



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 161 OF 2018

BETWEEN

JIMCAB SERVICES LIMITED.....APPLICANT

AND

BARTHOLOMEW BERNARD OSODO & JACOB OTIENO

(Suing as the Administrators of the Estate of

RICHARD OMONDI ODHIAMBO (deceased).....RESPONDENTS

(Being an application for leave to file appeal out of time from the Judgment of the High Court of Kenya at Nairobi (Sergon, J.) dated 19th February, 2016

in

HCCC No. 413 of 2007)

RULING OF THE COURT

1. This is a reference from a decision of a single Judge to the full Court under Rule 55(1) (b) of the Court of Appeal Rules. The applicant seeks a reversal of the decision of **Nambuye, JA** given on 9th November 2018 rejecting its application dated 24th May 2018 and filed on 25th May 2018 seeking extension of time, under Rule 4 of the Rules of the Court, within which to lodge its record of appeal.
2. The background, in brief, is that following a road traffic accident on 10th October 2005 along Juja Road, Nairobi in which Richard Omondi Odhiambo, deceased, was knocked down by a motor vehicle registered in the name of the applicant, the respondents, as the administrators of the estate of the deceased instituted a suit in the High Court against the applicant seeking damages under the Law Reform Act and the Fatal Accidents Act. In a judgement delivered on 19th February 2016, the High Court (**Sergon, J.**) awarded Kshs.3,214,055.00 to the respondents comprising of special damages; damages for pain and suffering; damages for lost years; and damages for loss of expectation of life.
3. The applicant was dissatisfied with that judgment and intends to appeal it to this Court. To that end, the applicant filed the application for extension of time dated 24th May 2018, which is the subject of this reference. In his affidavit in support of that application, John Katiku, the advocate for the applicant deposed that following the delivery of the judgement, leave was sought and granted by the High Court extending time within which a notice of appeal was to be filed; that pursuant to such leave, the applicant's notice of appeal filed on 10th March 2016 was admitted and that on the same day an application for certified copies of the proceedings and judgement was lodged in the High Court; that the typed and certified copies of the proceedings and judgment were collected by his clerk, Eliud Munyao Musao, on 21st February 2018; that the said clerk went on leave on 11th April 2018 after collecting the proceedings and judgement without informing him; that it was not until 21st May 2018 when the clerk returned to work from leave that he realised the mistake, namely that the clerk had neglected to give him the certified copies of the proceedings and the judgement; that in the meantime a certificate of delay had been prepared certifying that the period taken by the court for the preparation and supply of the certified copies of the proceedings was from 10th March 2016 to 21st February 2018 and that the certificate of delay was prepared and ready for collection on 18th May 2018.

4. Annexed to the affidavit of John Katiku, was an affidavit sworn by Eliud Munyao Musau, a court process server in the law firm of Musyoka Wambua and Katiku Advocates in which he deposed that he collected the certified copies of the proceedings and judgement from the High Court on 21st February 2018; that he did not inform the advocate handling the matter that he had done so; and that he went on leave on 11th April 2018 and resumed work on 21st May 2018.
5. It was on those grounds that the applicant sought an extension of time to file the record of appeal.
6. In opposition to the application, Bartholomew Bernard Osodo, one of the administrators of the estate of the deceased swore an affidavit on 31st July 2018 in which he deposed that on delivery of the judgment on 19th February 2016, the applicant was granted an order for stay of execution for 30 days; that the applicant waited until 10th March 2016 to make an application before the High Court for extension of time within which to lodge the notice of appeal; that the applicant was granted leave to file the notice of appeal out of time on 9th September 2016 alongside an extension of the order of stay of execution; that although both parties were notified by the court on 18th January 2018 that the certified copies of the proceedings and judgment were ready for collection, the applicant did not collect the same until 21st February 2018; and that the conduct of the applicant is dilatory.
7. The learned single Judge rejected and dismissed the applicant's application for extension of time on two main grounds. Firstly, that the applicant "*stands non suited on this application*" "*in the absence of an order that the notice of appeal filed on 10th May (should be March) 2016 was deemed as properly filed on the one hand, or that there is one filed pursuant to the orders of 9th September 2016*" and "*especially in an instance alluded to above when there is no prayer currently sought either for the validation of the notice of appeal filed on 10th March 2016 or a fresh one to be filed out of time.*"
8. The other reason the learned single Judge declined the application was that the claim by the advocate that the clerk who collected the proceedings and judgment had locked them away when he proceeded for his leave "*would have carried more weight if the name of the clerk concerned would have been disclosed supported by confirmation of the facts deposed to by the counsel by the very clerk together with a document evidencing that indeed leave was taken at that point in time.*"
9. During the hearing of the reference, **Mr. Maina**, learned counsel for the applicant relied on written submissions which he highlighted urging that the delay involved was satisfactorily explained as attributable to the omission by the clerk to inform the advocate who was handling the matter that he had collected the certified proceedings; and that the application was brought without undue delay. It was submitted on the strength of the decisions of the Court in *Hezekiah Michoki vs. Elizaphan Onyancha Ombongi [2015] eKLR* and *Elizabeth Wanjiru Njenga & another vs. Margaret Wanjiru Kinyara & 2 others [2018] eKLR* that the full Court can interfere with a decision of a single Judge where relevant factors, that should have been considered, have not been considered. In that regard, it was submitted that the learned single Judge in this case proceeded on the premise that the clerk, Eliud Munyao Musau, who collected the certified proceedings did not depose to those matters when in fact he had done so. Moreover, contrary to what the Judge stated, his application for leave was indeed an exhibit before her.
10. Counsel also submitted that the Judge failed to consider that the notice of appeal filed by the applicant had been validated by the High Court in the order given on 9th September 2016 by which the notice of appeal filed on 10th March 2016 was deemed to have been properly filed and served.
11. Opposing the reference, learned counsel for the respondent **Mr. Otieno Oluoch** also relied on his written submissions which he highlighted; he submitted that the learned single Judge properly exercised her discretion in accordance with legal principles in refusing to extend time to file the record of appeal; that the applicant failed to annexe a copy of the decision of the High Court granting leave for the filing of the notice of appeal out of time; that to the extent that the applicant's application did not refer or mention the affidavit of the clerk, Eliud Munyao Musau, the Judge was right in taking the view that she did; that the applicant chose "*the curious and strange procedure*" of annexing the affidavit of the clerk, Eliud Munyao Musau to the affidavit of John Katiku, and the Judge cannot therefore be faulted for holding as she did that the claim as to mistake of the clerk would have carried more weight had there been a supporting affidavit to that effect.
12. Counsel went on to submit that the applicant was guilty of unexplained delay in collecting the certified proceedings and judgment from the court; and that the clerk had adequate time before proceeding on leave to draw the attention of the advocate to the proceedings.
13. Counsel referred to decisions of the Court in *Pothiwalla vs. Kidogo Basi Housing, Mombasa Civil Appeal (application) No. 330 of 2003* and *Mugambi vs. Pan Africa Ltd, Nairobi Civil Application No. 143 of 2013* in relation to the circumstances under which the full Court should interfere with a decision of a single Judge and urged that in the present case the threshold for doing so has not been met. It was submitted that the applicant has not demonstrated that the decision of the single Judge is plainly wrong. He urged that the respondents will be prejudiced if the application is allowed.
14. We have considered the reference and the submissions by learned counsel. The question that arises is whether having regard to the submissions by counsel, the full Court should interfere with the exercise of discretion by the single Judge. The authorities to which counsel have referred us all express the principle that for the full Court to interfere with the discretion of a single Judge, it must be shown that the single Judge acted on matters which she should not have acted, or failed to take into consideration matters which she ought to have and in doing so arrived at a wrong conclusion or that the Judge was plainly wrong in her decision.
15. The principle is summarised in the statement by this Court in *Hezekiah Michoki vs. Elizaphan Onyancha Ombongi [2015] eKLR* where it is stated:

“Rule 4 of the Court of Appeal Rules gives a single Judge of this Court unfettered discretion on matters placed before him though of course he has to exercise that discretion judicially. As was stated in Margaret Muthoni Muchiga v. Esther Kamori Chobi – Civil Application No. Nai 117 of 2009, for this Court to interfere with the exercise of that discretion, the party making the reference must demonstrate that the single Judge took into account an irrelevant factor; or failed to take account of a relevant one, or that he 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.”

16. There is no doubt that the learned single Judge was alive to the principles of law that guide the Court in the exercise of its mandate under Rule 4 of the Rules of the Court. However, and as already noted, the Judge refused the request for extension of time on two main grounds, the first being that there was no affidavit by the clerk and that there was nothing to show that the clerk had indeed gone on leave as claimed. In that regard, the single Judge stated:

“Although I have no reason to doubt the veracity of that deposition considering that it is a deposition from learned counsel, the deposition would have carried more weight if the name of the clerk concerned would have been disclosed supported by confirmation of the facts deposed to by the counsel by the very clerk together with a document evidencing that indeed leave was taken at that point in time.”

17. Most respectfully, it would appear that the Judge’s attention was not drawn to paragraph 10 of the supporting affidavit of John Katiku in which the name of the clerk was given as Eliud Munyao Musao. To that affidavit was annexed an affidavit of the said Eliud Munyao Musao sworn on 24th May 2018. In that affidavit the said Musao deposed that he collected the proceedings and judgment on 21st February 2018 and went on leave on 11th April 2018 and resumed duty on 21st May 2018. His leave application form was also exhibited to the affidavit of Mr. Katiku. Respectfully, the Judge made no reference to that material. The argument put forth by counsel for the respondent in the course of the reference that the affidavit of Eliud Munyao Musao should not have been an annexure to the affidavit of Mr. Katiku was not raised at all before the single Judge. What is clear is that the affidavit sworn by Mr. Musao as well as his leave application form which were part of the record of the application before the learned single Judge appear to have escaped attention altogether.

18. The other ground on the basis of which the application was declined was that the order of the High Court granting the applicant leave to file the notice of appeal out of time was not produced. Whereas that is indeed so, it is noteworthy that there was a concession by the respondents that leave had in fact been granted on 9th September 2016. In light of that concession, it was not necessary in our view, again with profound respect, to require further verification of what was conceded.

19. Those are, in our view, relevant factors which the learned Judge ought to have borne in mind but did not do so. We are persuaded that had the learned single Judge taken those factors into account, she would have reached a different decision and allowed the applicant’s application. We are in the circumstances entitled to interfere with the discretionary decision by the Judge.

20. We accordingly allow the reference and set aside the ruling of the Judge given on 9th November, 2018. We substitute therefor an order allowing the applicant’s application dated 24th May 2018 in terms of prayer 2 of the said application. The applicant shall file and serve the record of appeal within 30 days from the date of delivery of this Ruling. The costs of the application and of the reference shall be in the intended appeal.

Orders accordingly

Dated and delivered at Nairobi this 25th day of October, 2019.

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR