Iraru (As legal representative of the Estate of Habel Iraru Okimaru) v Wanjala (As legal representative of the Estate of David Wanjala Welime) (Civil Application 142 of 2021) [2023] KECA 1094 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KECA 1094 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION 142 OF 2021

PO KIAGE, M NGUGI & JM NGUGI, JJA

SEPTEMBER 22, 2023

BETWEEN

GEORGE OKIMARU IRARU (AS LEGAL REPRESENTATIVE OF THE ESTATE OF HABEL IRARU OKIMARU) ..... APPLICANT

AND

D MARGARET WELIMA WANJALA (AS LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID WANJALA WELIME) ..... RESPONDENT

(Reference from a ruling of the single judge (Tuiyott, J.A) dated 11th March, 2022 on an application for extension of time to file and serve a Notice of Appeal against the order of the High Court of Kenya at Bungoma (Mukunya, J.) dated 29th May 2017 in HCC Suit No. 128 of 1994)

RULING

1. By a Notice of Motion dated October 8, 2021, the applicant sought leave to file an appeal out of time against the order of Mukunya, J. The application was heard by a single Judge, Tuiyott,J.A, who, in his considered ruling delivered on March 11, 2022, dismissed the application. The applicant, being dissatisfied with that decision, sought reference from that decision to the full Court vide a letter dated March 16, 2022, pursuant to rule 57 (1)(b) of the *Court of Appeal rules*, 2022.

2. This Court has on many occasions pronounced itself on circumstances that warrant interference with the exercise of a single judge's discretionary powers under rule 4. In *Donald O. Raballa v Judicial Service Commission & another* [2018] eKLR, it stated;

> "The reference is, of course, not an appeal and we may only interfere with the exercise of the wide discretion bestowed on a single Judge under rule 4 of the rules on the basis of sound principles. These in substance are that the single Judge took into account an irrelevant factor which he ought not to have taken into account or that he failed to take into account

a relevant factor which he ought to have taken into account; that he misapprehended or not properly appreciated some point of law or fact applicable to the issues at hand; or that the decision on the available evidence and law is plainly wrong. The onus of demonstrating the breach of any or all such principles is on the applicant." (See also *Lingam Enterprises Limited & 4 others v Radio Africa Limited* [2015] eKLR).

3. On the face of the motion seeking extension of time, and the affidavit sworn in support thereof, the applicant narrated the history of the matter at length and attributed his failure to file the appeal timeously to lack of funds. He claimed that when his application was dismissed on May 29, 2017, he applied for proceedings and received the same on June 22, 2017. Further, he took the proceedings to his advocate so that he could initiate the appeal process, but the advocate demanded legal fees of Kshs.100,000 which amount he could not raise. The applicant alleged that later he learnt that Mr. Ocharo, advocate, handled pro bono matters and so he approached him and he accepted to take over the case. The applicant contended that the intended appeal has a real chance of succeeding.

4. During the hearing, learned counsel, Mr. Angima, appeared for the applicant and sought to rely on his written submissions. There was no appearance for the respondent though served with the notice for the hearing.

5. We referred Mr. Angima to the finding of Tuiyott, J.A at paragraph 10 of the ruling to the effect that, there was an unexplained delay of about 2 years which was inordinate. We inquired from counsel whether he had an explanation for that delay which the learned judge observed on thus;

> "[10] Even if this Court was to accept that the applicant's alleged financial inability was good reason for the delay between May 3, 2017, the date of the order, to July 8, 2019, the date of this application before court, the applicant does not explain why it took him from January 23, 2020, the date of the ruling disallowing the application before the ELC to October 8, 2021, the date of the current Motion. This long period of 21 months is unexplained and is certainly therefore inordinate."

6. In response, counsel admitted that indeed there was an inordinate delay, the matter having not received the attention it deserved. He, however contended that the same could not be blamed on his client. Counsel besought us to reconsider the application "as human beings" and make a ruling accordingly considering that the applicant and his family were destitute. We pointed out to counsel that the delay herein was one of 1655 days, from the day the impugned ruling was given, to the day the applicant approached the Court for extension of time, a period that is not only inordinate but inexcusable. To that, Mr. Angima replied, 'we absolutely admit that there has been inordinate delay...I have said that this application was dead on arrival if that is the only consideration you take into account.' Having said so, however, counsel insisted that there was more for this Court to consider in the matter as "individual human beings" and "in the interest of justice".

7. In a long and consistent line of authorities, this Court has restated that discretionary powers bestowed on a single Judge under rule 4 ought to be exercised judicially, not on whim, sympathy or caprice. This was the case in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR, where Otieno-Odiek, J.A (May he rest in peace) stated thus;

> 12. The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the 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 and interested parties

if the application is granted, and whether the matter raises issues of public importance." See also *Joseph Ngimithi Muikamba v Joram Ndungu* [2021] eKLR

8. The applicant's counsel acknowledged that the period of delay in applying for extension of time to lodge the appeal was inordinately long. He has not advanced any plausible reasons, in accordance with the laid out principles, to explain the delay. Instead, counsel is urging us to consider the application on humanitarian grounds. He asserted that the applicant did not lodge the appeal and the instant application timeously because his family is impoverished, hence they were financially impeded from filing the appeal. This being a Court of law, we are not ready to allow this application based on such grounds; we are cognizant of the facility provided in our *rules*, for we think the learned judge properly exercised his discretion in the matter. The applicant has not demonstrated any wrong doing on the part of the learned judge to warrant our interference with the exercise of his discretion.

9. In the end, we find this reference to be without merit and we dismiss it with no order as to costs.

Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2023.

P. O. KIAGE

JUDGE OF APPEAL

.....

MUMBI NGUGI

JUDGE OF APPEAL

.....

JOEL NGUGI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR