



**Mbuthu v Gitau & another (Civil Application 319 of 2019)  
[2021] KECA 239 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 239 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 319 OF 2019  
DK MUSINGA, RN NAMBUYE & HM OKWENGU, JJA  
DECEMBER 3, 2021**

**BETWEEN**

**NAOMI WANJIRU MBUTHU ..... APPLICANT**

**AND**

**BERNADETTE MURUGI GITAU ..... 1<sup>ST</sup> RESPONDENT**

**ROSE MURUGI MACHARIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being a reference under Rule 55 of the Court of Appeal Rules from the Ruling of (F. Sichale, J.A.) dated 8th May 2020 in an application for extension of time to file an appeal out of time against the Judgment of the High Court of Kenya at Nairobi (Musyoka, J.) dated 29th September, 2017 in Succession Cause No. 2070 of 2011)*

**RULING**

1. This is a reference to the full Court, under Rule 55 of the *Court of Appeal Rules*, from the decision of a single Judge of this Court (F. Sichale, J.A.) dated 8th May, 2020. The learned single Judge's ruling was made pursuant to a notice of motion application dated 30th September, 2019. It was brought substantively under Article 159 of the *Constitution of Kenya, 2010*, sections 3, 3A, and 3B of the *Appellate Jurisdiction Act* and Rule 4 of the Court of Appeal Rules. The motion sought leave of the court to extend time within which to file and serve both the notice and the record of appeal out of time against the judgment of the High Court of Kenya at Nairobi in Succession Cause No. 2070 of 2011 (Musyoka, J.) dated 29th September, 2017 together with an attendant order for any such further orders the Court may deem fit and convenient to grant.
2. The application was supported by grounds on its body and a supporting affidavit of Naomi Wanjiru Mbuthu the applicant together with annexures thereto.
3. The application was opposed by a lengthy replying affidavit sworn on 12th February, 2020 by Bernadette Murugi Gitau, the 1st respondent on her own behalf and on behalf of the 2nd respondent.



The application was canvassed before the single Judge on 10th March, 2020 through oral submissions by learned counsel, Mr. Ondieki E. for the applicant and learned counsel, N. Kiagayu for the respondent. At the conclusion of the oral submissions, the learned single Judge analyzed the record in light of the oral submissions of advocates for the respective parties made before him and declined to exercise her discretion in favour of the applicant for the reasons given in the impugned ruling to which we shall revert at a later stage of this ruling, triggering the reference under consideration before us.

4. The reference to the full bench was canvassed before us in the absence of learned counsel for the respective parties herein, and without oral or written submissions. All we have on record for our consideration are the contents of the applicants' advocate communication to the Deputy Registrar of the Court, Ref. No. 00/NWM/05/19 dated 13th May, 2020 which we find prudent to reproduce the portion which in our view, contains what we believe are the grounds in support of the reference as hereunder:

“The applicant beseeches the full court to determine the serious issues of the law, constitutional and good practice. The single Judge failed to appreciate that the interests of justice dictate that the extension of time allowed; secondly; the learned single Judge failed to appreciate that the respondents will not suffer any prejudice and further that she derived into the merits of the intended appeal which was outside the purview of the jurisdiction of the single Judge which occasioned a miscarriage of justice. The application raises serious constitutional dilemmas on the access to justice, fair trial and protection of the law and full benefit of the law.

The learned single Judge misdirected herself to the evidential issues that could not be fully adjudicated on the merits of the appeal.”

The reference has been contested also by the contents of the respondents' communication to the Deputy Registrar of the Court dated 11th May, 2021 which we likewise reproduce the portion we believe contains a response to the applicant's grounds as hereunder: “the applicant has failed to file and serve their submissions as directed thereby leaving the respondents stranded in the absence of any specific grounds of discontent expressed against the impugned ruling of Sichale, J.A, the respondents have nothing to respond to”,

and prayed for the reference to be dismissed with costs to her.

5. In an application brought under Rule 4 of the Court of Appeal Rules, a single Judge is usually invited to exercise an unfettered discretion in the discharge of her mandate with regard thereto, that is to say without whim, caprice or sympathy See *Gitbiaka vs. Nduriri [2004] 1 KLR 67*.
6. Being guided as above, the approach we adopt in determining the reference is that taken by the Court in *John Koyi Waluke vs. Moses Masika Wetangula & 2 Others, Civil Appeal (Application) No. 307 of 2009*, (Unreported) wherein the Court stated inter alia as follows:

“Having considered all that has been urged before us in this reference we would say that we have stated time without number that in exercising the unfettered discretion under Rule 4 of this Court's Rules, a single judge of the Court is doing so on behalf of the whole Court, and the full bench of the Court would only be entitled to interfere with the exercise of discretion if it be shown that in the process of exercising the discretion the single Judge has taken into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account or that he misapprehended some aspect of the evidence and the law applicable or short of these, that his decision was plainly wrong and could not have been arrived at by a reasonable tribunal



properly directing itself to the evidence and the law. It is not enough, for example, to show the full Court that had it been sitting in place of the single Judge, it would have arrived at a different result.”

7. See also *African Airlines International Ltd Vs Eastern & Southern African Trade & Development Bank (PTA BANK) [2003] KLR 140 at page 143*, in which this Court made the following observation as regards exercise of judicial discretion:

“Since the grant of the extension is discretionary, this Court would not normally interfere with the exercise of that discretion. The circumstances in which this Court will disturb the exercise of a discretion of a trial judge were stated by the Court of Appeal for East Africa in the case of *Mbogo vs. Shah (1968) EA 93* which has been applied on numerous occasions by this Court. In his judgment in that case Sir Clement de Lestang V.P. said at page 94:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

8. The brief background to the application before the single Judge was that the applicant was aggrieved with the orders of Musyoka, J. dated 29th September, 2017 rejecting her affidavit of protest filed in the succession proceedings protesting the mode of distribution of the deceased's estate as proposed by the respondents who were co-administrators with the applicant. Instead of appealing against those orders, the applicant filed an application before the High Court seeking revocation and or annulment of the Certificate of Confirmation of grant issued by Musyoka, J. on 29th September, 2017. The respondents filed a Preliminary Objection (P.O.) to that application, resulting in a ruling delivered on 5th July, 2019 by Onyiego, J. sustaining the respondents P.O.
9. Onyiego, J.'s advice in the ruling dated 5th July, 2019 that the applicant should have filed an appeal if aggrieved with the orders of Musyoka, J. of 29th September, 2017 is what prompted the applicant to file the notice of motion dated 30th September, 2019. The grounds proffered by the applicant in support of that application were, inter alia, that: her advocates then on record for her erroneously advised her to file an application for revocation and or annulment of the grant instead of filing an appeal and pleaded with the single Judge that the delay involved was not inordinate. She had also given plausible reasons for the delay. Ends of justice therefore demanded that the matter be reopened for her to resuscitate her intended appellate process; and that the sins of her advocate should not be visited against her.
10. In rebuttal, the respondents asserted that the delay of seven (7) months to the filing of the application for revocation and three (3) months to the filing of the application for leave was not only inordinate but was also unexplained. Second, it would be also highly prejudicial to them if the relief sought were granted considering that the prolonged litigation had prevented them from benefiting from their inheritance for close to over twenty (20) years.
11. The single Judge analyzed the record and applied thereto the threshold for exercise of the Court's mandate under Rule 4 of the Court of Appeal Rules as succinctly restated by the Supreme Court in



the Case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR*; and expressed herself thereon as follows:

“In view of the guidelines enunciated by the Supreme Court above, the question before me is whether the applicant has satisfied the court that time should be extended for them to give notice of their intention to appeal.

The applicant seeks to challenge the judgment of Musyoka, J. delivered on 29th September, 2017. The present application was filed on 1st October 2019, a delay of about 2 years. The explanation for the delay is that the applicant acted on advice of her previous counsel who directed her to pursue orders for revocation of grant of letters of administration intestate in the High Court. The applicant submitted that mistake of counsel should not be visited upon an innocent litigant.

Having elected to pursue a certain course of action to the end and forfeiting all other avenues and their timelines with the intent of succeeding, can the advocate be said to have made a mistake? I think not. Rather, it was a deliberate choice that was taken by the applicant on the advice of her counsel.”

12. The Judge also took into consideration the case of *Somportex Ltd vs. Philadelphia Chewing Gum Corporation [1968] 3 All ER 26*; and the case of *Mary Waruga Wokabi & 3 Others vs. Jacob Mwanto Wangora [2019] eKLR*, both for the holdings/propositions that a party who has two procedures for seeking vindication open to him/her and elects to employ one of them cannot be allowed in law to fall back on the abandoned procedure after losing out on the one followed in the first instance.

13. Bearing the above exposition in mind, the Judge then expressed herself as follows:

“Even if it were to be argued that a litigant who sought the counsel of two different advocates on the best course of action and trustingly followed their professional advice however mistaken, should not be punished for their misdeeds, should not be punished for their misdeeds; the mistake alleged by the applicant only accounts for the period up to the delivery of the ruling by Onyiengo J. on 5th July, 2019. The remaining 88 days from 5th July, 2019 when the applicant’s application for revocation was dismissed to 1st October, 2019, when the instant application for extension was filed have not been explained. In *Motorways Kenya Limited vs. Kenya Engineering Workers Union [2018] eKLR*; Civil Appeal Application No. 111 of 2018 Waki, J.A. stated:

“Any delay, however, even for one day, ought to be explained otherwise it is rendered inordinate.”

14. Lastly on prejudice to be suffered by the opposite party, the Judge expressed herself thereon as follows:

“As for the prejudice likely to be suffered by the respondent if the extension sought is granted, the respondents submitted that they stand to be prejudiced as they have been waiting for almost 20 years to enjoy the fruits of distribution of the estate of their deceased father. Indeed, it is undisputed that the applicant filed an affidavit of protest before the High Court and was unsuccessful. In a bid to take a second bite of the cherry, she challenged the confirmed grant of letters of administration intestate by filing an application for annulment where she raised the same grounds of objection. Having failed in her pursuit yet again after the High Court dismissed her application, she is now attempting a third bite of the cherry



by pursuing an appeal. In the circumstance the applicant wants to have her cake and eat it at the expense of the respondents.”

15. On the totality of the above, the Judge concluded as follows:

“In view of the circumstances stated above, I decline to exercise my discretion. There is no merit in the motion before me and I order that it be and is hereby dismissed with costs.”
16. The factors the single Judge was obligated in law to consider in the discharge of her and now this Court upon reference and which we fully adopt are those crystallized by the Supreme Court of Kenya decision in the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [supra].
17. On the length of the delay, the undisputed position is that the applicant took seven (7) months from 29th September, 2017 to erroneously file the application for revocation and or annulment and slightly over three months to 30th September, 2019 from 5th July, 2019, the date of the ruling of Onyiego, J. sustaining the respondent’s P.O. Cumulatively the period of delay from 30th September, 2017 when the intended impugned orders were made to 30th September, 2019 when the application for leave was filed and which the applicant was obligated in law to explain to warrant the exercise of discretion in her favour, a delay of two (2) years.
18. In *George Mwendu Muthoni vs. Mama Day Nursery and Primary School, Nyeri C.A No. 4 of 2014 (UR)*, extension of time was declined on account of the applicant’s failure to explain a delay of twenty (20) months. It is evident herein that the period of delay falling for consideration herein is far much in excess of the period that was under consideration in the above cited case. The applicant’s reprieve therefore lies in the success on the element of having given a plausible and therefore excusable explanation for the delay.
19. As already borne out by the reasoning of the single Judge, the applicant blamed her advocate for then erroneous advice on the procedure followed in seeking redress against the orders of Musyoka, J. of 30th September, 2017.
20. In the case of *Owino Ger vs. Marmanet Forest Co-Operative Credit Society Ltd [1987] eKLR*, among numerous others, the Court variously declined to visit wrongs of advocates against clients in instances where there was sufficient demonstration that non-compliance with any prerequisites provided for in the applicable rules was due to client’s advocate’s fault. Failing of our determination therefore is issue whether the applicant demonstrated sufficiently before the single Judge and now before us on reference that the threshold in the Owino Ger case [supra] had been established. Our response to the above concern is in the negative.
21. Our reason for holding the above view is that all that the single Judge had before her was the mere allegation that the advocate was to blame for the wrong advise on the correct procedure to be followed to seek relief upon delivery of the intended impugned judgment, while before us all we have is applicant’s complaint in the manner the single Judge exercised her judicial discretion to decline the relief. No iota of evidence has been proffered to explain the delay. Neither was any effort made by the applicant or her advocates currently on record for her to source any affidavit from the alleged former advocate, or exhibit correspondences exchanged between them. We therefore find nothing to fault the single Judge for holding that the period of delay was not only inordinate but that it had also not been explained.
22. On the possible arguability of the intended appeal, the applicant relies on the annexed draft memorandum of appeal. We have perused the said grounds and find them arguable, bearing in mind



that an arguable appeal need not be one which must necessarily succeed, but one which ought to be argued fully before the Court, one which is not frivolous. See the case of *Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others*, Civil Application No. 124 of 2008. A single bona fide arguable ground of appeal is sufficient to satisfy this prerequisite. See the case of *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.

23. Sustaining this factor per se does not entitle the applicant to relief as in our view, it is not meant to be considered as a stand-alone factor but in conjunction with all the other factors that fall for consideration for granting the relief sought, a position we shall revert to shortly after expressing ourselves on the last factor as hereunder.
24. On prejudice to be suffered by the opposite party, the respondents pleaded that the prolonged litigation herein has denied them enjoyment of their rights of inheritance to the deceased's estate for close to twenty (20) years to which the applicant filed no rebuttal.
25. On the totality of our reasoning on the record as assessed above, we are in the circumstances satisfied that the learned single Judge acted within the parameters set in *Mwangi vs. Kenya Airways Ltd (2003) KLR 486* at pp. 489 - 490 wherein this Court expressed itself thereon was 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.”

These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.”

26. For the foregoing reasons, we are satisfied that the learned single Judge exercised her discretion in a judicious manner as was expected of her and as set out in the *Shah vs Mbogo* case [*supra*]. We have no basis for interfering with the learned Judge's judicial exercise of discretion. We therefore find this reference devoid of merit and dismiss it with costs to the respondent.

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

**D. K. MUSINGA, (P)**

.....

**JUDGE OF APPEAL**



**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

