



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: NAMBUYE, MAKHANDIA & ODEK, JJ. A)**

**CIVIL APPLICATION. No 4 of 2018**

**BETWEEN**

**ALFRED INDUVUAGWA SAVATIA.....APPLICANT**

**AND**

**NANDI TEA ESTATES.....1<sup>st</sup> RESPONDENT**

**INSURANCE COMPANY OF EAST AFRICA.....2<sup>nd</sup> RESPONDENT**

*(Being a Reference to the Full Bench of this Court from a decision of a single Judge (J. Mohammed)*

*dated 19<sup>th</sup> April 2018 declining leave to extend time to file and serve Notice of appeal arising from the*

*Judgment of the High Court at Eldoret (Kimondo J.) dated 20<sup>th</sup> April 2012 in Eldoret HCC No. 154 of 2013)*

**RULING OF THE COURT**

1. This is a Reference to the full bench of this Court against the ruling of a Single Judge (**J. Mohammed, JA**) dated 19<sup>th</sup> April 2018 declining to extend time within which to file and serve a Notice of Appeal in relation to the judgment of the High Court dated 20<sup>th</sup> April 2012 delivered in **Eldoret HCCC No. 154 of 2013**.
2. The Reference is made under **Rule 55 (1)** of the **Court of Appeal Rules (Rules)** which allows any person dissatisfied with the decision of a single judge to apply to have the application determined by the Court. By letter dated 26<sup>th</sup> April 2018, the applicant applied for reference to the full bench of this Court.
3. At the hearing of this Reference, the applicant appeared in person. He relied on the grounds in support of the application as well as the submissions that were made before the single Judge. The respondent was represented by learned counsel **Mr. Karuga** holding brief for Mr. Kamau. The respondent likewise relied on the submissions that were made before the single Judge.

**RE-STATEMENT OF APPLICANT'S SUBMISSIONS**

4. The applicant in his submissions before the single Judge submitted that he was seeking leave to extend time within which to file and serve the Notice of Appeal. That judgment was delivered by the High Court on 17<sup>th</sup> November 2015. That upon delivery of the judgment, he filed a Notice of Appeal dated 24<sup>th</sup> November 2015. The said Notice was filed out of time and was served on 15<sup>th</sup> December 2015. That by letter dated 24<sup>th</sup> November 2015, he requested for certified copies of proceedings. That the delay in filing the Notice of Appeal was occasioned by delay in obtaining certified copies of the proceedings. That the application for extension of time was filed on 17<sup>th</sup> January 2018. Based on the foregoing reasons, the applicant urged that leave be granted extending time within which to file and serve the Notice of Appeal.

**RESPONDENT'S SUBMISSIONS BEFORE SINGLE JUDGE**

5. The respondent did not file a replying affidavit but filed grounds of opposition. In opposing the application for extension of time, it was submitted that the reasons given for delay in filing and serving the Notice of Appeal within time were not satisfactory. That the applicant had not demonstrated the grounds upon which he sought to appeal and did not demonstrate if the intended appeal had an overwhelming chances of success. That the applicant was in court during the delivery of the judgment. That the application for extension of time was filed on 17<sup>th</sup> January 2018 after a delay of about two (2) years. That no satisfactory explanation for the delay of two years had been given.

## SINGLE JUDGE DECISION

6. Upon considering the application for extension of time and the submissions made by the parties, the learned Single Judge declined to extend time. In dismissing the application for extension of time, the learned single Judge expressed herself as follows:

***“[12] On the issue of delay, I note that the impugned decision was delivered on 17<sup>th</sup> November 2015, the notice of appeal is dated 24<sup>th</sup> November but was lodged in court on 15<sup>th</sup> December 2015 and was therefore filed outside the prescribed 14 days’ period. I further note that there is no letter bespeaking copies of the proceedings.....***

.....

***[14] It is instructive to note that there is no certificate of delay obtained from the court to support the applicant’s application. It is also notable that the instant application was filed on 17<sup>th</sup> January 2017, a period of over one years after the delivery of the impugned judgment. The reasons for the delay have therefore not been substantiated upon satisfactorily.***

.....

