



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, KIAGE & GATEMBU, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 238 OF 2014

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION APPELLANT

AND

GEORGE JOSHUA OKUNGU.....APPLICANT/1ST RESPONDENT

MARY KIPTUI.....2ND RESPONDENT

THE CHIEF MAGISTRATE'S COURT ANTI-CORRUPTION COURT

AT NAIROBI.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4THRESPONDENT

(Being an Application for extension of time to file and serve the record of appeal out of time in an appeal against the Judgment of the High Court of Kenya at Nairobi (Odunga and Korir, JJ.) dated 7th February 2014 in NAIROBI H.C. PETITION NOs. 227 and 230 of 2009)

RULING ON REFERENCE TO FULL COURT

1. This is a reference to the Court by the applicant/1st respondent, George Joshua Okungu under rule 55(1)(b) of the rules of the Court. He is dissatisfied with the ruling of a single Judge (*The Hon. Mr. Justice E. M. Githinji, J.A.*) delivered on 3rd June 2016 in which the Judge allowed an application by the appellant, Ethics and Anti-Corruption Commission, lodged in the registry on 16th December 2015 seeking orders that the time limited to lodge an appeal be enlarged and that the record of appeal dated 22nd August 2014 be deemed as duly filed and served.
2. This matter is closely related to another reference that is the subject of a separate ruling of the Court of even date in Civil Appeal (Application) No. 236 of 2014 between the same parties in which the background to the appeal is set out in more detail.
3. At the hearing of the present reference, learned counsel for the applicant/1st respondent *Mr. Obura* relied entirely on written submissions filed on 15th May 2017 in which it is urged that the Court is entitled to interfere with the decision of the single judge if the single judge took into account irrelevant matters or failed to take into account relevant matters or misapprehended the law or the facts in reaching his decision.
4. It was urged in the present case that despite the learned Judge's attention having been called to the fact that there was a pending application to strike out the appeal, and instead of directing that the application for extension of time and the application to strike out the appeal be consolidated and heard together by a full bench, the single Judge went ahead to hear and determine the application for extension of time to the prejudice of the applicant. According to counsel, to the extent that the judge was aware that his decision would be prejudicial to the applicant in that he would be denied the opportunity to canvass the application to strike out the appeal, the judge did not exercise his discretion judiciously.
5. It was submitted further for the applicant that the learned single judge should have kept in mind that he was exercising an equitable discretion; that the reasons given by the appellant for failure to serve a copy of the letter requesting for proceedings which was attributed to

oversight and inadvertence had no basis and the judge misdirected himself in coming to the rescue of a party who had been indolent.

6. It was submitted that on the whole the judge failed to take into consideration the history and background to the case; that the Judge assumed jurisdiction on a matter meant for the full bench; that the Judge ignored the mandatory rules of the court on extension of time; and that the judge failed to follow set precedents by the court and therefore failed to exercise his discretion judiciously.

7. Supporting the reference, **Mr. Enonda** learned counsel for Mary Kiptui, the 2nd respondent also relied entirely on written submissions filed on 15th June 2017 in which it was urged that the judge's attention was drawn to the fact that there was a pending application, for consideration by the full bench, to strike out the appeal despite which the single judge proceeded to exercise his discretion as a single judge by hearing the application for extension of time. It was submitted that the judge did not therefore exercise his discretion judiciously as his decision was bound to prejudice the application to strike out the appeal in that the opportunity to canvass that application would be lost.

8. It was submitted that the application to strike out the appeal had come up for hearing on previous occasions; that the application for extension of time was made in bad faith; that the judge should have had regard to that history; and that he assumed jurisdiction over a matter reserved for the full bench.

9. In opposition to the reference, learned counsel for the appellant **Mr. Ashimosi** also relied entirely on the written submissions in which it was argued that there is no basis for interfering with the decision of the learned single judge; that the reference is tantamount to appealing the decision of the single judge; that it has not been established that the single judge misdirected himself on either the facts or the law or that he took into account matters that he should not have or that he failed to take into account matters that he should have.

10. It was submitted further that the complaint that the judge failed to consolidate the application for extension of time with the application for striking out is baseless in light of the provisions of rule 53 of the rules of the court.

11. We have considered the arguments by learned counsel. In an application for extension of time under Rule 4 of the rules of the Court, a single judge is called upon to exercise a wide discretion. As stated by this Court in ***Macharia Njoroge vs. Gakure Kuria [2005] eKLR***:

“As to the circumstances in which the full court should interfere with the discretion of a judge, this Court in C. App. NAI. 255/97 LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI (UR) cited with approval, MBOGO vs. SHAH [1968] EA 93 per Sir Clement De Lestang, V.P. at page 94 thus:-

“..... 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 failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

And **SIR CHARLES NEWBOLD P.** at page 96 stated:-

“..... a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

12. In dealing with a reference therefore, the full Court is not, as stated by this Court in ***The Hon. Attorney General vs. James Alfred Korosso Civil Application No. NAI 114 of 2008***, concerned with the merits of the decision by the single judge, as it is not sitting on appeal against the decision of a single judge. Rather the full Court is only required to investigate whether or not the single judge has misdirected himself on matters of fact or law in exercising his unfettered discretion. [See also; ***Justice Said Juma Chitembwe vs. Edward Muriu Kamau and others Civil Application No. NAI 95 of 2010***; ***James Robert Karanja Muigai vs. Joseph Mwangi Karanja and others Civil Application No. NAI 183 of 2008***].

13. Applying those principles to the present reference, the learned single Judge was alive to the factors that required consideration in the exercise of his discretion. That is manifest from impugned ruling where the learned Judge stated:

“The Court has unfettered discretion under rule 4 to extend time inter alia limited by the rules whether before or after doing of the act. The factors which the Court considers in exercise of its discretion include the merits of the intended appeal, whether extension of time would cause undue prejudice to the respondents and whether delay is inordinate. (See Wasike v Swala [1984] KLR591)”

14. Having set out the legal principles, the learned single Judge went on to consider that the application for extension of time, and by extension the application to strike out the appeal, would not have been necessary had the letter bespeaking proceedings, which was within time, been compliant with the provisions of Rule 82(1) of the rules of the Court; that a subsequent compliant letter bespeaking proceedings was indeed prepared albeit 13 days outside the prescribed 30 days and that the explanation offered for the delay was satisfactory.

15. The Judge was without doubt alive to the fact that there was pending before court an application to strike out the appeal which, in his words *“had been listed for hearing on two occasions”* and which was based on the ground *“that the appeal was filed out of time as the appellant did not have the benefit of the proviso to rule 82(1)”*. These are matters that the Judge had in mind in reaching his decision.

16. We are therefore not persuaded that in allowing the application for extension of time the learned single Judge took into account matters he ought not to have or that he failed to take into account matters he should have taken into account so as to justify our interference with his discretion. What the applicant is in effect seeking is for the full Court to sit on appeal from the decision of the learned single Judge. That is not permissible.

17. The reference has no merit. It is dismissed with costs.

Dated and delivered at Nairobi this 24th day of April, 2020.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR