



REPUBLIC OF KENYA



KENYA LAW
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**Shikhoba v Odera & 3 others (Civil Application 157 of 2019)
[2022] KECA 826 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 826 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 157 OF 2019
PO KIAGE, M NGUGI & F TUIYOTT, JJA
MAY 13, 2022**

BETWEEN

THOMAS SHIKAMAYA SHIKHOBA APPLICANT

AND

SETH ODERA 1ST RESPONDENT

PETER IMBISI 2ND RESPONDENT

JOSEPH WANGA SHIKOBA 3RD RESPONDENT

GOLDMIRE COMPANY LIMITED 4TH RESPONDENT

(An application for leave to file an appeal out of time from the judgement and decree of the Environment and Land Court at Kakamega (Matheka, J.) dated 19th March 2019 in Kakamega ELC No. 129 of 2014)

RULING

1. This ruling is in respect of a reference to the full Court under Rule 55(1)(b) of the [Court of Appeal Rules](#).

By a Notice of Motion lodged on 9th December 2019, the applicant moved the Court under **rule 4** of the [Court of Appeal Rules](#), seeking extension of time to file and serve a notice of appeal and record of appeal out of time. The application was premised on grounds on the face of the motion and an affidavit sworn in support thereof. The grounds were that; judgment was delivered in the absence of the applicant and his advocates, the relationship between the applicant and his former advocate deteriorated due to the failure of the advocate to timely inform him of developments in the matter, the applicant engaged another advocate who filed two applications for extension of time on 2nd May 2019 and 11th July 2019 respectively, but the same were withdrawn from the record because the advocate had not sought leave before coming on record, on 16th September 2019 the advocate's application for



leave to come on record was granted, there was a delay in typing of proceedings by the court which were availed on 24th October 2019, and there is a certificate of delay to that effect.

2. The application was initially heard by a single Judge of this Court, (Ouko, (P) as he then was), who dismissed the application with no order as to costs. By letter dated 24th March 2021, the applicant expressed his dissatisfaction with the ruling of the learned single judge and invites us to interfere with the judge's exercise of discretion on grounds that he will suffer if the application for extension of time to file an appeal is not granted.
3. During the hearing the applicant was not present, neither had he filed any submissions. The Court was informed that he was unable to log onto the Go to Meeting online platform. Learned counsel Miss Masakwe holding brief for Mr Fwaya appeared for the 1st and 2nd respondents and although counsel sought to rely on written submissions which they had previously filed, the same are not on record.

We have considered the reference whilst distinctly aware of the discretionary powers bestowed on a single Judge under rule 4. This Court has on many occasions pronounced itself on circumstances that warrant interference with the exercise of such discretionary powers. In *Donald O. Raballa -vs- Judicial Service Commission & Another* [2018] eKLR, the Court stated;

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 -vs- Radio Africa Limited*[2015] eKLR).

4. The factors which a Judge should consider in determining a rule 4 application are notorious. For instance, they were well-elucidated by this Court in *Thuita Mwangi -vs- Kenya Airways Limited*[2003] eKLR that;

Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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”

5. The learned Judge upon evaluating the applicant's application declined to exercise his discretion in favour of the applicant for the reason that the explanation given for the delay in filing the appeal was not reasonable hence the delay was inordinate. The learned Judge stated;

The period between the date of the withdrawal, on 16th September, 2019 until the date when the current motion was filed on 9th December 2019 remains unexplained. The applicant seems to suggest that the ELC contributed too to the delay by not availing the



proceedings in time. That explanation has no substance since certified proceedings are not necessary before a notice of appeal can be filed under Rule 75.

6. The learned Judge further found that no explanation had been given as to why the application was filed on 9th December, 2019 yet the proceedings had been availed on 24th October, 2019.

We think the learned Judge acting on behalf of the Court, properly exercised his discretion in the matter. Besides, 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. There is nothing to suggest abuse of discretion or plain error of principle resulting in a perverse decision.

7. In sum, we find this reference to be without merit and we dismiss it with costs.

Order accordingly.

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

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR

