IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (KANTAI, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 179 OF 2017 (UR 143/2017)

VELOS ENTERPRISES LIMITED.....APPLICANT

AND

PARAGON ELECTRONICS LIMITED.....RESPONDENT

(Being an application for extension of time to file and serve a

Reference under Rule 55 of the Court of Appeal Rules from

the ruling and orders of the Court of Appeal of Kenya

at Nairobi (G. B. M. Kariuki, J.A.) dated 28th April, 2017

in

Civil Application No. 282 of 2015 (UR 240/2015))

****

R U L I N G

By a Notice of Motion dated 20th November, 2015 the applicant, ***Velos Enterprises Limited***, which company was then represented by the law firm of ***Sichangi Partners Advocates*** applied for extension of time to file and serve a notice of appeal out of time from a judgment of the High Court of Kenya at Nairobi delivered on 23rd October, 2015. That motion was heard on 23rd May, 2016 by ***G. B. M. Kariuki, J.A***., when counsel for both parties made submissions in support and opposition to the same. The learned Judge reserved ruling to 24th July, 2016 but ruling was not ready on that day. It was ordered that ruling would be delivered on notice. When ruling was eventually delivered on 28th April, 2017 the applicant's motion was found to have no merit and was dismissed. That would ordinarily have brought the matter to an end if the applicant chose not to exercise its right under ***rule 55*** of the rules of this Court where an applicant is entitled to refer the decision of a single Judge to a full bench for further consideration. But that is where the matter before me becomes interesting as I will show from what I gather from the submissions made before me.

The applicant asks me by Notice of Motion said to be brought under ***Sections 3*** and ***5*** of the ***Appellate Jurisdiction Act*** and ***Rules 42*** and ***55*** of the Court of Appeal Rules:

> ***"2. THAT the Applicant be granted leave to file its reference out of time.***
>
> ***3. THAT in the event that the leave is granted and time enlarged as prayed hereinabove, then the intended Application for reference be deemed to be properly filed and served on the respondent in compliance with rule 55 of this Honourable Court*** *(sic)".*

There are grounds set out in support of the motion and two supporting affidavits, one by ***Ramesh J. Shah***, a Director of the applicant, and another by ***George Sichangi***, an Advocate whose firm was on record for the applicant at the material time.

A summary of the grounds in support of the motion and the affidavits in support paints the following picture: The application for extension

of time was heard inter-partes by the said Judge on 23rd May, 2016 when ruling was reserved to 24th June, 2016 but when counsel appeared to take it, it was not ready. The learned Judge ordered that he would deliver ruling on notice. According to the applicant, when ruling was eventually delivered on 28th April, 2017 when the application was dismissed there was no representative by the applicant because it did not have notice of the date of delivery of the notice. At paragraph 5 of the affidavit of Mr. Sichangi, Advocate, he depones he and says:

> ***"5. THAT I hereby confirm that my law firm did not receive any notification of the impending delivery of a ruling by the Court of Appeal in Civil Application No. NAI. 282/2015 (UR 240/2015) either in that month of April, 2017 and/or any earlier period before that month of April, 2017".***

This version of events is countered by the respondent, ***Paragon Electronics Limited***. In a replying affidavit by its Director, ***Bulent Gulbahar***, it is stated amongst other things, that their lawyers were served on 25th April, 2017 with a notice of delivery of ruling and that, when their lawyers attended court on 28th April, 2017:

> ***"…However, counsel for the Applicant did not attend court. The ruling was delivered on the aforesaid date after the court had ascertained that the notice for delivery of the ruling had been served upon counsel for both sides…".***

It is further deponed by the respondent that a party who wishes to avail itself of a reference under Rule 55 of the rules of this Court must do so within 7 days of the date of the ruling and, not having done so as required, the applicant is not entitled to prayers sought and the application should fail.

In submissions before me when the motion came up for hearing on 10th May, 2018 ***Mr. Geoffrey Muchiri***, learned counsel for the applicant, and ***Miss Nyaga***, learned counsel for the respondent made substantive submissions that I think belong to the full bench if this application succeeds. I say this because I take the view that the issue I should deal with is whether the applicant had knowledge of the date of ruling and the effect an answer in the negative would have to that question. Also the full place of the right accorded a party by ***rule 55*** after the decision of a single Judge.

