



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, KIAGE & J. MOHAMMED, J.J.A)

CIVIL APPLICATION NO. 232 OF 2017 (UR 178/2017)

BETWEEN

ABERDARE STEEL AND HARDWARE LIMITED.....APPLICANT

VERSUS

SHREEJI ENTERPRISES (K) LIMITED.....RESPONDENT

(A reference from the Ruling of Musinga JA delivered on 11th May, 2018 in an application for leave to file a Notice of Appeal and the Record of Appeal out of time, from the order of the High Court of Kenya at Nairobi (Onguto, J.) delivered on 19th May, 2017

in

H. C. C. NO. 37 OF 2017)

RULING OF THE COURT

Background

[1] Before us is a reference to the full Court under **Rule 55 of the Court of Appeal Rules (the Court Rules)** against the decision of a single Judge (**Musinga, J.A**) dated 11th May, 2018. The applicant is challenging the exercise of the learned single Judge's discretion in dismissing its Notice of Motion dated 9th October, 2017 brought under **Rule 4 of the Court Rules** seeking leave to file its notice of appeal and record of appeal against the decision of Onguto, J, out of time.

[2] The applicant in this reference seeks to set aside the orders made by the learned single Judge. The application was supported by the affidavit of **Mr. Solomon Ndibui Ngechu (Mr. Ngechu)**, a director of the applicant, sworn on 9th October, 2017 who deposed that the applicant was not given notice of the delivery of the ruling and only learnt about the delivery after issuance of a proclamation and warrant of attachment on 20th June, 2017. **Mr. Ngechu** attributed this to the mistake of the applicant's previous advocates.

[3] The respondent opposed the application and filed a replying affidavit dated 6th December, 2017, sworn by its director, **Mr. Dhaval Soni** who deposed that the applicant issued the respondent with cheques amounting to the judgment sum; and that the cheques were dishonoured and the applicant had not given any explanation why the cheques were not honoured.

[2] In a ruling delivered on 11th May, 2018, **Musinga J.A** dismissed the application for extension of time with costs to the respondent and concluded as follows:

“ ... I am not persuaded that I should exercise my discretion in favour of the applicant. I find that there is no sufficient cause to extend time for the applicant to file an appeal out of time. I therefore dismiss the application with costs to the respondent.”

Submissions by Counsel

[3] When the reference came before us for hearing, **Mr. Mwaura** held brief for **Mr. Kiarie**, learned counsel for the applicant, while learned counsel **Mr. Muriungi** represented the respondent. **Mr. Mwaura** sought to persuade us that the learned single Judge erred in finding that there was inordinate delay on the basis that the applicant's motion was filed on 11th October, 2017, about five months after the impugned ruling was delivered. Counsel contended that the delay was not inordinate as the instant application was filed eight (8) days after the ruling

dismissing the applicant's motion for stay of execution was delivered by the High Court.

[4] Opposing the application, **Mr Muriungi** submitted that the delay in filing the notice of appeal and the record of appeal was not explained; that there was no draft memorandum of appeal on record; that the applicant's cheques were dishonoured on presentation; and the intended appeal therefore has no chance of success. **Ms Muriungi** asserted that the learned single Judge properly exercised his discretion in dismissing the application for enlargement of time.

Determination

[5] Under **Rule 4 of the Court Rules**, a single Judge has unfettered discretion, exercised judicially, to determine whether to extend the time limited by the Rules. **Rule 4 of the Court Rules** states 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 time shall be construed as a reference to that time as extended.” [Emphasis supplied].

[6] From the wording of **Rule 4 of the Court Rules**, the single Judge has discretion in an application for extension of time. In **Njuguna V. Magichu & 73 others [2003] KLR 507**, **Waki, JA.** stated 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 has to be exercised judicially, that is on sound factual and legal basis.”

[7] We have considered the Ruling of the learned single Judge, the submissions made before the single Judge, the submissions made before us and the law. The guidelines for interference with the discretion of a single Judge were set out in the case of **Mbogo v Shah [1968] EA 93** where **Sir Clement de Lestang VP** stated as follows:-

“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”. See also African Airlines

International Ltd. vs. Eastern and Southern African Trade, Development Bank [2003] 1 EA 1 & Purshottam Ramji Kotecha & Another vs. Sanjay Narandas Pan & Another [2005] eKLR & Vantage Road Transporters Ltd & another v Mistry Valji Naran Mulji & 5 others [2009] Eklr”

[8] Our mandate under **Rule 55 of the Rules** was succinctly laid down in **Hezekiah Michoki vs Elizaphan Onyancha Ombongi [2015] eKLR** in the following terms:

“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 addition, we are cognisant that our jurisdiction under **Rule 55 of the Court Rules** does not entail the substitution of our discretion for that of the learned single Judge. See **Rozaah Akinyi Buyu vs**

Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR.

[10] In determining whether to grant the applicant's motion for extension of time, the learned single Judge had to consider the length and reasons for the delay, the chances of the appeal succeeding and the degree of prejudice to the respondent if the motion was granted.

[11] As can be gleaned from the submissions, the applicant faults the learned single Judge's finding that the period of delay in filing the appeal was inordinate. The basis of this contention was that the applicant's motion was filed on 11th October, 2017, about five months after the impugned ruling was delivered and eight (8) days after the applicant's application for stay of execution was dismissed by the High Court on 28th September, 2017.

[12] **Rule 75 of the Rules** provides that a notice of appeal should be filed within 14 days of delivery of the impugned decision. The applicant filed the instant application seeking leave to file the notice of appeal and the record of appeal out of time on 11th October, 2017. This was about five months after the delivery of the impugned ruling.

[13] The learned single Judge reasoned as follows in the impugned ruling:

“While it is fundamental that the Court always tries to determine disputes on their merits in the administration of justice, it does not mean that parties will be granted leave for extension of time automatically and in spite of their conduct in the whole process of litigation. As regards the chances of success of the intended appeal, I find that the information on the record is inadequate since no draft memorandum of appeal has been filed. I am however doubtful whether the intended appeal has any chances of

success, considering that the applicant's cheques that had been issued to the respondent in settlement of the outstanding debt had all been dishonoured. Regarding the period of delay, the applicant only approached this court for extension of time a little over 5 months after judgment was entered against her. That delay is inordinate and was not properly explained."

[14] It is evident from the impugned ruling that the learned single judge correctly stated the guiding principles and referred to relevant authorities. In the circumstances of this application, we find that the learned single Judge properly addressed his mind on whether the reason adduced by the applicant for the delay was reasonable and found that the delay was inordinate and not properly explained. On the arguability of the appeal, the learned single Judge was aware that while he could not make definite pronouncements on the success or otherwise of the intended appeal, he was nonetheless at liberty to consider whether the intended appeal raised arguable points of law and fact. The learned single Judge complied with this requirement.

[15] In the circumstances, we find that the learned single Judge exercised his discretion judicially and there is no basis for for us to interfere with his decision. Accordingly, the reference is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 10th day of July, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR