IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL (APPLICATION) NO. 236 OF 2014

BETWEEN

GEORGE JOSHUA OKUNGU.....APPLICANT

AND

THE ATTORNEY GENERAL

(NOW DIRECTOR OF PUBLIC PROSECUTIONS).....1ST RESPONDENT

MARY KIPTUI.....2ND RESPONDENT

KENYA ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

THE CHIEF MAGISTRATE'S

ANTI-CORRUPTION COURT AT NAIROBI.....4TH RESPONDENT

(Being a reference to the full Court from the ruling and order of a single Judge, E.M.

***Githinji, J.A given on 3rd June, 2016 in* CIVIL APPEAL (APPLICATION) NO. 236 OF 2014)**

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RULING ON REFERENCE TO FULL COURT

On 7th February, 2004 the High Court (**Odunga & Korir, JJ**) delivered a judgment in consolidated **Constitution Petition numbers 227 and 230 of 2009** respectively in which it terminated criminal proceedings against the applicant and 2nd respondent. Aggrieved by the verdict, the 1st respondent filed an appeal in this Court on 22nd August, 2014. The record of appeal was then served on the said applicant and the 2nd respondent on or about 2nd September, 2014.

For the reason that the record of appeal was filed out of time and without leave of Court, and that the same was similarly served on the applicant and 2nd respondent out of time, the applicant filed an application dated 24th September, 2014 seeking to strike out the entire appeal. The application was duly served on the 1st respondent. In response, the 1st respondent on 31st July, 2015 filed a motion on notice seeking leave of the Court to file and serve supplementary record of appeal within 15 days. The main ground in support of the application was that the date of 21st March, 2014 referred to in the certificate of delay as being the date when the 1st respondent applied for proceedings was erroneous in that the said date should be the date of the letter of reminder to the Deputy Registrar by the 1st respondent requesting for proceedings, and that the correct date was 10th February, 2014. The 1st respondent maintained that if the proper certificate of delay that it sought to bring on board by way of supplementary record of appeal was accepted, it would have a bearing on the computation of time for purposes of determining whether the appeal was filed out of time or not.

It would appear that the applicant did not react to the 1st respondent's application by filing any papers in opposition to the same. However, the 2nd respondent who is like a conjoined twin of the applicant and who has all along sailed in the same boat with the applicant, filed a replying affidavit to the motion. Essentially, she deposed that it was doubtful whether the initial letter bespeaking proceedings existed since the certificate of delay referred only to a request for proceedings being made vide the letter dated 21st March, 2014, which letter was in any

event not served on the applicant and 2nd respondent as required. Given the foregoing, it was the view of the 2nd respondent that the ends of justice would be adequately served if the Court found that the record of appeal was incompetent and liable to be struck out. The 3rd and 4th respondents did not oppose the application. If anything, they supported the same.

The application came up before **Githinji, JA** for *inter partes* hearing as a single judge. Upon hearing the parties and in a ruling delivered on 3rd June 2016, **Githinji JA** allowed the application by holding that:

> **"Rule 92(3), allows an appellant to file a supplementary record at any time. The rule does not require that leave of the Court should be obtained or prescribe the documents which should be included in the supplementary record. The letter applying for proceedings and the certificate of delay, which are in fact made after the determination of a suit by the High Court, fall under the category of documents which can be contained in a supplementary record under Rule 92(3). It follows therefore that no leave of the Court is required to file a supplementary record envisaged by the appellant and that this application was, for that reason, unnecessary.**
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> **In case that such finding is wrong, I would allow the application in the exercise of my discretion, and having regard to Article 159 (2)(d) of the Constitution, that justice should be administered without undue regard to technicalities of procedure and the overriding objective of the rules that they should facilitate the fast, expeditious, proportional and affordable resolution of appeals.**
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> **As leave is not required to file the supplementary record of appeal, and as there is no prescribed time limitation for filing the supplementary record, the appellant should go ahead and file the supplementary record…"**

The 1st respondent was dissatisfied with the decision of the single Judge aforesaid and pursuant to **rule 55(1) (b),** and by a letter dated 7th June, 2016, applied to have the matter revisited by a full bench of this Court. The reference was for purposes of seeking a reversal of the decision by the single judge aforesaid.

