



REPUBLIC OF KENYA



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Rift Valley Machinery Services Ltd v Agro Complex (K) Ltd & 13 others (Civil Appeal (Application) E443 of 2020) [2023] KECA 1469 (KLR) (8 December 2023) (Ruling)

Neutral citation: [2023] KECA 1469 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E443 OF 2020
K M'INOTI, F TUIYOTT & GWN MACHARIA, JJA
DECEMBER 8, 2023

BETWEEN

RIFT VALLEY MACHINERY SERVICES LTD APPLICANT

AND

AGRO COMPLEX (K) LTD 1ST RESPONDENT
PETER KIMANI KUMARU 2ND RESPONDENT
JANE WAMBUI 3RD RESPONDENT
REGISTRAR OF COMPANIES 4TH RESPONDENT
PRINCIPAL REGISTRAR OF TITLES 5TH RESPONDENT
KINGS DEVELOPERS LTD 6TH RESPONDENT
JOSHUA GITARI MWANGI 7TH RESPONDENT
MUTUA MULI 8TH RESPONDENT
GEORGE NGUGI 9TH RESPONDENT
ANDREW JACOB ONYANGO ONDIEK 10TH RESPONDENT
CHARLES ODHIAMBO AYOLO 11TH RESPONDENT
ALFRED OMONDI MOLA 12TH RESPONDENT
CHRISTOPHER KALE CHETALAM 13TH RESPONDENT
ELISHA CHEBII CHESIYNA 14TH RESPONDENT

(Reference to the full court from the ruling of a single Judge (Murgor, JA) dated 7th May 2021)



RULING

1. This is a reference to the full Court under rule 57 of the *Court of Appeal Rules*, from the ruling of a single judge (Murgor, JA) dated May 7, 2021. Vide a Notice of Motion dated November 17, 2020, the applicant, Rift Valley Machinery Services Ltd., moved the Court for extension of time to deem as filed on time its appeal Number E443 of 2020. After considering the application, the learned single judge found that there was a delay of 135 days; that the applicant did not explain the delay; and that the Court was unable to assess the likelihood of success of the applicant's appeal in the absence of the judgment of the trial court, or a draft memorandum of appeal. Accordingly, the learned single judge dismissed the application for extension of time with costs.
2. The applicant was aggrieved and on May 12, 2021 referred the matter to the full Court. In its written and oral submissions, the applicant contends that the single judge exercised her discretion erroneously, firstly because the application for extension of time was filed within the appeal and therefore the judgment and the memorandum of appeal were available. Secondly, that this Court had earlier on granted a stay of execution, after finding that the applicant's appeal was arguable. Lastly, that the delay was adequately explained because of the physical closure of the courts arising from the measures adopted by the Judiciary to contain the COVID-19 pandemic. The applicant further submits that on June 13, 2020 the Deputy Registrar advised its advocates by telephone that the certified proceedings were ready for collection but did not indicate the amount to be paid and that the payable amount was not made known until 1st October 2020. Because of the Covid-19 measures, the applicant was not able to visit the court, pay, and collect the proceedings, until October 13, 2020.
3. The application was supported by the 6th, 13th and 14th respondents. The 6th respondent attempted to justify the delay in filing the appeal on the further reason that the proceedings availed were not complete, necessitating the filing of a supplementary record of appeal.
4. The application was, however, vigorously opposed by the 1st, 2nd and 3rd respondents who contended that the applicant had neither explained the delay in filing the appeal, nor demonstrated the manner in which the learned single judge erred in the exercise of her discretion. It was contended that the applicant was improperly attempting to shift blame to the Deputy Registrar whilst the latter had issued a correct and truthful certificate of delay and further that as regards the draft memorandum of appeal and the judgment of the trial court, it was the applicant who misled the Court by indicating in its supporting affidavit that it had annexed copies of those documents, which it had not.
5. We have carefully considered this reference. Firstly, in a reference, rule 57(2) of the *Court of Appeal Rules* strictly confines us to only the material that was before the single judge. To that extent, it is improper for the 6th respondent to introduce evidence of the alleged incompleteness of the record and supplementary record of appeal. Those issues were not placed before the single judge as reasons for the delay. To that extent we shall not consider that aspect of the 6th respondent's submissions. Secondly, a reference does not constitute an appeal from the decision of the single judge. All that the applicant is required to demonstrate to the full Court is that the single judge erred in the manner in which she exercised her unfettered discretion, by, for example, taking into account irrelevant matters, or failing to take into account relevant matters, or by misapprehending the evidence or law. In *George Itotia*