Rule 55 of the rules of this Court on reference from a decision of a single Judge provides:

> ***"(1) Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single Judge –***
>
> ***a) …***
>
> ***b) In any civil matter wishes to have any order, direction or decision of a single Judge varied, discharged or reversed by the court, he may apply therefore informally to the Judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.***
>
> ***(2) At the hearing by the Court of an application previously decided by a single Judge, no additional evidence shall be adduced".***

This rule therefore donates a right to a party who is not satisfied with the decision of a single Judge to apply for a reference to the court. The rule does not require such a party to give reasons to the single Judge or to the Registrar for the application to refer the matter to the court and the party may, indeed, apply informally to the Judge when the decision is made or write to the Registrar requesting a reference.

It is the case of the applicant before me that it has been denied a right to apply for reference within 7 days as required by the said rule because, says the applicant, it was not given notice for delivery of the ruling which had been deferred to be delivered on notice.

Miss Nyaga, learned counsel for the respondent, in opposing the application stated, as deponed by the respondent in the replying affidavit, that her law firm was served with a notice for delivery of ruling and that, when she attended before the said Judge for ruling, the learned Judge ascertained that both counsel on record had been served for that day.

I have already set out in this ruling what ***Mr. Sichangi***, counsel then on record for the applicant, says in his affidavit in support of the motion. He confirms that his law firm was not served with a notice at all.

I note the circumstances of this case where an application for extension of time was heard and ruling was referred to a specific date but on that date ruling was not ready and was deferred to be delivered on notice. I have perused the entire record and I cannot find evidence to show that there was a notice issued and served on the lawyers on record for the applicant to appear in court for delivery of the ruling. ***Miss Nyaga*** is right in her submission that the applicant's lawyers should have been more vigilant keeping a constant lookout for the ruling. But I think that in a situation where the court defers a ruling or judgment to be delivered on notice the burden shifts to the court to ensure that proper notice is served on all parties to attend when the deferred ruling is ready for delivery. That is what natural justice and the right to be heard require. Although Miss Nyaga says that the learned Judge ascertained that both parties had been served I needed more than her statement to that effect in a situation like here where the applicant says that it was not served where ruling had been deferred I requested learned counsel for the respondent to show me hearing notice served on her law firm but she did not have it.

I fully agree with my brother ***Waki, J.A., in Oshwal Academy (Nairobi) & Another v Induvishwanath [2017] eKLR*** when dealing with an application for extension of time where notice for delivery of judgment had not been served. The learned Judge said:

> ***"…the record of proceedings before the Industrial Court confirms the contention made by the applicant that there was no notice issued to them or their advocate to attend court when the award was delivered. …No reason has been advanced for this basic omission of the court to comply with basic rules of natural justice. The least that could have been done to ameliorate the omission was to inform the applicants that the judgment had been delivered against them and require compliance with whatever orders were made. None of that was done…".***

In the matter before me the applicant states in the affidavit in support of the motion that it only learnt that ruling had been delivered when garnishee orders were served on the applicant's bankers. This must have caught the applicant by surprise and embarrassment. I do not, in the circumstances, think that the applicant has been treated with procedural fairness which it was entitled to in law. The reference which a party is entitled to under ***rule 55*** of the rules of this court is neither whimsical nor fanciful. The party is entitled to such reference as of right and need not even give reasons for making the application for a reference to the Court.

I have found as a fact that the applicant had no notice of delivery of ruling whose delivery date had been deferred. Ruling was delivered in the absence of the applicant and no information on delivery of that ruling was conveyed to the applicant by the Court or by counsel for the respondent. The applicant did not know that ruling had been delivered until its bankers relayed information when garnishee proceedings were served on them. It is therefore surprising that learned counsel for the respondent submits that the application before me was filed with inordinate delay. That cannot be because counsel for the respondent did not produce any evidence to show that they had informed the lawyers on record for the applicant that ruling had been delivered. I accept what ***Mr. Walter Amoko***, learned counsel, in Affidavit in Support of Urgency says – that the applicant learnt of delivery of ruling after 25th July, 2017 when garnishee proceedings were served on I & M Bank Limited. The motion before me was filed on 31st July, 2017, less than a week later. There was no delay.

I probably have spoken to this issue more than I should have so let me stop here.

I allow the motion dated 31st July, 2017 by granting leave to the applicant to have a reference as contemplated by rule 55 of the rules of this Court. There shall be no need to file any other application. The file will be placed before the court for a reference.

This file and the ruling will be placed before the Registrar of this Court for his necessary action.

Costs of the motion will be in the reference.

Dated and delivered at Nairobi this 8th day of June, 2018.

S. ole KANTAI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR