



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & KANTAL, J.J.A)

CIVIL APPLICATION NO. 87 OF 2019 (UR NO. 62 OF 2019)

BETWEEN

WILLIAM NJIHIA KIMANI.....APPLICANT

AND

FRANCIS WAWERU MBOCHI.....RESPONDENT

(Being a reference under Rule 55 of the Court of Appeal Rules from the Ruling of

(Nambuye, JA) dated 8th November, 2019 in an application for extension of time

*to file and serve the record of appeal out of time in an appeal against the Ruling of
the High Court of Kenya at Nairobi (Okwengu, J.) dated 23rd November, 2010*

in

Nairobi HCCC No. 2761 of 1994

(Currently Nyahururu ELC Case No. 36 of 2018)

RULING OF THE COURT

1. By a Notice of Motion dated 11th June, 2019, the applicant moved the Court under Rule 4 of the Court of Appeal Rules seeking extension of time to file and serve out of time the Notice and Record of Appeal against the Ruling delivered by the Hon. Lady Justice Okwengu, J. (as she was then) dated 23rd November, 2010 in Nairobi High Court Civil Case No. 2761 of 1994 (currently Nyahururu ELC Case No. 36 of 2018).

2. The central premise of the application is that the applicant was unaware of the Ruling by the High Court dated 23rd November, 2010 allowing the Respondent's application dated 10th December, 2008 seeking cancellation of the title deed issued in favour of the applicant. He avers that the Ruling was delivered in his absence, that his advocate on record never informed him of the intended delivery of the impugned Ruling as he had fallen out with the advocate over fees payable and as a result he had not lodged a Notice of Appeal within the stipulated time frame. He asserts that he only became aware of the impugned ruling when he was served with pleadings by the respondent herein in Engineer Magistrate's Court ELC Suit No. 4 of 2018 seeking to evict him from the suit property. The Applicant averred that the delay was neither inordinate nor deliberate on his part as it was occasioned by the failure of the advocate then on record for him to notify him of the delivery of the ruling.

3. The application was initially heard by a single Judge of the Court (Nambuye, JA) who dismissed the application with costs to the respondent. The applicant thus brought the present application before this Court, a reference under **Rule 55 (1)(b)** of the **Court of Appeal Rules**, inviting this Court to interfere with the exercise of discretion bestowed on a single Judge under **Rule 4** of the rules.

4. The applicant argued generally that the single Judge had misdirected herself on the issues under submission. He reiterated the assertions in the application in regard to the length of the delay, the reasons for the delay, and the degree of prejudice to the respondent should the

application be allowed, and requested this bench to reconsider, vary or set aside the decision of Nambuye, JA and grant the order prayed for in the application under Rule 4.

5. Counsel for the respondent opposed the reference asserting that the single Judge considered all the material placed by the parties before her and the applicable law and principles before dismissing the application. Counsel submitted that the application was purely premised upon lack of knowledge of the existence of the impugned ruling delivered on 23rd November, 2010. He submitted that the applicant had to have known of the ruling due to his pleadings and involvement in the proceedings, that he was undeserving of the exercise of the court's discretion in his favour due to lack of candor, and that, citing the decision in Donald Raballa vs. Judicial Service Commission & Another (Supra), even if it was assumed that the applicant had been prevented from filing the appeal on account of the mistake of his counsel, he would still not be entitled to an extension of time after such a long delay.

6. We have considered the reference, the submissions of parties and counsel, the applicable law 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 the guiding principles to be adhered to warrant such interference. In Donald O. Raballa vs. Judicial Service Commission & Another [2018] eKLR; it was 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 the demonstrating the breach of any or all such principles is on the applicant.”

7. Therefore the decision arrived by a single judge in exercise of such discretion under Rule 4 ought not to be easily dislodged unless the applicant demonstrably shows that discretion was exercised contrary to law, that is, that the Judge misapprehended the applicable law, or that the Judge failed to take into account a relevant factor or took into account an irrelevant one, or that applying the facts and the law in the particular matter, the decision is shown to be plainly wrong. This Court in Eva Wangui Murua vs. Kigerua Motors & 3 Others [2020] eKLR stated:

“We remind ourselves that this is not an appeal against the ruling of the single Judge. In granting the orders now challenged in this reference, the single Judge was exercising her discretion on behalf of the full 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 she ought not to have taken into account, or that she failed to take into account a relevant matter which she ought to have taken into account or that she misapprehended some aspect of the evidence and the law applicable or short of these, that her 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. (See Said Juma Chitembwe v. Edward Muriu Kamau & 4 Others [2011] eKLR.)” (See also Lingam Enterprises Limited & 4 Others v. Radio Africa Limited [2015] eKLR).

8. Further, in Thuita Mwangi vs. Kenya Airways Ltd. [2003] eKLR this Court explained the factors a single Judge ought to consider:

“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”.

9. A single judge exercises wide discretion in an application for extension of time under Rule 4 of the rules of this Court. Given the pleadings on record, the submissions of the counsel, the background we have analysed, and the applicable law, we now move to consider whether the learned Judge exercised her discretion within the parameters given above. In Ethics and Anti-Corruption Commission vs. George Joshua Okungu & 3 Others [2020] eKLR, this Court stated:

“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]”.

10. In the decision dated 8th November, 2019 the learned Judge was alive to the factors that required consideration in the exercise of her discretion. That is manifest from impugned ruling where the learned Judge stated:

“In order for the applicant to succeed on his application, he has to demonstrate that on the basis of the supportive facts relied upon in support of his application, he has satisfied the threshold for granting relief under Rule 4 CAR procedures with regard to the following factors:

(a) The length of delay.

(b) The reasons for the delay.

(c) Chances of the appeal succeeding.

(d) Degree of prejudice to the respondent if the application were to be allowed.

(e) Any other relevant factors.”

11. The learned Judge interrogated each of the factors above. Though the Judge did agree that the intended appeal was arguable, she found, on the evidence presented, that the applicant had failed to give a reasonable explanation for his inaction for a period of 8 years, 6 months and nineteen days within which the applicant had failed to seek the court’s intervention and initiate the appellate process. On the degree of prejudice to the respondent, the learned Judge noted that it was uncontroverted that after the order issued on 23rd November, 2010, the suit property had been passed to 3rd parties who were not parties to the application subject of the present ruling. The Judge concluded that though the right of appeal is constitutionally entrenched, it has to be exercised in accordance with laid down procedures including being timeously initiated. The learned Judge stated that in default of timeous initiation, the onus was upon the party in default to meet the threshold for the exercise of the court’s discretion to extend time, and the applicant herein had failed to do so.

12. From the foregoing, we find that the learned single Judge took into account all the relevant factors in granting the relief sought under Rule 4, in particular, the length of the delay and the reasons therefor. The delay was inordinate and the applicant was unable to offer a plausible explanation for it. We are therefore not persuaded that in disallowing the application for extension of time the learned single Judge took into account matters he/she ought not to have or that she failed to take into account matters he/she should have taken into account so as to justify our interference with her discretion. We reject the invitation to go in that direction.

13. The reference has no merit and it is dismissed with costs.

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

M. WARSAME

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JUDGE OF APPEAL

P. KIAGE

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR