Hass Petroleum (K) Limited v Nyanza Enterprises Limited & another (Civil Application E065 of 2020) [2021] KECA 290 (KLR) (3 December 2021) (Ruling)

Neutral citation: [2021] KECA 290 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E065 OF 2020

K M'INOTI, M NGUGI & PO KIAGE, JJA

DECEMBER 3, 2021

BETWEEN

HASS PETROLEUM (K) LIMITED ..... APPLICANT

AND

NYANZA ENTERPRISES LIMITED ..... 1ST RESPONDENT

COMMISSIONER OF LANDS ..... 2ND RESPONDENT

(Notice of appeal arising from the Judgement and Decree of the Environment and Land Court at Kisumu (Kibunja, J.) read and delivered by (Ombwayo, J.) on 6th March 2020 in ELC CASE NO. 825 OF 2015)

RULING

1. By a Notice of Motion dated 22nd June, 2020, the applicant moved the Court under Rule 4 of the *Court of Appeal Rules*, Sections 3A & 3B of the *Appellate Jurisdiction Act* and Article 159 of the *Constitution* of Kenya seeking extension of time to file and serve a Notice of Appeal and a letter bespeaking proceedings and judgment of the Kisumu Environment and Land Court. The applicant also prayed that the Notice of Appeal and the letter bespeaking proceedings and judgment already on record be deemed as having been filed and served on time. No grounds were set out on the face of the application but the applicant's counsel swore an affidavit in support of the application.

2. The application was initially heard by a single Judge of this Court (Kantai, J.) who dismissed the application with costs to the 1st respondent. Hence, what is before us is a reference under Rule 55 (1) (b) of this Court's rules. By letter dated 22nd March, 2021, the applicant expresses its dissatisfaction with the ruling of the single judge and invites us to interfere with the judge's exercise of discretion for the reason that, the learned judge's rejection of the application on the premise that the application did not include a prayer for enlargement of time to file a record of appeal was a fundamental misapprehension of law. The applicant elaborates this claim by stating that, an application for

enlargement of time to file the record of appeal cannot lie unless proceedings have been furnished to parties, and there was no evidence that it had been furnished with the proceedings and would therefore be in a position to file the record of appeal if directed to do so. Thus, it would have been premature for it to seek such an order.

3. Further, while affirming that time for filing an appeal runs from the date of filing the notice of appeal and not from the date of judgment as held by the learned judge, the applicant faults the learned judge for overlooking the proviso to Rule 82(1) of this Court's rules. To the applicant, following the learned judge's finding that it had rendered a good explanation for the delay in filing and serving the notice of appeal and the letter bespeaking proceedings, the respondent had not conducted itself well in the matter, and the application was not frivolous, the application should have been allowed.

4. Both parties filed written submissions in support of their contentions. Donald Otieno, counsel for the applicant submitted that misapprehension of a point of law is sufficient ground for interference with a single judge's exercise of discretion, citing *OCEAN FREIGHT SHIPPING COMPANY LIMITED -VS- OAKDALE COMMODITIES LIMITED [1997] eKLR*, in support. Counsel further drew our attention to the case of *JAMES MWANGI MATHENGE & ANOTHER -VS- CHARLES MWAI & ANOTHER [2006] eKLR*, arguing that asingle judge's exercise of discretion can be interfered with where he took into account an irrelevant factor which ought not have been taken into account or where he failed to take into account a relevant factor which he ought to have taken into account. According to counsel, failure to include a prayer for extension of time to file a record of appeal was an irrelevant consideration. In conclusion, counsel beseeched us to set aside the order of the learned single judge and allow the application for extension of time. The applicant also prays for costs of the application before the single judge and the reference before us.

5. In reply, learned counsel for the respondent, Chris Maganga, affirmed that the learned judge properly exercised his discretion when he declined the application for extension of time, and urged that this being an old matter of over 14 years, the respondent should be left to enjoy the fruits of the judgment.

6. We have considered the reference and are distinctly aware of the discretionary powers bestowed on a single Judge under Rule 4. This Court has on many occasions pronounced itself on circumstances that warrant interference with the exercise of such discretionary powers. Some of those instances have already been mentioned in the foregoing paragraphs. In *DONALD O. RABALLA -VS- JUDICIAL SERVICE COMMISSION & ANOTHER [2018] eKLR*, the Court stated;

> "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 demonstrating the breach of any or all such principles is on the applicant." (See also LINGAM ENTERPRISES LIMITED & 4 OTHERS -VS- RADIO AFRICA LIMITED [2015] eKLR).

7. The factors which a Judge should consider in determining a Rule 4 application were well-elucidated by this Court in *THUITA MWANGI -VS- KENYA AIRWAYS LTD [2003] eKLR* that;

> " Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules.

For instance, in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), 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'"

8. The applicant is aggrieved by the learned judge's dismissal of the application on the basis that he had not prayed for extension of time for filing the record of appeal, asserting that the judge took into consideration matters he ought not to have considered in determining the application. We see it fit to cite the relevant part of the judge's holding in the matter as follows;

> " Even if I were to deem notice of appeal which was filed and served outside the timelines in the rules to have been properly filed it would be of no practical assistance to the applicant where no prayer is made on the fate of the appeal itself, which was not filed and there is no prayer for extension of time. It is for this reason that I am unable to exercise my discretion in favour of the applicant and the motion fails and is dismissed with costs to the 1st respondent".

9. With respect to the learned single judge, and guided by the laid out principles for adjudicating Rule 4 applications, we agree that the judge took into account matters he ought not, in declining to grant the application. We think that once he was satisfied on the merits that the applicant had explained the delay and that its application was not frivolous, he should on that basis have allowed it. It was an error not to, and then upon a consideration of what was essentially an extraneous matter. This is because once the applicant is granted leave to file the Notice of Appeal or the notice of appeal filed out of time is deemed to have been filed on time, subsequent computation of time, including for the filing of the record of appeal, is determined by the Rules of this Court, reckoned from the date of filing the Notice of Appeal or the date the Notice of Appeal is deemed to have been filed on time. That is really the reason why Rule 4 provides that reference to time which has been extended "shall be construed as a reference to that time as extended." We therefore find ourselves compelled to interfere with the exercise of his discretion in the matter.

10. In sum, we find this reference merited and we allow it. The learned judge's ruling is accordingly set aside. The motion is allowed so that the notice of appeal and letter bespeaking proceedings duly filed and served are hereby validated.

11. Costs shall be in the intended appeal. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR