



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, GATEMBU & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 113 OF 2016

BETWEEN

MICHAEL ODERA TOM

(Suing as the Administrator of the estate of

THOMAS OTOM AGULLO.....APPLICANT

AND

COMMISSIONER OF LAND.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

KENYA RAILWAYS

CO-OPERATIVE SOCIETY.....3RD RESPONDENT

(Appeal from the ruling and decision of the

High Court of Kenya at Kisumu (Kibunja, J) dated

9th March, 2016 in HC Civil Suit No. 207 of 2013)

RULING OF THE COURT

[1] By a notice of motion dated 23rd February, 2017, the applicant **Michael Odera Otom** moved the court under **Rule 4** of the Court of Appeal Rules for time to be extended to enable him file his record of appeal out of time.

[2] The application was heard by a single Judge (Odek, JA) who in a ruling dated 19th February, 2019, dismissed the motion. The applicant who is dissatisfied by that ruling has filed a reference under **Rule 55** of the **Court of Appeal Rules** for the matter to be placed before a full Bench.

[3] Following notices served upon the parties, hearing of the motion proceeded before us by way of submissions without the presence of counsel. The applicant did not file any submissions. We note that in his letter seeking the reference he has given the grounds for the reference as: the learned judge did not consider the fact that the applicant had already filed an appeal which has not been struck out; that the notice of appeal, the appeal and the application were filed within reasonable time; that there is sufficient reason for the extension of time; that the Court has a duty to do justice rather than dismissing matters on technicalities; that the learned judge did not deal with all issues involving the matter; and that the land the subject of litigation is occupied by an entire community and a lot of injustice would occur if the appeal is not heard.

[4] Only the 3rd respondent filed written submissions in which it urged that the discretion of the single Judge can only be interfered with if it is shown that the single Judge took into account some irrelevant factor or factors or failed to take into account a relevant factor or factors; or 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.

[5] The 3rd responded submitted that the learned judge dismissed the applicant's motion as he found the reason given for the failure to file the record of appeal within time not satisfactory; and that the reasons given by the applicant for the reference amount to introducing new evidence and departing from their pleadings.

[6] We have considered the motion before us. It is trite that under **Rule 4** of the **Court Rules** a single Judge exercises unfettered discretion on behalf of the Court, and that in a reference such as this, that exercise of discretion can only be interfered with if it is established that it was not exercised judicially.

[7] In this case, the learned judge delivered a ruling in which he clearly identified the principles applicable in considering an application for extension of time, by relying on *Nicholas Kiptoo Arap Salat -vs IEBC [2014] eKLR S. C. Application No. 16 of 2014*. The learned judge found the delay of eleven months inordinate and the reason for the delay unsatisfactory.

[8] In our view, we cannot fault the learned judge. He exercised his judicial discretion properly having taken into account the appropriate principles and factors. We therefore have no basis to interfere. The application is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR