Gichohi v Uhuru High Way Development Ltd & 2 others (Civil Appeal (Application) 60 of 2017) [2022] KECA 1390 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KECA 1390 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 60 OF 2017

HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA

DECEMBER 16, 2022

BETWEEN

HEZEKIAH W. GICHOHI ..... APPELLANT

AND

UHURU HIGH WAY DEVELOPMENT LTD ..... 1ST RESPONDENT

LIBYAN ARAB AFRICAN INVESTOMENT CO. LTD T/A GRAND REGENCY HOTEL ..... 2ND RESPONDENT

CENTRAL BANK OF KENYA ..... 3RD RESPONDENT

(Being an application for extension of time within which to file and serve a record of Appeal against the Ruling and Decree of the High Court of Kenya at Nairobi (J. W. Mwera, J.) made on 12th May, 2010 In Nairobi HCC No. 292 of 2008)

RULING

1. The applicant, Hezekiah W Gichohi, sued the respondents in Nairobi HCCC No 292 of 2008 seeking numerous declarations, prohibitory orders and other reliefs as specified in his plaint dated July 3, 2008.

2. The respondents separately applied to strike out the applicant's suit *vide* 3 Chamber Summons dated July 30, 2008, November 4, 2008 and May 20, 2009.

3. In its ruling delivered on May 12, 2010, the High Court (JW Mwera, J) allowed the respondents' applications and struck out the applicant's suit with costs to the respondents.

4. Aggrieved by the ruling of the learned Judge, the applicant filed a notice of appeal on May 26, 2010, but took no further steps until March 21, 2017, almost 7 years later, when he filed an application for extension of time to file and serve the record of appeal vide his Notice of Motion dated March 20, 2017. He also prayed that the record of appeal filed on March 6, 2017 and served on the respondents on March 8, 2017 be deemed as having been duly filed and served.

5. The Motion was supported by the applicant's affidavit sworn on March 20, 2017. According to the applicant, the application was made without unreasonable delay; that the delay was attributable to his former advocates, who collected the certified copies of the proceedings on August 16, 2012 together with the certificate of delay; that it was not until March 1, 2017 when he discovered that his former advocates, M/s. Kinoti Kibe and Company, then on record had obtained the proceedings and certificate of delay; that he filed the record of appeal on March 6, 2017 and served the same on the respondents on March 8, 2017; that the applicant should not be made to suffer from mistake of his counsel; that the intended appeal had a good chance of success; and that the respondents would not suffer any prejudice by grant of the orders sought

6. The respondents successfully opposed the application, which was dismissed on October 26, 2018 with costs to the 2nd and 3rd respondents. In his ruling, DK Musinga, JA. found that the applicant's delay in filing and serving his record of appeal was inordinate and unexplained, and that it was not enough to show that the intended appeal was arguable.

7. Dissatisfied with the ruling of Musinga, J., the applicant comes on reference to a full bench pursuant to Rule 57 of the *Court of Appeal Rules*, 2022. His written request for a reference to the full bench is dated October 30, 2018 in compliance with the timelines prescribed in Rule 57(1) (b), which reads:

> " 57. Reference from decision of a single judge
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> 1. Where under the proviso to section 5 of the Act, any person, being dissatisfied with the decision of a single judge—
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> a. in a criminal matter, wishes to have his or her application determined by the Court; or
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> b. in a civil matter, wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, that person 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.
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> 2. At the hearing by the court of an application previously decided by a single judge, no additional evidence shall be adduced."

8. Learned counsel for the applicant, M/s Gacheru Ng'ang'a and Company, filed written submissions dated October 27, 2022 citing 5 judicial authorities to back his foundational submission that a client should not suffer from the mistake of his counsel. Other decisions focused on the circumstances under which a full bench may interfere with the decision of a single judge, and that there is no set rule as to what constitutes inordinate delay. He urged us to allow the reference as prayed.

9. In response, learned counsel for the 2nd respondent, M/s Oraro and Company, filed their written submissions dated November 1, 2022. Counsel cited 3 authorities to support their proposition: that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court (see *County Executive of Kisumu vs County Government of Kisumu and 8 Others* [2017] eKLR); that a plausible and satisfactory explanation for the delay is the key that unlocks this Court's flow of discretionary favour (see *Ezekiel Mwenja Ngure vs Sammy Kipkorir Seroney and 3 Others* [2017] eKLR); and that, in the absence of any explanation, the Court is unable to tell what caused the delay and, where no explanation for delay is given, it cannot be assumed that any exists (see *Wakaba Ndegwa and Another vs Lucy Nyaguthii* [2017] eKLR).

10. The main question before us is: do the circumstances of this case justify interference with the impugned decision of Musinga, JA? We do not think so. The applicant's submission that the delay was not inordinate; that he should not suffer from the mistake of his counsel; and that the respondents stand to suffer no prejudice by a grant of the orders sought, do not hold.

11. In *Kenya Co-Operative Creameries Ltd vs Fims Ltd* [2006] eKLR, the Court of Appeal held:

> "In hearing matters brought under rule 4 of this Court's Rules, the single Judge exercises unfettered discretionary powers which in law must be exercised upon reason and not capriciously. Once the single Judge has so exercised the same discretion, and made a decision on the matter, the full bench will be very slow in interfering with the same exercise of discretion by a single Judge unless it is demonstrated that the single Judge, in the
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> exercise of the same discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice (see the case of *Mbogo vs Shah* (1968) EA 93 at
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> page 96)."

12. We find nothing on the record as put to us to suggest that the learned Judge misdirected himself in any of the matters falling to be considered; or that he arrived at a wrong decision; or that he was wrong in exercise of his unfettered discretion. In our considered view, the learned Judge correctly exercised his discretion, and his decision was by no means a misjustice.

13. In *Simeon Okingo & 4 others vs Benta Juma Nyakako* [2021] eKLR, this Court set out the considerations to be made by the full bench in the following words:

> "12. In an application under Rule 4 of this *Court's Rules*, as was the one before the learned single Judge of this Court, the single Judge is exercising unfettered discretion, on behalf of the whole Court; 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."

14. Finally, we hasten to point out that alleged mistake of counsel does not of itself cure the litigant's own inaction. Moreover, it is a litigant's case and not that of his counsel. The primary responsibility to act within the prescribed timelines under this Court's Rules rests heavily on the litigant's shoulders. With regard to the responsibility of the litigant to follow up their case, Waki, JA had this to say in *Habo Agencies Limited vs Wilfred Odhiambo Musingo* [2015] eKLR:

> "It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

15. Having carefully considered the applicant's reference, the rival written and oral submissions of learned counsel for the parties, the cited authorities in the backdrop of this *Court's Rules*, we reach the inescapable conclusion that the applicant's reference fails and is hereby dismissed.

16. Accordingly, the ruling of Musinga, J. dated October 26, 2018 is hereby upheld. The costs of this reference shall be borne by the applicant. Orders accordingly.

Dated and Delivered at Nairobi this 16th day of December, 2022.

H. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR