Lalji v Lalji & 2 others (Civil Appeal (Application) 165 of 2017) [2022] KECA 1391 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KECA 1391 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 165 OF 2017

HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA

DECEMBER 16, 2022

BETWEEN

SULTAN HASHAM LALJI .... APPELLANT

AND

DIAMOND HASHAM LALJI .... 1ST RESPONDENT

TRIO HOLDINGS LIMITED .... 2ND RESPONDENT

PROP INVEST LIMITED .... 3RD RESPONDENT

(Being an appeal against the ruling and order of the High Court of Kenya at Nairobi (E. K. O Ogola, J.) given on 19th April 2016 in High Court Civil Case No. 330 of 2013)

RULING

1. Before us is a reference to a full court pursuant to rule 54(1) of the *Court of Appeal Rules*, 2010(now rule 56(2) of the Court of Appeal Rules, 2022). The 1st respondent seeks variation or reversal of the decision of the single Judge (Nambuye, JA.) dated November 25, 2019. The Judge heard and determined an application by the appellant under rule 4 of the *Court of Appeal Rules* for extension of time to file and serve the record of appeal out of time. The learned Judge allowed the application and ordered that the record of appeal filed out of time be deemed as having been duly filed and served on the respondents.

2. Aggrieved by the decision of the learned Judge, the 1st respondent, by a letter dated November 29, 2019, applied for a reference for determination of the matter by a three-Judge bench of this court.

3. By way of background, the appellant filed a Civil Suit No. 330 of 2013 in the Commercial and Admiralty Division, Nairobi, on January 30, 1996. The plaint was later amended on March 8, 1996. The dispute relates to the shareholding in the 3rd respondent and a property known as L.R 37/132 (IR 9179/1).

4. The respondents raised a preliminary objection contending that the suit was fatally defective as the appellant had no locus standi to commence or continue with the suit. Upon hearing the preliminary objection, the learned Judge (E. K. O Ogola, J.) upheld the preliminary objection and struck out the suit with costs to the respondents.

5. The events that followed after the striking out of the suit triggered this reference. On April 20, 2016, the appellant's advocate, Ngatia & Co. associates, filed a notice of appeal and served it on the respondents on April 28, 2016. On April 21, 2016, the advocate for the appellant applied for typed proceedings and a copy of the ruling for the purposes of filing an appeal. The letter was copied to all the advocates for the respondents.

6. From the record, the proceedings were typed and the appellant's advocate was informed accordingly, but there was a delay of 9 days in filing and serving the record of appeal. As a result, the appellant filed the notice of motion dated July 26, 2017 under rule 4 of the *Court of Appeal Rules*. The application was heard and determined by a single Judge, who allowed extension of time.

7. Rule 57 of the *Court of Appeal Rules* provides as follows:

    1. Where under the proviso to section 5 of the Act, any person, being dissatisfied with the decision of a single judge—

        a. in a criminal matter, wishes to have his or her application determined by the Court; or

        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.

    2. At the hearing by the court of an application previously decided by a single judge, no additional evidence shall be adduced."

    On the face of it, the rule does not provide the reasons which a full bench should consider in upholding or rescinding the decision of the single Judge. However, many have walked down this path over the years and reasons which a full bench should consider are now well developed. In determining a reference under rule 57 of the *Court of Appeal Rules*, the guiding star at all times is that, the full bench has to take into account that the mandate under rule 4 is discretionary, unfettered, and does not require establishment of sufficient reasons. The discretion given to a single Judge is unfettered, there is no limit to the number of factors that the court should consider so long as they are relevant to the issues falling for consideration before the court.

8. In an application for reference as the one before us, a 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 or she ought not to have taken into account, or failed to take into account a relevant matter; or that there was misapprehension of the law applicable, and the evidence presented; or that his decision was plainly wrong.

9. The above position was reiterated by this Court in A*frican Airlines International Ltd vs. Eastern & Southern African Trade & Development Bank (PTA Bank)* eKLR where the Court stated inter alia:

> "It is thus clear that the learned judge failed to consider all the necessary factors before he exercised his discretion to refuse an extension of time. That being so, we now turn to consider whether we should interfere in any way with the exercise of that discretion.

Since the grant of the extension is discretionary, this Court would not normally interfere with the exercise of that discretion. The circumstances in which this Court will disturb the exercise of a discretion of a trial judge were stated by the Court of Appeal for East Africa in the case of *Mbogo v Shah* [1968] EA 93 which has been applied on numerous occasions by this court. In his judgment in that case Sir Clement de Lestang VP said at page 94:

> "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.
>
> Applying these principles to the present case, we are satisfied that this is one of those cases where, with the greatest of respect, we have no hesitation in interfering with the exercise of the discretion of the learned judge."

10. In the case of *John Koyi Waluke vs. Moses Masika Wetangula & 2 others*, Civil Appeal Application No. 307 of 2009, (unreported), the Court pronounced itself on the same issue as follows:

> " 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… 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. Taking into account the principles that this court should consider before interfering with the decision of a single Judge, we now turn to the reasons that have been advanced by the 1st respondent. Whereas, the respondents admit that the discretion conferred by Rule 4 of the Court of Appeal Rules is wide and unfettered, they state that the reasons advanced by the appellant for extension of time amount to an abuse of the Court process. They have advanced the following arguments: that the rules do not require a party to include certified proceedings in the record of appeal; that the delay between May 29, 2017 and June 7, 2017 was not properly explained; and that the appellant deliberately misled the Court on the sequence of events and, therefore, does not deserve judicial discretion in his favour.

12. The main issue that was before the single Judge was whether there was inordinate delay on the part of the appellant. The learned Judge took into account the fact that the notice of appeal and the request for typed proceedings were made in the timelines set by the *Court of Appeal Rules*. On the issue of the delay, it was properly explained and she was satisfied with the explanation given by the appellant. The single Judge took into account the fact that the memorandum of appeal raised arguable grounds and the prejudice that would be caused to the respondents if she exercised her discretion to extend time.

13. Having considered the arguments by the parties and the decision of the learned Judge, the question that we should now answer is: did the single Judge consider any irrelevant matters or disregard any

relevant matters that would have influenced her decision. We note that the single Judge extensively examined all the reasons that had been advanced for and against extension of time. In the end, she was satisfied that the delay was properly explained.

14. We are satisfied that the learned Judge acted within the parameters set in the exercise of discretion, and that there is no basis for interfering with her decision. It therefore follows that this reference is devoid of merit and is hereby dismissed with costs to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR