



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. E 411 OF 2020

(CORAM: ASIKE-MAKHANDIA, JA (IN CHAMBERS))

BETWEEN

JOHN KIMANYI MUKUHA.....1<sup>ST</sup> APPLICANT

SAMUEL MUKUHA NJUKI.....2<sup>ND</sup> APPLICANT

AND

MARGARET NYOKABI KAHIHU.....1<sup>ST</sup> RESPONDENT

JOHN KAHIHU KAMUYU.....2<sup>ND</sup> RESPONDENT

*Being an application under Rule 55 for extension of  
time for referring the matter to the full bench of the court  
against the ruling (Gatembu ,JA) dated 19<sup>th</sup> February, 2021.*

\*\*\*\*\*

RULING

The Motion before me is dated 10<sup>th</sup> March 2021 brought under the provisions of Rules 3, 47 and 55 of the Court Of Appeal Rules, Sections 3A & 5(3) of the Appellate Jurisdiction Act and Article 159 (2) (d) of the Constitution of Kenya. The applicant seeks several prayers but the main one that falls before me for consideration is that the time prescribed for referring this matter for hearing before a full bench of the court be extended.

The application is grounded on the fact that the applicants are aggrieved by the ruling of the single judge (Gatembu, JA) rejecting their application for extension of time to enable them file and serve record of appeal out of time and that failure to refer the application to the full bench of the court was an inadvertent mistake on the part of their advocate then on record who reasonably believed that the applicants may have come to the end of the road in their quest for redress, that the mistake of the advocate should not be visited upon them and finally, that they will suffer irreparable damage and injury should they not get audience before the full bench of the court.

The application is supported by the affidavit of the 1<sup>st</sup> applicant dated 18<sup>th</sup> March 2021. The affidavit merely reiterates and expounds on the grounds on the face of the of the application. Suffice to add that after the delivery of the ruling by Gatembu JA in which he dismissed their application, a reference of the ruling to the full court was not sought within the prescribed seven (7) days from the date of the ruling. The reason for not seeking the same was due to the believe by their advocates then on record that the matter had come to the dead end.

The Respondents did not file any response or submissions despite the notice to all parties of 14<sup>th</sup> April 2021 by the Deputy Registrar of this Court to that effect. However the applicants filed submissions on 21<sup>st</sup> April 2021 as per the directions of the court which submissions reiterate the contents of the supporting affidavit. The applicants nonetheless placed much reliance on the case of Kennedy Odhiambo Owiti V. Jane A. Staussi, Betty O. Asunah 2021 eKLR on the exercise of discretion by court in an application of this nature.

I have considered the motion, affidavit in support, the submissions and the cited authority. I wish from the onset to point out as already stated

that this is an omnibus application containing prayers that can be granted by a single judge and equally others that can only be entertained by a full bench of the court. In regard to this kind of application, this court has before expressed itself in the case of **Riccardo Fanelli & 2 others Vs. Frigrievi Graziano [2015] eKLR** thus:-

***“Before me is yet another ominous motion on notice in which the applicants are seeking in the same application, reliefs which can only be granted by a single judge, as well as other reliefs which must be sought before the full court. This undesirable practice that is fast taking root in Malindi and Mombasa has no basis in the rules procedure, encourages wastage of time in the term of unnecessary objections and is otherwise avoiding payment of prescribed court fees for applications before a single judge and those before a full court. We have previously decried the practice in Christopher Iddi Moto & 15 others V. Chiriba Nyambu Barua & anor. CA No. 43 of 2014 UR 38/14 and Feisal Mohammed Ali vs. Republic CR. APP. NO. 2 of 2015 or/1/15) and hope that it shall cease forthwith for record, application for extension of time under Rule 4 of the court of Appeal Rules are by Virtual of the Provision of Rule 53(1) to be heard and determined in the first instance by a single judge such an application came in the full court under rules 55 only by way of reference from the decision of the single judge (Kathurima I’noti JA)***

***I fully associate myself and re-echo these sentiments and state that prayers 3 and 4 are not properly before me.***

***Turning to the prayer for extension of time, the proper rule to cite was rule 4 of the court of Appeal rules which rule provides for extension of time.”***

But as already stated elsewhere in this ruling, I will confine myself to the prayer for extension of time.

In the case of the **County Executive of Kisumu V. County government of Kisumu and 8 others 2017 eKLR**, the supreme court reiterated that extension of time was an exercise in discretion and identified the following principles that a court should take into account in exercising such discretion:-

- 1) Extension of time is not a right of a party. It 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 delay. The delay should be explained to the satisfactory of the court.***
- 5) Whether there will be prejudice suffered by the respondents if the extension is granted.***
- 6) Whether the application has been brought without undue delay;***

The above principles I believe equally govern the discretion of a single judge in determining whether to extend time within which the reference to the full bench ought to be made. Thus I will bear in mind the foregoing parameters in dealing with this application. The ruling was delivered on 19<sup>th</sup> February 2021 and the instant application was filed on 18<sup>th</sup> March 2021 barely a month in between. This is clear that there was no delay and even if there was it was not inordinate.

The applicants have advanced the reason for their failure to seek a reference to the full bench within the prescribed time on account of their advocate who thought that they were contented by the ruling and would not wish to proceed any further. I take this as a plausible and sufficient explanation for the delay. The Respondent did not file any documents in response to the application, thus the application is unopposed. Accordingly what the applicants have deposed to ought to be taken as true. The respondents having failed to file any papers in opposition to the application am not in a position to appreciate the prejudice they may suffer in the event the application is allowed.

For the aforesaid reasons, I find that this is an appropriate case in which I should exercise my discretion in the applicants’ favour. Accordingly I allow the application in terms prayer of 2. However I specifically direct and for avoidance of doubt that the applicants are granted Seven (7) days from the date of this ruling within which to make the reference, failing which the leave hereby granted shall automatically lapse.

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021.**

**ASIKE- MAKHANDIA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**