Ng'an'ga v. Mary Wanjiku Kimaru CA No. Nai. 38 of 2006, the Court explained the approach as follows:

“The full Court can only interfere with the exercise of discretion by single Judge if, and only if, it be shown that in coming to the decision the single Judge took into account an irrelevant matter or failed to take into account a relevant matter, or misapprehended the evidence or the law or, short of these, that the decision under consideration is plainly wrong.”

(See also Simon Okingo & 4 others v. Benta Juma Nyakako [2021] eKLR and George Joshua Okungu v. Attorney General & 3 others [2019] eKLR).

6. The applicant faults the single judge on two prongs. The first is the lack of the judgement of the trial court and a draft memorandum of appeal, which the applicant contends were not necessary because it had already filed the record of appeal containing the judgment of the trial court and the memorandum of appeal. Whilst that is an attractive argument, we do not have any evidence before us that the record of appeal was actually availed to the single judge. Concerned only with an application for extension of time, it is not unusual for the single judge to receive only the application, affidavits, submission and authorities relevant thereto. We needed to be satisfied that the record of appeal was actually before the single judge.
7. In addition, the applicant must take full responsibility for this aspect of the application, because, in the affidavit sworn by Mr. Edgar Washika Ochima in support of the application for extension of time, he deposed in paragraph 24 that he had annexed a copy of the Memorandum of Appeal demonstrating arguable issues of law with great prospects of success. The fact of the matter is that neither the judgment of the trial court nor the memorandum was attached to the affidavit as alleged.
8. But for us that is not the clincher. The real question is whether the applicant candidly explained the reason or reasons for its delay in filing the appeal. The applicant's advocate contends that the registry “orally” informed him on 3rd June 2020 that the certified proceedings were ready for collection but he was not informed of the payable fees. On record is the letter from the Deputy Registrar dated June 3, 2020. It advised the applicant to collect the proceedings upon payment of Kshs 12,400. The letter supports the applicant's contention, but only to the extent that the information was conveyed orally. The Deputy Registrar endorsed on that letter this sentence:

“Spoke to Wachika (sic) advocate and informed him that proceedings were ready for collection. 3/6/2020.”

As aptly noted by counsel for the 1st, 2nd and 3rd respondents, although the applicant claims that it received the letter from the registry dated 3rd June 2020 by email on 1st October 2020, the attached email is from the email address, wabenkim@gmail.com. This is important because in their communication with the trial court's registry, the email address that the applicant's advocates consistently used was milimani.environmentandland@court.go.ke. The applicant did not disclose or explain the source of the wabenkim@gmail.com. email or the sudden change from the official email. To make matters worse, the applicant did not make the attachment to wabenkim@gmail.com. email accessible.

9. The applicant's own documents actually explode the myth that there was total lockdown of the courts, including the registries. For example, on 17th June 2020, the applicant's advocates communicated with the Deputy Registrar (through the email milimani.environmentandland@court.go.ke), regarding the



decree. The Deputy Registrar responded on 18th June 2020 and informed the applicant’s advocates as follows:

“Kindly make your request through milimanielc@gmail.com for assessment of decree. Present your copies of the letter at our customer service desk for stamping.” (Emphasis added).

On the same date the applicant’s advocates responded with a curt,

“Noted with thanks.”

10. As early as 18th June, therefore, the applicant’s advocates had been notified by the Deputy Registrar that the court’s customer service desk was open and operational, a fact which they acknowledge. To turn around and claim that they were not able to access the Court until October due to the COVID-19 mitigation measures is clearly not a convincing or candid explanation for the delay in filing the appeal.
11. Taking all the foregoing into account, and in particular the certificate of delay duly signed by the Deputy Registrar, we are not satisfied that the learned single judge exercised her discretion erroneously. The applicant did not candidly explain the reason for the delay in filing the appeal. Accordingly, we find no merit in this reference and the same is dismissed with costs to the 1st, 2nd and 3rd respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH OF DAY DECEMBER 2023

K. M’INOTI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

