



**Njuki & another v Kahihu & another (Civil Application
E411 of 2020) [2022] KECA 961 (KLR) (26 August 2022) (Ruling)**

Neutral citation: [2022] KECA 961 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E411 OF 2020
W KARANJA, S OLE KANTAI & HA OMONDI, JJA
AUGUST 26, 2022**

BETWEEN

SAMUEL MUKUHA NJUKI 1ST APPLICANT

JOHN KIMANI MUKUHA 2ND APPLICANT

AND

MARGARET NYOKABI KAHIHU 1ST RESPONDENT

JOHN KAHIHU KAMUYU 2ND RESPONDENT

*(Being a Reference on an application for leave to file an appeal out of
time from the Ruling of the Court of Appeal (Gatembu, JA) delivered
on 19th February, 2021 in Civil Application No. E411 of 2020)*

RULING

1. This is a reference to full Court, pursuant to Rule 55 of this Court's Rules, from the decision of a single Judge of this Court (Gatembu, JA) dated 19th February, 2020. The learned single Judge's ruling was made pursuant to an application for extension of time, made under Rule 4 of this Court's Rules, seeking to file an appeal out of time against the ruling of the High Court of Kenya (Mbogholi, J (as he then was)) dated 22nd September, 2010.
2. A brief background of the matter is that the respondents had instituted NAI HCC (OS) No. 1476/2005 claiming Land Parcel No. Dagoretti/Riruta/1868, (the suit property) registered in the name of the applicant's late father, through adverse possession. The suit was compromised by a consent judgment entered into on 15th April, 2008. The applicants herein contended that the consent was made without authority as the deceased was mentally incapacitated and did not instruct the Advocate in that regard.



3. An application to appoint a guardian in the suit was dismissed on 23rd June, 2009 and an application to review the ruling was also dismissed on 12th July, 2011. On 22nd September, 2010, Mbogholi J dismissed an application seeking to set aside the consent judgment.
4. Ten years later, the applicants filed an application dated 26th October, 2020 seeking leave to appeal out of time against the ruling by Justice Mbogholi. They also sought other prayers that could only be determined by a full bench and which were therefore outside the purview of the single judge's remit. The learned Judge only dealt with the prayer for extension of time.
5. The application was heard by Gatembu, JA who dismissed it by his ruling dated 19th February, 2021. The learned Judge observed that although the applicants sought leave to appeal the orders of 22nd September, 2010, the notice of appeal referred to an appeal against the consent judgment of 15th April, 2008. The Court stated that the 2008 and 2010 decisions were considerably old and the delay in making the application was too inordinate.
6. The applicants filed an application dated 18th March, 2021, seeking extension of time to refer the matter to a full bench, following the decision by Gatembu JA. The application was heard by Asike-Makhandia, JA on 21st May, 2021 who allowed it and gave the applicants 7 days to file their reference. That is the reference that is the subject of this Ruling.
7. It is trite law that in an application under Rule 4 of this Court's Rules, the single Judge exercises unfettered discretion on behalf of the full Court. As is expected, such discretion ought to be exercised based on proper principles of law. Therefore, the full bench would only interfere with the exercise of such discretion if it is apparent that the single Judge took into account an irrelevant matter which he/she ought not to have taken into account or failed to take into account a relevant matter which he/she ought to have taken into account or that he/she misapprehended the law applicable and evidence before him or that his decision was plainly wrong.
8. It is not enough to show the full Court that had it been sitting in place of the single Judge, it would have arrived at a different result. The full Court, were it to do that would be replacing the single Judge's exercise of discretion with its own and that is not permissible under Rule 54 of this Court's Rules. It is noteworthy that a reference under that rule is not an appeal to the full Court.
9. The threshold required to be met in applications such as this one is well settled. The applicant must demonstrate that the learned single Judge disregarded a relevant matter, regarded an irrelevant matter or acted on a misapprehension of evidence or applicable law. This position was reiterated by this Court in *John Koyi Waluke vs Moses Masika Wetangula & 2 Others*, Civil Appeal (Application) No. 307 of 2009, (Unreported) where the 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.”

10. Did the learned Judge exercise his discretion judicially? From a careful reading of his decision, it is evident that the learned Judge was alive to the parameters and guidelines to be applied when considering an application under Rule 4 of the rules of this Court. The learned Judge appreciated that although the applicants blamed their predicament on the numerous advocates who acted for them from time to time, he was not satisfied that an explanation had been given, least of all a satisfactory explanation why an appeal against the judgment given on 15th April, 2008 was not lodged in time or extension of time sought within a reasonable time and added that 16 years was a long time to wait.
11. We have reconsidered the application placed before the learned Judge. It is noteworthy that the learned Judge had held that even assuming that the intention was to challenge the decision of 22nd September, 2010 given by Mbogholi, J there was no satisfactory explanation as to why it had taken another 10 years to make the present application. He found the delay to be inordinate and no sufficient cause had been shown on the basis of which he could exercise the Court’s discretion in the applicant’s favour.
12. It is clear from the ruling that the learned Judge had in mind all the relevant factors when he considered the issue of delay and whether the delay had been sufficiently explained. It may well be that if any other Judge had been sitting in the single Judge’s place, he or she could have come to a different conclusion on the issue of whether the delay was inordinate and whether it had been explained. But that is neither here nor there.
13. It is to be remembered that the single Judge was exercising unfettered discretion and it would be wrong for the full Court to differ with him merely because the full Court thinks he reached wrong conclusions on the material placed before him. That would be tantamount to the full Court substituting its discretion for that of the single Judge. The unfortunate turn of events by the applicant which included the plethora of applications filed in the course of the case and the negligence, if at all by their advocates are issues that were canvassed before the single Judge and considered before the decision to dismiss the application was arrived at.
14. Based on the material placed before the learned Judge, the Court is satisfied that he did not consider any irrelevant matters or disregard any relevant matters that would have influenced his decision. The Court is satisfied that the learned Judge acted within the parameters set in *Mwangi vs Kenya Airways Ltd* (2003) KLR 486 at pp. 489 - 490 where this Court said:-

“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.’

“These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive



and that is clear from the use of the words “in general”. Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.”

15. For the foregoing reasons, the Court is satisfied that the learned Judge exercised his discretion in a judicial manner as expected of him and as set out in *Shah v Mbogo (1967 E.A)* 116. There is no basis for interfering with the learned Judge’s judicial exercise of discretion.
16. The reference is devoid of merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

