



**Nyang'au & 2 others v Onchiri (Civil Application 37 of 2020)
[2022] KECA 590 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 590 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 37 OF 2020
PO KIAGE, M NGUGI & F TUIYOTT, JJA
MAY 13, 2022**

BETWEEN

NYAMWANGE NYANG'AU 1ST APPLICANT

OBIERO NYANG'AU 2ND APPLICANT

OSEKO NYANG'AU 3RD APPLICANT

AND

NYAKUNDI ONCHIRI RESPONDENT

(A reference from the ruling of Hon. Kantai, JA, delivered on 19th March, 2021 on an application for stay of extension of time for the filing of the Record of Appeal from the judgment of the Environment & Land Court at Kisii (Mutungi, J) dated 9th October, 2018 in Kisii Environment & Land Court Case No. 638 Of 2016)

RULING

- [1] This is a reference from the ruling of Hon. Kantai, JA, delivered on 19th March, 2021 in which he disallowed an application dated 9th March, 2020 for leave to file an appeal out of time. The reference is brought pursuant to Rules 55 and 57 of the [Rules](#) of this Court.
- [2] In exercise of his discretion the learned Judge held as follows: -

“I note that Judgment of the ELC was delivered on 9th October, 2018 and a decree issued on 31st October, 2018. The Motion was filed on 5th March, 2020, about 16 months after Judgment was delivered. The applicant says that the Notice of Appeal was lodged on 21st February, 2020 (way out of time allowed by the Rules) but was not served on the respondents. He says that this was due to circumstances that could not allow him to give instructions to his lawyers. He does not explain what those circumstances were. As properly submitted by the 4 respondent’s delay in serving Notice of Appeal and in not filing Record



of Appeal as required is not explained. I find the delay to be inordinate. I am also not persuaded that the intended appeal is arguable. I do not think that the issue of a mistake of counsel has any relevance here, the applicant not having explained why he was unable to instruct his lawyers. In those circumstances, I refuse to exercise my discretion and dismiss the Motion with costs to the respondents.”

- [3] The role of a full bench on a reference from a single Judge matter is well settled. In *John Koyi Waluke v Moses Masika Wetangula & 2 others* [2010] eKLR this Court stated inter alia:

“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.”

- [4] The application before the judge was supported by an affidavit sworn by one of the applicants, Nyamwange Nyang’au, on 4th March 2020. In it he states that judgment in ELC No. 638 of 2011 was delivered on 9th October, 2018. He then instructed his advocates Gikonyo, Kinyanjui & Co. Advocates to lodge an application to set aside the judgment and stay the decree. His advocates carried out the instructions but the application was dismissed with costs by Mutungi, J on 9th October, 2019. At this point it became apparent that the said advocates had not requested for copies of proceedings and judgment from the ELC during the pendency of application.

- [5] The applicant deposes that he thereafter instructed his current advocate M/S Maosa & Co. Advocates to take over the conduct of the matter and on 19th February, 2020 the new advocates wrote to court requesting for copies of the proceedings and Ruling. The applicant pleads: -

- (11) That I did not file and serve the Notice of Appeal within the statutory period was not a fault of my own save that I had instructed my previous advocates to handle the matter on my behalf.
- (12) That I am advised by my advocates on record that the law provides that the mistakes of an Advocate shall not be visited of (*sic*) his client.”

- [6] The reasons in the affidavit are at odds with the reason given on the face of the application which is that,

“...failure to lodge the Record of Appeal in good time on the part of the applicant was not occasioned by any willful neglect and/or negligence on his part, save that the circumstances he was in at the material time could not enable him to give proper instructions on the conduct of the appeal.”

- [7] As correctly observed by the single judge, those circumstances were not explained. They were not set out; they were not elaborated. On our part, we also observe that the applicant gives conflicting reasons for failure to file the Notice of Appeal on time. He blames it on inaction by the advocates then again



on his own failure to instruct them. We have little hesitation in reaching a similar decision as the single judge that the inordinate delay of 16 months was not properly explained.

[8] The reference is dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MAY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