The reference to the full bench was canvased by way of written submissions. Though the applicant, 1st and 2nd respondents filed their respective written submissions, the 3rd and 4th respondents did not do so for reasons that are not readily apparent to us. Indeed, even on the day of the plenary hearing of the reference, they still did not appear though served with the hearing notice. Accordingly, the determination of this reference will be without the input of the said respondents.

We have carefully read and considered the respective written submissions on record which counsel opted not to highlight, the authorities cited, as well as the law. We decipher the following to be the issues for determination, namely whether the learned Judge failed:

(a) to take into consideration the fact that the 1st respondent's application had a bearing on the earlier application filed by the applicant to strike out the appeal;

(b) to exercise his direction judiciously by failing to consider the inordinate delay by the 1st respondent in filing the application;

(c) to appreciate the fact that even if he was acting within the law to allow the 1st respondent to file a supplementary record for appeal, such filing would not have cured the defect in the appeal since the letter bespeaking proceedings by the 1st respondent had not been copied to nor served upon the applicant and the 2nd respondent so as to trigger the application of the proviso to rule 82(1) of this Court's rules;

(d) misapprehended the law by coming to the finding that the 1st respondent did not require leave to file a certificate of delay;

(e) to notice that no leave was obtained from the deputy registrar to file the supplementary record of appeal;

(f) wrongly invoked article 159 of the Constitution.

It is trite that a reference to a full bench is not an appeal, though in a way it may appear so, and in dealing with a reference, the full bench is not really concerned with the merits or demerits of a decision of a single Judge. It is only required to investigate whether or not a single judge has misdirected himself on matters of fact or law in exercising his unfettered discretion. This Court in the case of **Mombasa Development Ltd V Jimba Credit Corporation Ltd & Anor [2005] eKLR** stated that:

> **"… By dint of rule 54(1) of the Rules, a dissatisfied party may seek to have the decision of a single judge varied, discharged or reversed by the full court. To succeed, however, the applicant must show that the single judge took into account an irrelevant matter; or that he failed to take into account a relevant matter; or he misapprehended the law applicable to the case, or that he misapprehended the facts of the case and hence misapplied the law to them or that his decision, taking into account all the circumstances of the case, is plainly wrong. Those guidelines have been restated many times in this Court for example in the** Standard Ltd & 2 Others vs Wilson K. Kalya & Another, Civil Application No. Nai 306 of 2002 **(unreported)."**

We shall bear in mind the foregoing principles in reaching our determination on this reference. The first challenge mounted by the 1st applicant and 2nd respondent is with regard to failure by the single judge to consider that the application had a bearing on the application to strike out the appeal filed by the applicant. To the respondents therefore, the two applications should either have been consolidated and heard together or the 1st respondent's application should have been stayed so that the ends of justice could be met. We have looked at the

proceedings before the single Judge and noted that the Judge indeed made reference to the said application in the ruling sought to be impugned. However, from the proceedings and in particular their submissions, neither the applicant or 1st respondent asked for the two applications to be consolidated and/or that the application by the 1st respondent be stayed. In any event, the two applications could not have been consolidated for the simple reason that an application for leave is ordinarily heard by a single Judge of this Court whereas that of striking out is heard by a full bench. Further, the application which was fixed for hearing was the one for leave by the 1st respondent. That being the case, it was not incumbent upon the single Judge to either stay the application for leave or to hear them concurrently as submitted by the respondents. We do not, therefore, see the fault committed by the single Judge either in law or fact in hearing the application for leave that was before him as opposed to the application for striking out the appeal that was not. No doubt had the issue been raised before him, the single Judge would have made a determination. We would then have been in a position to weigh that determination against the guidelines and parameters already referred to elsewhere in this ruling. Further, this complaint seems to touch on the merits of the single Judge's decision. We are injuncted from considering such complaint. Finally, the decision of the single Judge was anchored on the fact that the applicant did not require leave of Court to file the documents he had sought to. In the alternative he took the view that even if he was wrong on that aspect then Article 159 of the Constitution, as well as the overriding objective of the Appellate Jurisdiction Act which is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals would be invocable. On this basis, we do not think that the single Judge could have considered such a complaint in any event.

The next challenge was that the single Judge failed to exercise his discretion judiciously by not considering the inordinate delay by the 1st respondent in filing the application for extension of time. From the ruling, though the single Judge did not make a definite finding on the question of delay, he did have it at the back of his mind. In any case, this is a challenge to the single Judge's exercise of his unfettered discretion. It is settled law that for us to interfere with such exercise of the discretion, it must be demonstrated that the single Judge took into account an irrelevant consideration or failed to take into account relevant consideration; misapprehended facts or the law, or that the single Judge was plainly wrong in his decision. We discern no such misgivings in the manner the single Judge exercised his discretion. Further, and as already stated, which is self-evident, the learned Judge determined the application on three grounds; that the 1st respondent did not require leave of Court to file a supplementary record of appeal; that he allowed the application in the exercise of his unfettered judicial discretion having regard to Article 159(2)(d) of the Constitution; and; lastly, on the overriding objective of the Act. The single Judge was perfectly entitled to bear in mind the foregoing considerations. We do not therefore, see any misdirection in law on the part of the Judge in reverting to the above considerations nor can it be said that he was plainly wrong in doing so. Finally, this complaint just like the earlier one, challenges the merits of the Judge's decision.

Turning to the third complaint, which is failure by the appellant to serve on the respondent in time the letter bespeaking proceedings and the consequences thereof, we must reiterate once more that the decision of the Judge turned on the three considerations already stated. The issue of the letter bespeaking proceedings is neither here nor there. That is an issue that is best left for consideration or interrogation when the respondent's application to strike out the appeal comes up for *inter partes* hearing. Perhaps, out of abundant caution, the Judge declined to delve into that issue, since the motion to strike out the appeal was still pending hearing.

We are not persuaded that the Judge misapprehended the law when he came to the conclusion that the appellant did not require leave of the court for file a certificate of delay. In our view and once again, this complaint challenges the merits of the Judge's decision. In any event, this Court has previously held in the case of **Municipal Council of Kitale v Nathan Fedha [1983] eKLR** that the rules of the Court do not specifically require that a certificate of delay must be included in the original record. The single Judge cannot therefore be faulted for holding that leave of court was not necessary for purposes of filing a supplementary record of appeal for purposes of bringing on board a certificate of delay.

The Judge is also faulted for failing to notice that no leave was obtained from the Deputy Registrar to file the supplementary record of appeal. Our short answer to this assertion is that the issue was never canvassed before the single Judge. It is being raised before us for the first time. No doubt, had the issue been raised the single Judge would have considered it and made appropriate determination. As it is therefore, we do not have the benefit of the judge's thoughts on the issue. We cannot therefore test it against the set criteria. The Judge cannot be faulted for not dealing with a matter that was never raised before him. Again, given the considerations that informed the single Judge's decision, the complaint is simply a non-starter.

With regard to the invocation of Article 159 of the Constitution, the applicant and 2nd respondent should understand that the Judge was dealing with an application for extension of time. He was not dealing with the application to strike out the appeal. We do agree, however, with the submissions by the two that Article 159 of the Constitution does not allow parties to disregard the rules of procedure. See **Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others [2013] eKLR**. We are also aware that whether or not an appeal is filed on time goes to the jurisdiction and therefore an appeal that is filed out of time can only be cured by the application for extension of time and not by invocation of Article 159 of the Constitution. However, it should be appreciated once more that the Judge was only dealing with an application to extend time. The application dated 24th September, 2014 to strike out the appeal could only be heard by a full court pursuant to rule 53(2) of this Court's rules and the same was and is still pending hearing. It is in that context that the Judge's invocation of Article 159 of the Constitution should be seen and appreciated. On our part, we must be cautious and restrain ourselves just as the single Judge, from making any comments or, determination or revert to any submissions on the pending application. We leave the issue to the bench that will eventually hear and determine the application for striking out the appeal.

In which event then, this reference fails and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 19th day of July, 2019.

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

DEPUTY REGISTRAR