***[17] In the circumstances of this case, there is no material placed before me to warrant the exercise of my discretion in favour of the applicant and accordingly, I find that this application has no merit...”***

7. As stated heretofore, dissatisfied with the dismissal of his application for extension of time, the applicant lodged a Reference to the full bench of this Court to hear and determine the application. Both parties relied on their respective submissions made before the single Judge. We hereby consider and make a determination on the application.

## ANALYSIS and DETERMINATION

8. The principles which guide the Court in the exercise of discretion in an application for extension of time are well settled. In **Leo Sila Mutiso vs. Hellen Wangarir Mwangi, Civil Application No. Nai. 255 of 1997**, it was stated that in an application for extension of time, the relevant factors to be considered is the length of delay; the reason for delay; the chances of appeal succeeding and the degree of prejudice (if any) likely to be caused to the respondent if extension of time is granted.

9. As was stated in **Donald O. Raballa vs. Judicial Service Commission & another [2018] eKLR**, a Reference is not an appeal and we may only interfere with the exercise of the discretion bestowed on a single Judge under ***Rule 4*** of the rules on the basis of sound principles. 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 did not properly appreciate 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 demonstrating the breach of any or all such principles is on the applicant. (See **Ramesh Shah v.s Kenbox Industries Limited [2008] eKLR**).

10. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others [2015] eKLR** identified salient principles to be considered in an application for extension of time. The Court expressed itself thus:

***“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:***

***1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***

***2. a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court;***

***3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;***

***4. [where] there is a reasonable [cause] for the delay, the delay should be explained to the satisfaction of the Court;***

***5. whether there will be any prejudice suffered by the respondents if the extension is granted;***

***6. whether the application has been brought without undue delay; and,***

***7. whether in certain cases, like election petitions, public interest should be a consideration for extending time.”***

11. In the instant matter, there are several issues that we need to consider. First, has the applicant satisfactorily explained the reason for delay in filing and serving the notice of appeal; second, is the delay of over two years inordinate; third, has the application for extension of time been brought without undue delay; fourth, has the applicant demonstrated the respondent stands to suffer no prejudice if extension is granted?

12. It is evident from the impugned ruling that the learned single Judge correctly stated the guiding principles to be taken into account in an application for extension of time. In this context, the single Judge correctly cited the decisions in **Wasike vs. Swala [198] KLR 591** and

**Monica Malel & another vs. Republic, Eldoret Civil Application No. Nai. 246 of 2008.**

13. We note that the learned single Judge made a finding that there was delay in bringing the application for extension of time and which delay had not been sufficiently explained. The primary reason given for the delay of over two years is that the delay was caused by failure to obtain certified copies of the proceedings. If this were so, the applicant ought to have annexed a certificate of delay. This was not done. The absence of a certificate of delay diminishes the value and weight to be given to the applicant's explanation for delay. Accordingly, we agree with the learned single Judge that the delay between 17<sup>th</sup> November 2015 when the impugned judgment was delivered and 17<sup>th</sup> January 2018 when the instant application was filed was not sufficiently explained. We thus find the two-year delay to be inordinate and unexplained.

14. The record shows that the Notice of Appeal is dated 24<sup>th</sup> November but was lodged in court on 15<sup>th</sup> December 2015. The delay in lodging the Notice of Appeal in court has similarly not been explained.

15. A further observation is that the letter bespeaking certified copies of proceedings is dated 24<sup>th</sup> November 2015. However, there is no evidence that the letter was filed in court. The failure to file the letter has not been explained.

16. Finally, the applicant has not demonstrated the prejudice the respondent is likely or unlikely to suffer if extension of time were granted.

17. For the foregoing reasons, we find that the learned single Judge exercised her discretion judicially. The upshot is that we find no good reason to interfere with the decision of the Single Judge. Accordingly, the Reference be and is hereby dismissed with costs.

***Dated and delivered at Eldoret this 17<sup>th</sup> day of October, 2019***

**R. N. NAMBUYE**

**JUDGE OF APPEAL**

**ASIKE MAKHANDIA**

**JUDGE OF APPEAL**

**J. OTIENO ODEK**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**