appear in court and give their story. Thus, it was submitted, the single judge denied the 3rd, 4th and 5th respondents a right to be heard in an appeal filed with leave granted to them as "corporate" body of applicants. It was urged that the learned single judge ought to have considered the effect of the success of the reference in Civil Application No 5 of 2019 on the ruling.

4. In his oral highlight, Mr Kimani took issue with the statement in the ruling that the application for striking out ought to have been made within 60 days instead of the prescribed 30 days from the date of service of the notice and record of appeal. In his view, this incorrect statement of the law ought to be taken into account in determining the basis upon which the learned single judge interpreted the matter before her. According to him the learned single judge ought to have adjourned the matter to full court which was seized of the reference in Civil Application No 5 of 2019 and Civil Appeal No 85 of 2019.

5. In opposing the reference, Mr Lewa submitted that he had no instructions to act for the 3rd, 4th and 5th respondents. It was submitted on behalf of the 1st, 2nd, 6th and 7th respondents that there is no proper reference before the court because the court filing fees was not paid on the same date that the reference was made. In support of their submissions the said respondents relied on *Charles Onyinge Abuso vs Kenya Ports Authority & another* [2018] eKLR and *Mario Rossi vs Salama Beach Hotel Limited* [2018] eKLR.

6. It was the said respondents' case that the reference was lacking in merit as the learned single judge correctly exercised her inherent discretionary jurisdiction in arriving at her decision. We were therefore urged to dismiss the reference with costs.

7. We have considered the submissions made by the parties in this reference. Rule 57(1)(b) of the *Court of Appeal Rules, 2022* 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."

8. It is therefore clear that an application for reference may either be made informally at the time the decision is made or in writing within seven days hereafter. It follows that it is not necessarily fatal to the application that payment is not made at the time that the application is made since such an application may even be made orally immediately after the decision is made. Accordingly,we find no merit in the objection that the reference was made out of time due to non-payment of the filing fees.

9. As regards the issues raised by the applicants, the learned single judge in his decision under challenge found that the applicants had failed to satisfactorily explain the reasons for the delay in making the application to strike out the notice and record of appeal. According to the applicants, though leave was given to 7 applicants, only 4 of them acted thereon hence they could not move to have the notice and record of appeal struck out before the other applicants also filed their notice of appeal.

10. Under rule 84 of the *2010 Court of Appeal Rules*, any person affected by an appeal may apply to strike out notice of appeal or appeal on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. However, the proviso to rule 84 required such an application to be brought before the expiry of thirty (30) days from the date of service of the notice of appeal or record of appeal as the case may be. Similar provisions are now found in rule 86 of the 2022 Rules. In this case, it is not contested that the motion seeking to have the notice and record of appeal were filed way out of time. It was therefore necessary, if that motion was to succeed to have the time prescribed for making the application extended. We, just like the learned single judge, find the reason given (that an applicants were waiting for all the respondents to file their notice and record of appeal), untenable. The Rules state in mandatory terms that the application must be filed within 30 days of service of the notice or record of appeal. This rule was introduced in the Rules to avoid the filing of such applications very late in the day when the appeal has been pending for years thereby causing injustice to the appellants who would have to make a fresh start having been lulled into a false sense of security that no issue would be taken regarding the competency of the notice of appeal or record of appeal. The timelines for making applications to strike out the notice or record of appeal are therefore meant to expedite the steps to be taken in the appeals. They should therefore be adhered to scrupulously by the parties. As was held by this court in *Onjula Enterprises Ltd vs Sumaria* [1986] KLR 651, the Court of Appeal held that:

> " The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See London Association for the Protection of Trade & Another vs Greenlands Limited [1916] 2 AC 15 at 38."

11. As Kiage, JA appreciated in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR:

> " This court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

12. The applicants have introduced another angle to the matter by submitting that the fact that the other applicants in whose favour leave was granted have not complied with the order means that the time for filing an application to strike out the notice and record of appeal is yet to start running. If that position is correct, and we are not properly seized of the matter, then the application by the applicants for extension of time would have been unnecessary and premature and a candidate for dismissal. In other words, that argument is self-defeatist.

13. On the issue that the ruling referred to 60 days instead of 30 days, nothing turns on it. That must have been a typing error and it did not prejudice the Applicant. To the contrary had the court been of the view that the period required was 60 days it would have been to the benefit of the applicants. Regarding the denial of an opportunity to be heard by the 2nd, 4th and 5th respondents, it is for the said parties to move this court if they feel that such opportunity has not been availed to them. It does not lie in the mouths of the applicants to purport to "hold their brief". On the issue of the failure to adjourn the matter to full court, that is an exercise of discretion and as the learned single judge was properly seized of the matter before her, we cannot fault her for proceeded in the manner she did.

14. We have considered the submissions of learned counsel in this reference. 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 vs 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."

15. The learned single judge found, rightly in our view, that reasons for not taken steps within the prescribed time, was not plausible. In the premises, we have not been satisfied that in arriving at her decision, the learned 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; or 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.

16. We dismiss the reference with costs to the respondents.

17. It is so ordered

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JUNE, 2023

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR