



REPUBLIC OF KENYA



KENYA LAW

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**Heldo Foodstuff Ltd v Kiptugen & 6 others (Civil Application
E168 of 2021) [2023] KECA 919 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 919 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E168 OF 2021

FA OCHIENG, LA ACHODE & WK KORIR, JJA

JULY 28, 2023

RULING OF THE COURT ON REFERENCE TO FULL BENCH

BETWEEN

HELDO FOODSTUFF LTD APPLICANT

AND

DAUDI KIPTUGEN 1ST RESPONDENT

COMMISSIONER OF LANDS 2ND RESPONDENT

CHIEF LAND REGISTRAR, NAIROBI 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

**COUNTY DISTRICT LANDS REGISTRAR, UASIN GISHU
COUNTY 5TH RESPONDENT**

**HARON CHEPKILOT KIPSANG T/A HELDO FOODSTUFF 6TH
RESPONDENT**

**SILAS KIPTUI KIPCHILAT (ACTING AS THE PERSONAL
REPRESENTATIVE OF THE ESTATE OF THE LATE LEAH JELAGAT
KIPCHILAT) 7TH RESPONDENT**

(Being a reference from the decision of (P. O. Kiage, JA) dated 28th April 2022)

RULING

RULING OF THE COURT ON REFERENCE TO FULL BENCH

1. This reference is brought under rule 57 of the *Court of Appeal Rules*, 2022. The reference arises from the ruling of Kiage, JA dated April 28, 2022. In the said ruling, the learned Judge of Appeal dismissed an



application brought under rule 4 of the *Court of Appeal Rules*, 2010 by the applicant, Heldo Foodstuff Limited, through which leave was sought for the filing of a memorandum of appeal out of time against the judgment of Ombayo, J dated January 27, 2021 in Eldoret ELC Case No 787 of 2012.

2. In dismissing the application for extension of time, the learned Judge of Appeal expressed himself as follows:

“To my mind, the reasons advanced for the inordinate delay are unsatisfactory and inexcusable. Counsel had numerous occasions to follow up on the matter, if he so wished, but failed to do so. It seems like both parties were satisfied with writing letters and leaving the onus of following up on their issue to the Deputy Registrar. Counsel seems to rely upon the certificate of delay as evidence that the delay was occasioned by them. However, the purpose of a certificate of delay as envisioned by rule 82(1) of the *Rules* is to compute the amount of time taken by the Superior Court in the preparation of proceedings not as evidence of how much time it took for a party to collect the said proceedings I believe a little vigilance on their part would have prevented them from being in this predicament. The delay was therefore not occasioned by the registry ...

I find that the delay is not only inordinate but the reasons given are unsatisfactory and not plausible. Thus, the applicant is undeserving of this relief.”

3. The facts leading to the motion for extension of time have been succinctly summarized in the ruling of the learned Judge. To give this ruling a contextual background, the impugned judgment was delivered on January 27, 2021. Counsel now on record held brief for the applicant's former advocates, and filed a letter on February 15, 2021 bespeaking the proceedings at the Environment and Land Court. Later, on July 7, 2021, the applicant's counsel officially came on record. On September 7, 2021 counsel wrote a reminder to the Deputy Registrar inquiring about the status of the proceedings. According to counsel, there was no response to the letter. On November 1, 2021, counsel received a hearing notice for Eldoret Civil Appeal No E304 of 2021 that had been filed by the 6th respondent, Haron Chepkilot Kipsang T/A Heldo Foodstuff.
4. Upon receiving the hearing notice, the applicant tried to reach his former advocates in a bid to establish whether they were served with the notice of appeal and record of appeal to no avail. Counsel then wrote a complaint letter to the Deputy Registrar which was received on November 9, 2021 and at the same time sought a certificate of delay which was later issued.
5. The 6th respondent opposed the application for extension of time stating that the typed proceedings were ready for collection by February 24, 2021 and therefore, the applicant could have been aware of the readiness of the proceedings had the applicant's counsel followed up on the proceedings.
6. This reference was canvassed by way of written submissions with Mr Nabasenge appearing for the applicant while Mr Arusei appeared for the 6th respondent. Mr Korir represented the 1st respondent, Daudi Kiptugen. There was no appearance for the 2nd, 3rd, 4th, 5th and 7th respondents being the Commissioner of Lands; the Chief Land Registrar, Nairobi; the Hon. Attorney General; the County District Land Registrar, Uasin Gishu Eldoret and Silas Kiptui Kipchilat (Acting as the Legal Personal Representative of the Estate of the late Leah Jelagat Kipchilat).
7. Submitting in support of the reference, Mr Nabasenge pointed out that this reference was pegged on grounds that there was an existing appeal by the 6th respondent on the same judgment and therefore the appellant was not precluded from lodging an appeal since rule 106 of the 2022 of the *Rules of this Court* provides for the consolidation of appeals. According to counsel, since the applicant was a party to the



already existing main appeal, there was no effluxion of time as the appeal was yet to be heard on merit and the applicant being a respondent in that appeal will be affected by its outcome. Counsel submitted that the delay was occasioned by the Environment and Land Court registry due to the scaled down operations. He further submitted that the reason and length of the delay was occasioned by the Deputy Registrar who failed to notify the applicant's advocates of when the proceedings were ready. Counsel urged that no prejudice would be suffered by the other parties if the applicant was allowed to lodge his appeal and have the same consolidated with that of the 6th respondent. Counsel cited [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR, [Thuita Mwangi v Kenya Airways Ltd](#) [2003] eKLR and [John Koyi Waluke v Moses Masika Wetangula & 2 others](#) [2010] eKLR to highlight the factors to be considered when dealing with an application for extension of time and the circumstances under which a full bench may interfere with the decision of a single judge. Counsel additionally submitted that the learned Judge of Appeal failed to appreciate that there was an appeal already filed by one of the respondents in which the applicant was named as a respondent and which appeal was yet to be heard and determined. According to counsel, the applicant being a party to the pending appeal should be given an opportunity to ventilate its grievances as an appellant. Mr. Nabasenge also asserted that the single Judge had failed to consider the fact that the intended appeal has a high probability of success. Counsel concluded his arguments by asking us to allow this reference.

8. In opposition to the reference, Mr Arusei for the 6th respondent relied on the case of [Simeon Okingo & 4 others v Benta Juma Nyakako](#) [2021] eKLR to identify the threshold that must be met before the full bench can interfere with the exercise of discretion by a single Judge. Counsel submitted that the present reference fell short of meeting that threshold as it did not show either that the learned Judge took into account an irrelevant factor or misapprehended the evidence or the law. Mr. Arusei also referred to the case of [Nicholas Kiptoo Arap Korir Salat](#) (*supra*) to submit that the delay by the applicant was inordinate and the explanation tendered for the delay unsatisfactory. Counsel contended that the applicant failed to diligently follow up on the matter and therefore, they cannot be pardoned for indolence. Counsel consequently urged us to find that the learned Judge of Appeal judiciously exercised his discretion and dismiss the reference with costs.
9. Mr Korir for the 1st respondent did not file any submissions but indicated to the Court during hearing that he was opposed to the application. He associated himself with the submissions by Mr Arusei for the 6th respondent. The 2nd, 3rd, 4th, 5th and 7th respondents did not file any submissions in this matter.
10. We have duly considered the application before us as well as the submissions by counsel. This being a reference, we are aware that we are not sitting on appeal against the decision of the single Judge. Under rule 4 of the [Court of Appeal Rules](#), a single judge of this Court sits and exercises unfettered discretion on behalf of the Court and which discretion is exercised in line with the principles of law applicable to the exercise of discretion. A reference not being an appeal, the fact that the full Court would have exercised discretion differently is not a sufficient ground for interfering with the decision of a single Judge. Instead, an applicant desirous of getting different results from a full bench on reference must show either that the single Judge considered an irrelevant factor, or overlooked a relevant factor, or misapprehended the law or legal principles. The principles governing a reference such as the one before us have been previously captured in several decisions of this Court including [John Koyi Waluke](#) (*supra*) where it was stated that:

“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.”

11. Having established the law applicable to references, the key question is whether a case has been made for our interference with the decision of the single Judge. In addressing this issue, we wish to first restate the factors that are taken into account in an application under rule 4. From the impugned ruling of the learned single Judge, we note that the Court while referring to the case of *Muringa Company Limited v Archdiocese of Nairobi Registered Trustees* [2020] eKLR appreciated the inexhaustive list of factors to be taken considered in an application for extension of time. In the cited case W. Ouko, (P), JA (as he then was) stated that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In considering the last principle, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”

12. In *Thuita Mwangi (supra)*, this Court stressed that the factors to be taken into account are not limited because limiting the factors to be considered would amount to fettering the discretion of the single Judge which is not fettered in any way.
13. We have gone through the ruling of the learned single Judge, and it appears to us that the application which is the subject of this reference was dismissed on the single ground that there was unsatisfactory explanation by the applicant of the inordinate delay. Nowhere in that ruling did the single Judge address any other issue. We are aware that under rule 57(2) of the *Court of Appeal Rules, 2022*, this Court sitting on a reference does not take any additional evidence. Being guided by this, we note that in affidavits sworn by counsel and the applicant in support of the application for extension of time, the applicant brought to the attention of the learned single Judge the existence of an appeal lodged by the 6th respondent arising from the judgment the applicant desired to appeal against. The applicant further averred that it had been listed as a respondent in the said appeal and it was upon being served with a hearing notice for that appeal that it got to learn that the record of appeal was ready. These averments by the applicant as to the existence of an appeal on the same matter lodged by the 6th respondent was not rebutted by the 6th respondent at all despite having actively participated in the application for extension of time. In our view, the existence of this set of facts was enough to invoke the single Judge’s curiosity as to whether there would have been any prejudice to be suffered by any of the parties if the



application was allowed. As already stated, among the factors to be taken into account in determining an application for extension of time is whether any of the parties will be prejudiced.

14. Failure to consider a relevant factor as was the case in the instant reference is a good ground for interfering with a single judge's discretion. For instance, in *John Koyi Waluke (supra)*, the full bench in allowing a reference from the decision of the single Judge held that:

“The issue of untruthful affidavit had been raised before the learned single judge but it appears that he never considered that point. We do not think the learned judge would have granted the application if he had considered the fact that the affidavit in support of the application which was intended to explain the reason for the delay was untruthful. An application seeking exercise of the court's discretion must be supported by an honest explanation. It is a serious matter to mislead the court by untruthful affidavits.”

15. In the case before us, considering the fact that there is already another appeal lodged by the 6th respondent against the impugned judgment of the Environment and Land Court, it would only be in the interest of justice that the applicant be allowed to pursue the intended appeal and probably have it consolidated with the appeal already properly lodged. It would be prejudicial to the appellant if, albeit entering the appellate stage late, he is denied an opportunity to prosecute his intended appeal while also responding to the appeal lodged by the 6th respondent or any other party for that matter. On the other hand, the 1st and 6th respondents have not alluded to any possible prejudice that they would suffer if this application is allowed. In our own view, there would be no prejudice if the intended appeal is argued on the same table alongside the other appeal already on record. We think this was an important consideration worth taking into account while determining the application for extension of time. After all, the factors to be taken into consideration when determining an application for extension of time have to be weighed holistically so that at the end of the day the discretion granted to the single Judge will be deemed to have been exercised judicially. Indeed, allowing the applicant to file an appeal out of time will give the bench that will hear the appeals an opportunity to fully and finally address the issues arising from the decision of the Judge of the Environment and Land Court.
16. For the stated reason, we find that the applicant has convinced us that we should interfere with the discretion of the single Judge. Consequently, we allow the reference. The order of the learned Judge made on April 28, 2022 dismissing the applicant's application for extension of time is hereby set aside and substituted with an order granting leave to the applicant to file and serve a memorandum of appeal and a record of appeal out of time against the judgment and decree delivered on January 27, 2021 in Environment and Land Court Case No 787 of 2012 (formerly High Court Civil Case No 213 of 2011). Further, the memorandum of appeal filed and lodged on November 7, 2021 is deemed as duly filed. The prayer for consolidation of the appeals is declined for the reason that it is not within the purview of rule 4 of the *Rules of this Court*. The applicant will be at liberty to pursue this prayer subsequently.
17. For the avoidance of doubt, the final orders of this Court are as follows:
- i. That the applicant is hereby granted leave to file and serve a memorandum of appeal and record of appeal against the judgment and decree in Eldoret ELC No 787 of 2012 out of time;
 - ii. That the memorandum of appeal filed on November 7, 2021 be deemed as duly filed;
 - iii. That the applicant do file and serve the record of appeal within 7 days of this ruling;
 - iv. That the costs of this reference and the notice of motion be in the cause.

It is so ordered.



DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF JULY 2023

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR

