



REPUBLIC OF KENYA



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**Sunguh v Oraro (Civil Application 70 of 2015)
[2022] KECA 1314 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1314 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 70 OF 2015
HM OKWENGU, JM MATIVO & WK KORIR, JJA
DECEMBER 2, 2022**

BETWEEN

ERIC GOR SUNGUH APPLICANT

AND

GEORGE ODINGA ORARO RESPONDENT

(An Application for extension of time to seek leave to appeal to the Supreme Court of Kenya from the Judgement and Decree of the Court of Appeal (Mwera, Ouko & Kiage JJ.A.) dated 31st day of January, 2014 in CIVIL APPEAL NO. 226 OF 2011)

RULING

1. Before us is a reference arising from the ruling of M K Koome, JA (as she then was) delivered on July 31, 2015 dismissing the notice of motion dated March 16, 2015 in which the applicant, Eric Sunguh, had sought extension of time to seek leave to appeal to the Supreme Court, from the judgement and decree of this Court (Mwera, Ouko & Kiage, JJ A).
2. When this matter came up for hearing before us on November 1, 2022 neither the applicant nor the respondent, George Odinga Oraro, were represented. Considering that the parties had filed submissions on the reference, we listed the matter for ruling.
3. A brief background to the matter is that the respondent successfully sued the applicant for defamation at the High Court and was, among other reliefs, awarded Kshs 3 million as general damages. The applicant's appeal to this Court was dismissed and the respondent's cross-appeal was allowed so that the general damages were enhanced to Kshs 5 million. The respondent was also awarded Kshs 4 million as aggravated damages and a permanent injunction was issued against the applicant. The order directing the applicant to tender an apology was set aside.
4. The judgment of this Court (JW Mwera, W Ouko and PO Kiage, JJA) in Civil Appeal No 226 of 2011, Eric Gor Sunguh v George Odinga Oraro was delivered on January 31, 2014. On March 17, 2015, the



applicant filed an application seeking extension of time to seek leave to appeal against that decision before the Supreme Court. The application was dismissed by the single Judge through the ruling that has given rise to this reference.

5. In submissions dated July 4, 2019 titled “Further applicant’s submissions on the notice of motion application dated March 16, 2015,” the applicant restates his reasons for the delay in seeking leave on time. He states that he could not file the notice of appeal in the Supreme Court within the time frame stipulated in Rule 30(1) of the [Supreme Court Rules, 2011](#) because he could not afford the legal fees for an advocate and other attendant costs. His case is that he had to seek the intervention of the Parliamentary Service Commission to assist him file an appeal to the Supreme Court and that the Commission did indeed eventually accept to assist him in mounting an appeal at the Supreme Court.
6. The applicant submits that the single Judge limited her jurisdiction when she relied on the holding of Omolo, JA in [Francis Mwai Karani v Robert Mwai Karani](#), Civil Application No Nai 246 of 2006 that lack of money or impecuniosity on the part of the applicant is not a valid reason for extending the time to appeal.
7. As for the grounds upon which this Court can interfere with the decision of a single Judge, the applicant cited the holding in [Benson Mbuchu Gichuki v Evans Kamende Munjua & 2 others \[2006\] eKLR](#), that for an applicant to upset the decision of a single judge, he must demonstrate “that the single judge took into account some irrelevant factor or that he had failed to take into account a relevant fact or that taking into account all the circumstances of the case, his decision is plainly wrong.” Further, that the discretion granted to the single judge must be exercised judiciously taking into account all the matters of law and fact.
8. As for the applicable principles guiding an application for extension of time, the applicant replied on the decision of [Nicholas Kiptoo Korir Arap Salat v Independent Electoral and Boundaries Commission & 7 others \[2014\] eKLR](#), where the Supreme Court distilled the principles as follows:
“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”



9. Also relied on are the decisions of this Court in *Del Monte Kenya Limited v Patrick Njuguna Kariuki [2013] eKLR* and *Eddy Ndeto Gitetu v Kenya Commercial Bank Limited [2004] eKLR*.
10. According to the applicant, the single Judge dismissed his application on a procedural technicality without taking into consideration that his intended appeal has merit. Further, that the subject matter was of public importance, and as was exhorted in the case of the Clerk of the *National Assembly & 208 others v Timothy Njoya & 23 others [2018] eKLR*, time should be enlarged in matters raising issues of public importance.
11. The applicant consequently urged us to set aside the decision of the single Judge dismissing his application for extension of time to seek leave to appeal to the Supreme Court and substitute therewith an order allowing his application.
12. The respondent opposed the reference through submissions dated July 19, 2019. It is the respondent's position that a full bench sitting on a reference from a single judge has a fairly narrow and perfunctory mandate. The decision in *Hezekiah Michoki v Elizaphan Onyancha Ombogi [2015] eKLR*, is cited as stating that an applicant can only succeed in a reference where he shows that the single judge considered irrelevant factors or failed to take into account relevant factors; failed to apply correct principles to the issue at hand; or that from the circumstances, the decision was plainly wrong.
13. According to the respondent, as held in *Pullin Harachand Shah v Southern Credit Banking Corporation Limited [2016] eKLR*, in making its determination, the full bench is not sitting on appeal against the decision of the single Judge. Further, that as per the ratio decidendi in *Rozah Akinyi Buyu v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR*, the jurisdiction to be exercised by the full bench does not entail the substitution of its discretion for that of the single judge.
14. It is the respondent's submission that the single Judge in paragraphs 11-20 of her ruling, carefully considered all the reasons that were placed before her by the applicant before arriving at her decision. This Court is therefore urged to find that the single Judge judiciously considered the application. We are therefore asked to dismiss this reference with costs to the respondent.
15. Before deciding whether the applicant has made a case for our interference with the decision of the single Judge, it is necessary to briefly delineate our jurisdiction. In entertaining this reference, we start by appreciating the fact that we are not sitting on appeal over the decision of the single Judge. This principle was clearly enunciated by the Supreme Court in

Charles Karathe Kiarie & 2 others v Administrator of the Estate of John Wallace Mathare (Deceased) & 2 others [2020] eKLR when it was stated that:

“[16] A review of the decision of a single judge is not an appeal as there can be no appeal from the decision of a single judge of this Court to the full Court. To allow such an appeal will not only be an abuse of the court process but it will also lead to endless litigation and clog the system.”

16. The Supreme Court went ahead and aptly captured the limited jurisdiction of a full court in a reference as follows:

“(18) Therefore, for such an application to succeed, the applicant must satisfactorily demonstrate that in reaching his decision, the judge acted whimsically or misdirected himself in the exercise of his or her discretion and as a result reached a manifestly wrong decision causing apparent injustice.”



17. That our jurisdiction in a matter like the one before us is limited to considering whether the single judge disregarded a relevant matter, regarded an irrelevant matter or acted on a misapprehension of the evidence or the applicable law has been confirmed in several decisions of this Court. For instance, in [Simeon Okingo & 4 others v Benta Juma Nyakako \[2021\] eKLR](#), it was held that:
- “ 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.
13. The threshold required to be met in applications such as the one before us 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.”
18. What was before the single Judge was an application for extension of time and the factors to be considered were condensed in [African Airlines International Ltd v Eastern and Southern African Trade & Development Bank \(PTA BANK\) \[2003\] eKLR](#) when this Court stated that:
- “ These factors include the length of the delay, the reasons for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendants if time is extended.”
19. These factors were elaborated by the Supreme Court in [Nicholas Kiptoo Korir Arap Slat v independent Electoral and Boundaries Commission & 7 others \[2014\] eKLR](#) as already reproduced in this ruling.
20. The question, therefore, is whether the single Judge narrowly interpreted her mandate as alleged by the applicant when considering the application that was placed before her. In the notice of motion dated March 16, 2015, the applicant had sought two main orders namely the extension of time for filing the notice of appeal and the extension of time for filing the application certifying that the intended appeal to the Supreme Court raised a matter of general public importance.
21. In disposing of the application for certification of the intended appeal, the single Judge correctly, in our view, held that she had no jurisdiction to handle the matter as a single Judge because that was an issue for the consideration of a full bench. She then proceeded to consider the application for enlargement of time as one filed under Rule 4 of this Court’s *Rules*.
22. From the outset, the learned Judge appreciated the factors to be considered in determining an extension of time as “the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.” She then observed that the applicant’s claim that he delayed for four months before seeking extension of time because of his inability to pay legal fees and because he resided in a rural area was not a ground for extension of time because financial problems or impecuniousness has never been regarded as a ground for extension of time. This statement was backed up by the decision of this Court in [Francis Mwai Karani v Robert Mwai Karani](#), Civil Application No Nai 246 of 2006.



23. The single Judge did not stop there. She observed that the applicant had throughout been represented by the same advocate and the advocate ought to have filed the appeal which would have established the basis for seeking financial aid from Parliament. The Judge observed that there was lack of diligence by the applicant in the filing of the application and even in prosecuting it.
24. As to whether the respondent would be prejudiced by the extension of time, it was observed that the respondent had averred that the applicant had never taken any step to settle the decretal amount and it would be prejudicial to keep the respondent away from the fruits of his successful litigation.
25. As to the arguability of the proposed appeal, the Judge observed that the issue of parliamentary immunity or privilege upon which the applicant had anchored the arguability of his appeal had been thrashed to a pulp before the High Court and this Court.
26. In view of the findings of the single Judge, we do not see any irrelevant factors taken into account or relevant factors omitted from her decision. There is also nothing in the ruling that can lead us to the conclusion that her decision was plainly wrong or that she exercised her discretion in an injudicious manner.
27. In saying so, we are cognizant of the fact that the applicant’s application was majorly premised on his alleged impecuniousness and that he had to ask for assistance from the Parliamentary Service Commission before seeking leave to appeal to the Supreme Court. That lack of finances is not a good reason for seeking extension of time has indeed been stated in many decisions of this Court. In the case of *Francis Mwai Karani v Robert Mwai Karani*, Civil Application No 246 of 2006 relied on by the single Judge, RSC Omolo, JA held that:

“I must make it abundantly clear at the outset that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. But as has always been said, each case must be looked at on its own facts and that is exactly what I am doing in this application. In other words, I am not establishing any new principle different from the well-known one that lack of financial resources is generally not a basis for extending time.”
28. In *JNM v JNM [2020] eKLR*, where financial distress was cited as one of the grounds for the delayed filing of an appeal, W Karanja, JA in dismissing the application for extension of time opined that:

“On the second issue, filing a notice of appeal in person would not have required a lot of money. Besides, the Court Rules provide for filing of pleadings in forma pauperis. Had the applicant approached the Registrar of the Court with a request to be allowed to waive fees, such a matter would have been given due consideration. We have not been told that she did so. I am not satisfied that the applicant has laid proper basis to explain the delay as required in the cases cited above to prevail upon the Court to exercise its discretion in her favour. The delay involved in this matter is inordinate and in my view, it has not been adequately explained.”
29. The applicant before us could have sought assistance from the Registrar of this Court if indeed he had insurmountable financial difficulties. He could as well have asked his advocate, who had traveled the litigation journey with him from the High Court to this Court, to file the application for leave to appeal to the Supreme Court as he sought financial support. He did none of this. We, therefore, find no fault in the manner the single Judge exercised her discretion.
30. In view of what we have stated above, it follows that this reference has no merit. The same is dismissed with costs to the respondent.



DATED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF DECEMBER, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

J MATIVO

.....

JUDGE OF APPEAL

W KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

