



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OKWENGU, GATEMBU & MURGOR, JJA)

CIVIL APPLICATION NO. 12 OF 2013

BETWEEN

NANCY WANGARI SIMBA (SUBSTITUTED).....1<sup>ST</sup> APPLICANT

DOMINIC WANJOHI SIMBA (ADDED).....2<sup>ND</sup> APPLICANT

AND

CYRUS MACHARIA GITONGA AND

JOHN MAINA GITONGA

*(Suing as the Legal Representatives of the Estate of*

FRANCIS GITONGA MACHARIA (Deceased)....1<sup>ST</sup> RESPONDENT

NAOMI NJERI KARUMBA (SUBSTITUTED)..2<sup>ND</sup> RESPONDENT

NAOMI WANJIRU KIBUCHI.....3<sup>RD</sup> RESPONDENT

AND

SIMON MBARIA NJERU.....THIRD PARTY

*(Being a reference under Rule 55 of the Court of Appeal Rules from the*

*Ruling of (Otieno-Odek, JA) dated 18<sup>th</sup> July, 2013 in an application*

*for extension of time for leave to file and serve the Notice and Record*

*of appeal out of time in an appeal against the Ruling of the High Court*

*of Kenya at Nyeri (Sergon, J.) dated 17th September, 2010 in Nyeri HCCC No. 74 of 1990*

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RULING OF THE COURT

[1] Before this Court is a reference brought by the applicants under Rule 55 (b) of the Court of Appeal Rules against the decision of a single Judge, (the late Otieno-Odek, JA) dated 18th July 2013 in which the single Judge declined to exercise his discretion in the applicants favour and dismissed the applicants Notice of Motion dated 13th June, 2012.

[2] The applicants' motion was brought under Rule 4 of this Court's Rules, seeking leave to file the Notice and Record of Appeal out of time. The applicants sought to appeal the decision of **Sergon, J** dated 17th September, 2010 in which the learned Judge dismissed the applicants'

motion seeking to have their suit reinstated following its dismissal for non-attendance.

[3] The application was premised on the ground that the 1st applicant was indisposed and was ailing hence there was a breakdown of communication between her and her advocate leading to the inordinate delay in the filing of the appeal. The 1st applicant, who swore an affidavit in support of the application, averred that her advocate also failed to receive the typed proceedings on time, that even after her advocate received the proceedings, she never received any correspondence from her advocate as the letters were sent to an old letter box that she had stopped using, and that due to her deteriorating health, she was unable to visit the advocate's chambers to follow up on the matter. The 1st applicant maintained that the appeal had high chances of success.

[4] The application was opposed through an affidavit sworn by the 1st respondent **Francis Gitonga**, on behalf of the respondents who deposed that the applicants delay was inordinate and unexplained, and that the applicants had failed to adequately explain their inaction.

[5] Under Rule 4 of the Court Rules, the single Judge had the discretion to grant or refuse to grant the extension of time. That Rule states as follows:

***“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”***

[6] The discretion exercised by a single Judge under Rule 4 though unfettered, should be exercised judicially. This was so held by **Waki, JA** in **Njuguna V. Magichu & 73 others [2003] KLR 507**, where he **stated** as follows: -

***“The discretion exercisable under Rule 4 of this Court’s Rules is unfettered. The main concern of the court is to do justice between the parties. Nevertheless, the discretion has to be exercised judicially, that is on sound factual and legal basis.”***

[7] The mandate of this Court in hearing a reference under Rule 55 of this Court’s Rules is as held in the case of **Hezekiah Michoki vs Elizaphan Onyancha Ombongi [2015] eKLR** where the Court held as follows:

***“For this Court to interfere with exercise of discretion by a single Judge sitting on behalf of the full Court and to vary, discharge or reverse that decision, the full Court must bear in mind that the single Judge was exercising a discretion which is unfettered, though exercisable judicially, and it has to be shown by the applicant that the single Judge took into account some irrelevant factor or factors or failed to take into account a relevant factor or factors; that the Judge failed to apply correct principles to the issue at hand, or that, taking into account all the circumstances of the case, his decision was plainly wrong.”***

[8] In **Donald O. Raballa vs. Judicial Service Commission & Another [2018] eKLR** this Court pronounced itself on the circumstances in which the exercise of discretion under Rule 4 of the Court Rules can be interfered with. Stating as follows:

***“The applicant ... now comes before us on a reference under Rule 55 (1) (b) of the Rules of this Court... The reference is, of course, not an appeal and we may only interfere with the exercise of the wide discretion bestowed on a single Judge under Rule 4 of the rules on the basis of sound principles. These in substance are that the single Judge took into account an irrelevant factor which he ought not to have taken into account or that he failed to take into account a relevant factor which he ought to have taken into account; that he misapprehended or not properly appreciated some point of law or fact applicable to the issues at hand; or that the decision on the available evidence and law is plainly wrong. The onus of the demonstrating the breach of any or all such principles is on the applicant.”***

[9] This is to say that, the decision of the single Judge may only be interfered with if the applicant demonstrates that the Judge misapprehended the applicable law or failed to take into account a relevant factor or took into account an irrelevant factor. In **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, (Civil Application No. Nai 255 of 1997)** this Court addressed the factors to be considered by a single Judge in dealing with an application for extension of time under Rule 4 of the Court Rules where 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”.***

[10] In addressing the applicants’ motion, the single Judge was alive to the factors required for consideration while exercising his discretion. This is evident from the following extract of his ruling.

***“I am aware that the discretion I have to exercise under the Rules of this Court is unfettered. Nevertheless, it ought to be guided by consideration of the factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance.”***

[11] The single Judge addressed each of these factors and noted that the applicants delay was inordinate as they failed to explain the delay of over 8 months between the date the typed proceedings were collected and the date of filing the Notice of Motion, and that the explanation given by the applicant was inadequate. This was after the single Judge interrogated the explanation by the 1st applicant that she was suffering

from a chronic illness. The single Judge noted that the nature of the chronic illness was not given hence the inadequacy of the explanation. The single Judge also noted that the 2nd applicant failed to offer any explanation on his inaction on the appeal.

[12] In our view, the single Judge properly exercised his discretion, taking into account relevant factors. We have no reason to interfere with his decision. Accordingly, the applicants' motion is dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of January, 2021.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU (FCIArb)**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**