



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OUKO, (P) (IN CHAMBERS))

CIVIL APPLICATION NO. 144 OF 2019

BETWEEN

LUCAS CHAGWONY.....1ST APPLICANT

PHILIP K. RUTO.....2ND APPLICANT

NICHOLAS KOMEN.....3RD APPLICANT

CHRISTOPHER K. KANGOGO.....4TH APPLICANT

JOSEPH CHEPKEITANY.....5TH APPLICANT

JAMES CHANGWONY.....6TH APPLICANT

JOSEPH CHEPKOIYA.....7TH APPLICANT

AND

STANLEY CHEBIATOR.....RESPONDENT

(Being an application for extension of time for lodging Notice of Appeal, Memorandum of Appeal and

Record of Appeal from the Judgment and Decree of the High Court of Kenya at Eldoret,

(Justice H.A. Omondi, J.) delivered on 10th January, 2019 in HCA No. 43 of 1996)

RULING

A similar application like this was taken out on 4th September, 2019 to extend time to challenge the very decision of the High Court of Kenya at Eldoret (Omondi, J.) dated 10th January, 2019. The single Judge (Odek, JA.) found that, although the delay was only for a period of four days, the applicants had failed to explain those days. He then concluded that;

“In the absence of an explanation or reason for delay, I find that there is no factual or legal basis for me to exercise my discretion to extend time.

Accordingly, the Notice of Motion dated 4th September, 2019 be and is hereby dismissed for lack of merit. The applicant has failed to give any explanation for the 4 days delay in filing the Notice of Appeal out of time”.

He added that;

“I note that the applicant applied for this matter to be taken out of today’s hearing list to enable a further affidavit to be filed explaining the reason for delay.

I have considered this application and find it has no merit. In law, dismissal of an application, for extension of time does not bar a party from making a similar application in future”.

The costs of the application were awarded to the respondent.

This was on 14th October, 2019. Shortly after, on 6th November, 2019, the applicants, obviously buoyed by the words of the learned Judge that a dismissal of an application for extension of time does not bar a party from making a similar application in future, brought the instant application after the initial one was dismissed.

The procedure and practice of the Court is well established, that the decision of a single judge can only be varied, discharged or reversed first by informally applying to the judge at the time when the decision is given. If no application is informally made at the time of delivery of the decision, an aggrieved party can move the single Judge by writing to the Registrar within seven days from the decision. If the single judge does not vary or discharge his orders the party may make a reference to the full Court.

Rule 55 is explicit and provides that;

“(1) Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single judge—

.....

(b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, he may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.

(2) At the hearing by the Court of an application previously decided by a single judge, no additional evidence shall be adduced”.

The focus shifts to the decision of the single Judge. It is either the Judge or the full bench that can entertain an application to vary, discharge or reverse the decision. I understand the context in which the learned single Judge made the statement that the applicant’s were not barred from making a similar application in future to be that they could either move him to vary or vacate his orders and thereafter go to a full bench by way of a reference.

From the passage of the ruling of the single Judge reproduced above, it is apparent that the applicants sought for adjournment so as to file a further affidavit to explain the reason for delay. That would appear to have been disallowed with the result that there was no explanation for the delay, leading to the dismissal of the application as stated earlier. The applicant ought to have informally asked the

Judge to reconsider his decision. That option was not utilized. The next and only option left was to move the full bench to review the decision, guided by the consideration that a single judge in an application for enlargement of time exercises unfettered discretion on behalf of the whole Court; and that a reference to the full court is not an appeal.

In bringing a fresh application, the applicants violated the *res judicata* rule as the single Judge had found that the application had no merit and dismissed it. It is settled that when an action is dismissed, it may not be brought again. See:

Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 others (1996) eKLR.

Bearing in mind all these, the application is stillborn. I do not have the jurisdiction to entertain it in the form it was presented. It is accordingly dismissed with no orders as to costs.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR