



**Pyramid Hauliers Limited v Nyaanga & 3 others (Civil Application
183 of 2019) [2021] KECA 178 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 178 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 183 OF 2019
DK MUSINGA, RN NAMBUYE & W KARANJA, JJA
NOVEMBER 5, 2021**

BETWEEN

PYRAMID HAULIERS LIMITED APPLICANT

AND

JAMES OMINGO NYAANGA 1ST RESPONDENT

VINCENT KINYUA 2ND RESPONDENT

GEORGE OLANDO 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. Before this Court is a reference brought by the applicant under Rule 55(1) (b) of the [Court of Appeal Rules](#) against the decision of a single Judge, (W. Ouko, (P) (as the then was) dated 7th February, 2020 in which the single Judge declined to exercise his discretion in the applicant's favour and dismissed the applicant's Notice of Motion dated 20th June, 2019. The application was brought under Rule 4 of this Court's Rules, seeking leave to file the Notice and Record of Appeal out of time, against the decision of R. Nyakundi, J dated 30th January, 2019 dismissing the applicant's appeal against a judgment granted in favour of the 1st respondent in Kajiado SRM Court Civil Suit No. 11 of 2007.
2. Following a complaint made to police by the applicant, the 1st respondent was charged and prosecuted in Kajiado SRM's Criminal Case No. 36 of 2005 for the offence of theft of motor vehicle parts at the conclusion of which he was acquitted, prompting him to institute Kajiado SRM Court Civil Suit No. 11 of 2007, against the applicant, 2nd and 3rd respondents seeking damages for malicious prosecution, at the conclusion of which, the court found his claim proved against the applicant, 2nd and 3rd respondents, allowed it accordingly and awarded him Kshs.500,000.00 in damages.



3. The applicant's appeal to the High Court at Kajiado against the above judgment was dismissed. The applicant was allegedly dissatisfied with that decision and desired to appeal against it but failed to file the Notice and record of appeal within the timelines stipulated for in Rules 77 and 82(1) of the Court of Appeal Rules.
4. The delay in timeously initiating the intended appellate process was attributed to its advocates' mistake hence pleading that it should not therefore be punished for the mistakes, of its advocates; and second that no prejudice would be occasioned to the 1st respondent if the relief sought were granted in their favour as the decretal amount of Kshs.500,000.00 was secured in a joint account of counsel for the respective parties and would thus be easily accessible to the successful party as soon as the intended appellate process was finalized.
5. The application was opposed by the 1st respondent, asserting that the delay was not only inordinate but was also unexplained. Further that the security of Kshs.500,000.00 had already been released to him on 22nd February, 2019.
6. It is now trite that in law the mandate the single Judge was called upon to exercise under Rule 4 of the Court Rules is discretionary with the only caveat being that it be exercised judiciously. It provides 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 shall be construed as a reference to that time as extended.”

7. The case law on principles that guide a single Judge in the first instance and this court on a reference in the second instance in the exercise of their respective mandates in deciding whether to grant relief or otherwise under the said rule now form a well-trodden path. We take it from Waki, JA in [*Njuguna vs. Magichu & 73 others \[2003\] KLR 507*](#), wherein the learned Judge (as he then was) expressed himself 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 as to be exercised judicially, that is on sound factual and legal basis.”

8. The mandate of this Court in hearing a reference under Rule 55 of this Court's Rules has also been delineated by the court itself. We take it from 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.”



9. In *Donald O. Raballa vs. Judicial Service Commission & Another [2018] eKLR* the court expressed itself on the same issue 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.”

10. Our take on the position enunciated in the above case law and which we fully adopt is that a decision of a single Judge may only be interfered with if the applicant demonstrates that the single Judge misapprehended the applicable law or failed to take into account a relevant factor or took into account an irrelevant factor.

11. The factors to be borne in mind both by the single Judge in the first instance and this court in the second instance are the same though not limited to those set out in *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, (Civil Application No. Nai 255 of 1997)* wherein 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”.

12. We have appraised the record as placed before us. It is explicit that the single Judge was not only alive but also appreciated the factors falling for consideration in the discharge of his mandate as crystallized by the *Sila Leo Mutiso [supra]* case. He expressed himself thereon as follows:

“A perusal of the supporting affidavit deposed by Mr. Peter Njenga reveals that besides faulting the learned Judge’s decision and blaming his former advocate for his inaction of failing to file the appeal, he does not demonstrate the steps taken by the applicant in pursuing the appeal. Additionally, on record, there is no request for proceedings and no certificate of delay to prove that the applicant has been diligent in following up on the typing of proceedings. The reasons for delay are not plausible and as such, they do not form the basis upon which the court can exercise its discretion in favour of the applicant.

Though the circumstances under which Kshs. 500,000/- was disbursed are disputed and unclear, the fact remains that the money was indeed disbursed to the 1st respondent. If this application were to be granted, it would be prejudicial to the 1st respondent.”

13. It is our position that the above excerpt of the record is sufficient demonstration that the single Judge addressed each of the factors the applicant had relied upon to seek relief and noted that: the applicants delay was inordinate as they failed to explain the delay of over 3 months and 3 days for which the applicant blamed his erstwhile advocate, Mr. Chigiti; the applicant did not attribute the reason for delay to itself and that although it was commonly stated in the rival position before the Judge that



the mistake of an advocate should not be visited upon an innocent litigant, this statement was not a blanket protection to clients who having failed to comply with procedural requirements continue to hide behind the failure of their advocates to perform certain actions on their part; the applicant failed to offer any explanation on its inaction to initiate the appellate process timeously. Additionally, that there was nothing on the record before the Judge to show that there was a request for proceedings, nor that a certificate of delay had been obtained to prove that the applicant had been diligent in following up on the typing of proceedings.

14. On the totality of the above assessment and reasoning, it is our view that the single Judge properly exercised his discretion, taking into account relevant factors highlighted above which, in our view, were also not only correctly but also as properly appreciated, and the law properly applied thereon. We therefore have no reason to interfere with the exercise of that discretion. Accordingly, the applicant's reference is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

