



**Stackelberg & another v Obst (Civil Application 29 of 2016)  
[2022] KECA 845 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 845 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION 29 OF 2016  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
MAY 27, 2022**

**BETWEEN**

**JOACHIM VON STACKELBERG ..... 1<sup>ST</sup> APPLICANT**

**YOLANDA FIRTH ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SYLKE OBST ..... RESPONDENT**

*(Being a reference application arising from a decision by Ouko JA dated 25th November 2016 declining to grant leave to appeal from the Judgement delivered on the 6th November 2014 by Hon Lady Justice M. Kasango at Mombasa in the High Court Civil Suit No 133 of 2007)*

**RULING**

1. The Applicants herein have by a letter dated 30<sup>th</sup> November 2016 sought that a decision by Ouko, JA (as he then was) in a ruling delivered herein dated 25<sup>th</sup> November 2016 be referred to a full bench of this Court, and be discharged and or reversed. The learned Judge in the said ruling declined to extend time for the Applicants to file a notice of appeal and lodge an appeal out of time against a judgement delivered on the 6<sup>th</sup> November 2014 by the High Court at Mombasa (Kasango J.) in High Court Civil Suit No 133 of 2007.
2. After detailing the background giving rise to the application for extension of time made by the Applicants, Ouko JA (as he then was) found that there was inordinate delay in bringing the application. The learned judge found that the reason for the over 1-year delay to lodge the notice of appeal, which was that the delay was occasioned by the Applicants' former Advocates, was not plausible. The learned Judge was also of the view that it would be unfair to visit the mistakes of the Applicants' advocates on the Respondent, and unconscionable to delay the conclusion of the matter, which was first filed in 2007. Lastly, that the likelihood of the Applicants' appeal succeeding was remote. The learned judge



was therefore not persuaded to exercise discretion in favour of the Applicants, and dismissed their application, giving rise to the instant reference.

3. We heard the reference application on 28<sup>th</sup> February 2022, and the Applicants' counsel, though served, did not appear, while learned counsel Mr. Karina appeared for the Respondent. Kadima & Company Advocates however filed written submissions dated 16<sup>th</sup> July 2021 in support of the application, wherein it was stated that it was not possible to obtain an affidavit from the former Applicant's advocate to explain the delay. It was revealed that the Applicants are dissatisfied with the award of 15% interest on the purchase price and could not afford to pay the same, and they have a constitutional right to appeal. This Court was implored to reverse the decision of Ouko JA (as he then was) dismissing the application for leave and to grant the Applicants leave to file an appeal.
4. Mr. Karina highlighted written submissions dated 23<sup>rd</sup> July 2021 filed by Ndegwa, Katisya, Sitonik Advocates in opposition to the reference application. The counsel maintained that the learned Judge correctly exercised his discretion in dismissing the application due to the unexplained delay. It was added that there was no evidence that the Applicants gave instructions to their previous Advocates, and that the Applicants expressly admitted that either party had a right to receive interest at 15% of the purchase price in the event of breach of the subject agreement.
5. The application before us is anchored on Rule 55 of the Court of Appeal Rules which stipulates:  

“(1) Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single judge—

  - a. ...
  - b. in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, he 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.”

(2) At the hearing by the court of an application previously decided by a single judge, no additional evidence shall be adduced. “
6. The impugned ruling by the learned single Judge was delivered on 25<sup>th</sup> November 2016, and the present reference was requested by a letter dated 30<sup>th</sup> November 2016 lodged with this Court on the same date. The application for reference was made within seven days of the impugned decision, and is therefore within time and properly before this Court. In a reference, the obligation of this Court is not to reconsider the application but to consider whether the single Judge properly exercised his discretion in declining to extend time for applicant to file his appeal.
7. We note that the learned Judge carefully considered the authorities cited by the parties on the parameters that apply in the exercise of the discretion under Rule 4 of the Court of Appeal Rules of 2010 to extend time, including the decision by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Salat vs IEBC* [2014] eKLR, and identified the factors that ought to be considered in a case for extension of time where the delay involved is prolonged and inordinate. These were whether the delay is excusable; whether there are justifiable reasons for the delay; whether justice can nevertheless be done; and, whether the respondent will be prejudiced.
8. The learned Judge also considered the explanation proffered by the Applicants and found that that this delay was inordinate and inexcusable as there was no attempt by the Applicants' previous Advocates to file a Notice of appeal for one year and four months, even after filing and being granted an application



for stay of execution. The learned Judge also observed that the Applicants did not obtain an affidavit from the advocates to explain their failure to file the notice of appeal.

9. In our view, the learned Judge applied the principles in considering an application for extension of time, which were settled in in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, (1999) 2 EA 231* as follows:

“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.”

10. Additionally, the learned Judge also took into account relevant factors in finding that the delay was inordinate and the reasons by the Applicants unsatisfactory, including the lack of due diligence on the part of the Applicants and their previous Advocates, and the prejudice the Respondent would suffer. We note in this respect that the explanation given by the Applicants in the instant application that the previous advocate who had conduct of the matter opened a new law firm and it was therefore not possible for him to file an affidavit on the delay, is new evidence, which is not only being introduced through submissions but was also not before the learned judge at the time of hearing the application for extension of time.
11. In the circumstances, we are satisfied that the learned single Judge judicially and properly exercised his discretion and we accordingly dismiss the reference with costs to the Respondent.
12. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY OF MAY 2022.**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

