



REPUBLIC OF KENYA



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**Mukanda v Mutswenje (Civil Application 138 of 2020)
[2022] KECA 1016 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1016 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 138 OF 2020
DK MUSINGA, PO KIAGE & F TUIYOTT, JJA
SEPTEMBER 23, 2022**

BETWEEN

FRANCIS MAKUBA MUKANDA APPLICANT

AND

FELIX SAKWA MUTSWENJE RESPONDENT

(Being a reference under rule 55 of the Court of Appeal Rules from the Ruling of (S. ole Kantai, J.A.) dated 4th June 2021 in an application for extension of time to file an appeal out of time against the Judgment of the Environment & Land Court of Kenya at Kakamega (Matbeka, J.) dated 28th February, 2019 in ELC Case No. 507 of 2014.)

RULING

1. This is a reference to the full Court under rule 55 of this Court's Rules from the decision of a single judge of this Court (S. ole Kantai, J.A.) dated 4th June 2021. The single judge's ruling was made pursuant to an application dated 9th November 2020. The application was brought substantively under Article 164(3) of *the Constitution* of Kenya, 2010, unspecified provisions of the Appellate Jurisdiction Act and the Court of Appeal Rules as well as Order 12 and 79G of the *Civil Procedure Rules*. The applicant sought leave to file his appeal out of time.
2. The application was supported by grounds appearing on its body and a supporting affidavit sworn by the applicant. The crux of the argument by the applicant was that upon delivery of judgment by the trial court he instructed the firm of Malalah & Co. Advocates to commence the appeal process. However, and unbeknown to the applicant, the advocate failed to act on these instructions and hence the delay in filing the appeal.
3. The application was opposed by a replying affidavit sworn by the respondent on 25th May 2021. The respondent argued that the applicant had already filed a substantive appeal on 26th April 2021 and should therefore not be granted audience as far as the application for extension of time was concerned.



Additionally, that he had filed an application, to wit, Kisumu Civil Application No. 64 of 2020 on 17th March 2020 seeking to have the appeal by the applicant deemed as withdrawn pursuant to the provisions of rule 83 of this Court's Rules and which application was scheduled for ruling on 7th May 2021. For these reasons, the respondent was of the view that the application by the applicant had been overtaken by events.

4. The Court had sent a Hearing Notice to the parties on 17th May 2021 directing parties to file written submissions within three days of that date. At the time the application came up for consideration before the single judge, only the respondent had filed his written submissions which are dated 27th May 2021.

The single judge declined to exercise his discretion in favour of the applicant.

5. The reference to the full bench was canvassed before us in the absence of the applicant as well as learned counsel for the respondent. As the Court was deliberating on the fate of the application owing to the non-attendance by parties, Kiage, J.A, indicated that he had received a hard copy of the applicant's written submissions that had been delivered to his office that very morning. It is on the basis of the applicant's written submissions that the Court issued a ruling date for the reference.
6. The applicant's written submissions dated 30th November 2021 bears the heading "applicant/ appellants written submissions in support of an application for leave to file and serve the notice of appeal and record of appeal out of time." We have perused the written submissions and note that they are tailored for the application for extension of time which the single judge had already dispensed with. The written submissions are not relevant to the reference before us.
7. The absence of suitable written submissions notwithstanding, the applicant had authored a letter to the Deputy Registrar of this Court on 10th June 2021 requesting for a reference before a three-judge bench pursuant to the provisions of rule 55 of the Court's Rules. We reproduce the salient contents of this letter as hereunder:

"I refer to the above matter which was heard and a ruling delivered by Hon. Justice Kantai, JA on 4th June 2021.

I am dissatisfied with the said ruling and wish that the matter be placed before a three Judge bench under Rule 55 of the Court of Appeal Rules, 2010.

The said application is one seeking extension of time to file an appeal out of time and the applicant herein stands to suffer if the same is not granted."

8. The respondent has not filed before any affidavit or submissions contesting the reference.
9. The principles that guide the exercise of judicial discretion are now well settled. See *Githiaka v. Nduriri* [2004] 1 KLR 67 where we reiterated, inter alia, that judicial discretion has to be exercised judiciously, that is to say on sound reason rather than whim, caprice or sympathy.
10. This Court (O'kubasu, Githinji & Nyamu, JJ.A.) while dealing with a reference from the decision of a single judge in *John Koyi Waluke v. Moses Masika Wetangula & 2 others* [2010] eKLR stated thus:

"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.”

11. With regard to the application on which this reference is predicated, the reason for the delay as proffered by the applicant was the failure by the firm of Malalah & Co. Advocates to act on his instructions to commence the appeal process from the judgment of the trial court. In his ruling, the single judge stated as follows:

“On the facts before me I note that Judgment intended to be appealed was delivered on 28th February, 2019. The Motion is dated 9th November, 2020, nearly 20 months after Judgment was delivered and the only explanation proffered by the applicant is that he instructed an advocate to file an appeal which the lawyer did not. I am not satisfied with the reason given for delay and I hold that there was inordinate delay on the part of the applicant in bringing the application.”

12. It is an undisputable fact that there was a delay of about 20 months from 28th February 2019 when the trial court delivered the impugned judgment and 9th November 2020 when the applicant filed his application seeking extension of time within which to file his appeal. In *George Mwenda Muthuri v Mama Day Nursery and Primary School Limited* [2014] eKLR, extension of time was declined on account of the applicant’s failure to explain a delay of twenty (20) months.
13. As already borne out in this ruling, the reason for the delay in filing the appeal in good time was the failure by the applicant’s advocate to institute the appeal as instructed. The applicant pleads with the Court not to visit the mistakes of his advocate upon him. In *Owino Ger v. Marmanet Forest Co-operative Credit Society Ltd* [1987] eKLR, this Court declined to visit wrongs of advocates against clients in instances where there was sufficient demonstration that non-compliance with any prerequisites provided for in the applicable rules was due to the advocate’s fault. What we must determine, therefore, is whether the applicant demonstrated plausibly before the single Judge and now before us that the delay was wholly attributable to his advocate’s failure to act on his instructions.
14. We have gone through the application for extension of time as well as the annexures thereto and are satisfied beyond any peradventure that the applicant did not explain the reason for the delay to the satisfaction of the single judge and to us. The allegation by the applicant that his advocate failed to act on his instructions required some form of proof for it to be regarded as plausible. The applicant could have, for instance, annexed to his application copies of correspondence exchanged between him and his advocate regarding the intended appeal. The applicant could have also made effort to source an affidavit from the said advocate in support of his allegation and if that were not possible, then he could have at least included an averment in his supporting affidavit explaining his inability to secure such affidavit. In any case, save for a letter addressed by the firm of Malalah & Co. Advocates to the Deputy Registrar of the trial court requesting for typed proceedings, there is no other form of proof on record to show that the applicant had indeed instructed this advocate to commence the appeal process. The contents of this letter are not fully legible and it therefore not possible for us to determine when the same was authored. We must reiterate the fact that a party in a legal dispute bears the responsibility of making appropriate follow up with his advocate to ensure that the advocate timeously acts on the



party's instructions. We do not think the applicant made any effort to pursue the status of the intended appeal after he instructed Malalah & Co. Advocates.

15. The applicant has stated in his written submissions that some time after delivery of judgment he suffered a stroke and lost consciousness for about 4 months and had been receiving treatment for a period of about one year. The applicant should have presented before the single judge or before this Court copies of treatment notes or medical reports to show that indeed he was unwell and maybe that was the reason why he was not able to make a follow up with his advocate on the status of the appeal. In the absence of such documentation, the claim that he was unwell remains a mere allegation.
16. In the circumstances, it is our view that there was inordinate delay that was not sufficiently explained by the applicant. We are satisfied that the learned single judge exercised his discretion judiciously and this Court cannot therefore interfere with his determination. Accordingly, this reference lacks merit and is dismissed. The respondent did not file any response to the reference and neither did he attend Court for the hearing of the reference. In the circumstances, we make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY SEPTEMBER, 2022.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

O. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

