



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED JJ.A.)

CIVIL APPLICATION NO. 10 OF 2016

BETWEEN

LIVUKANA MAHALANG'ANG'A.....APPLICANT

AND

FESTUS MWAKHA AMARE.....RESPONDENT

(A reference from the ruling of a single judge (Musinga, JA.) delivered on 15th June, 2016 in an application for extension of time within which to file and serve a Notice of Appeal and Record of Appeal out of time arising from the judgment of the High Court of Kenya at Kakamega, (Chitembwe, J.) delivered on 19th day of May, 2014)

in

CIVIL CASE NO. 60 OF 2008)

RULING OF THE COURT

[1] On the 15th of June, 2016 the Hon. Musinga, J sitting as a single judge under **rule 4** of the **Court of Appeal Rules**, dismissed the applicant's motion for extension of time within which to file and serve his record of appeal against the judgment of the High Court (Chitembwe, J), delivered on 19th May, 2014. The applicant is now before us by way of a reference under **rule 55(1)(b)** of the **Court of Appeal Rules**.

[2] In dealing with the motion, the learned judge was exercising a discretionary power under rule 4 of the Court Rules. The circumstances in which this Court can interfere with the exercise of such power, by a single judge were stated in **Benson Mbuchu Gichuki vs Evans Kamende Munjua & 2 Others [2006] eKLR** (Civil Application 79 of 2004) as follows:

“... the full court must consider that the single judge was exercising an unfettered discretion though he was enjoined to exercise it judicially. The applicant must demonstrate in a reference such as this that the single judge took into account some irrelevant factor or that he had failed to take into account a relevant fact or that taking into account all the circumstances of the case, his decision is plainly wrong.”

[3] In this case, the learned judge being guided by **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi**, Civil Application No.Nai.255 of 1997 [unreported], and having taken into account the factors that need to be considered in an application for extension of time, stated as follows:

“13. The High Court judgment was delivered on 19th May, 2014 and since then, no notice of appeal was ever filed. No reason was given for the failure to file the notice of appeal. A party does not require certified copies of proceedings to file a notice of appeal. That unexplained delay is inordinate.

Secondly, even after the applicant's counsel received certified copies of the proceedings and judgment, he did not take any action for more than 6 months. A counsel does not require so much time to prepare an application for extension of time. I find the explanation for the delay unsatisfactory.

14. I have perused the High Court judgment as well as the draft memorandum of appeal. I entertain grave doubts about the chances of success of the intended appeal. I also agree that the respondent shall suffer prejudice if the application is granted, considering that he has already paid for the subdivision of the land, although if this was the only consideration, I would have held that such can be compensated for.”

[4] In the reference before us, counsel for the applicant faults the single judge contending that he was wrong in finding the explanation for the delay unsatisfactory. Counsel maintains that the delay was not inordinate given the circumstances that surrounded it, to wit, that the

delay was caused by the applicant's inability to get the appropriate documents. He pleads with the Court that the dispute involves land, and that unless the applicant's motion is allowed, he will suffer irreparable loss.

[5] On his part, learned counsel for the respondent has argued that the applicant has not demonstrated any compelling reasons to warrant the Court granting the orders sought. He states that the learned judge rightly held that there was delay as there was no action taken for over 6 months. He points out that the judgment subject of the intended appeal, has already been executed, the suit land subdivided, and the respondent registered as the owner of the subdivision. He concludes that there is no justification for any interference.

[6] As held in **Mwangi vs Kenya Airways Limited [2003] KLR 486** a single appellate judge sitting alone and acting under rule 4 of the Court of Appeal Rules, exercises the powers vested in him alone, on behalf of the whole Court. A full Court can only interfere with the exercise of those discretionary powers for very specific reasons. In this case, the learned judge considered the excuse given for the delay which was delay in obtaining proceedings/judgment from the Court, but found that explanation unsatisfactory. The learned judge further found that even after the proceedings and judgment were procured, there was a further delay of six months for which there was no explanation. Having examined the affidavit that was sworn by the applicant in support of the motion, we cannot but agree with the learned judge.

[7] We note that the learned judge went further and considered the chances of the intended appeal succeeding but this elicited negative results. While it is true that the subject of the suit involved land and that the dismissal of the applicant's motion will be prejudicial to the applicant, the applicant only has himself to blame. In the circumstances, we find that the learned judge properly and judicially exercised his discretion, as he took into account all relevant factors. Accordingly, we dismiss the reference.

Dated and delivered at Kisumu this 8th day of February, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.