



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO (P), WARSAME & MURGOR, JJ.A)**

**CIVIL APPLICATION NO. 119 OF 2017**

**BETWEEN**

**ALI MOHAMED MWANZIA.....APPLICANT**

**AND**

**NATIONAL BANK OF KENYA LIMITED.....RESPONDENT**

***(Being an application for leave to file the Notice and Record of Appeal out of time and for stay of execution of the ruling and order of High Court at Nairobi (Koome, J.(as she then was)) delivered on 12<sup>th</sup> March 2010***

***in***

***HCCC No. 1705 of 1997***

**\*\*\*\*\***

**RULING OF THE COURT**

This is a reference from the decision of a single judge (W. Karanja, J.A.) delivered on 29<sup>th</sup> September 2017 in which the judge declined to grant **the applicant, Ali Mohamed Mwanzia**, an extension of time within which to file and serve the Notice and Record of appeal against the Ruling of Koome, J, (as she then was), delivered on 16<sup>th</sup> September 2009.

The application is premised on a Notice of Motion dated 29<sup>th</sup> May 2017 seeking orders that;

- “ 1. ....
2. *That the Honourable Court be pleased to grant an order of stay of execution of the decree issued in Milimani HCCC No. 1705 of 1997 pending the hearing and determination of the present application.*
  3. *That the Honourable Court be pleased to grant leave to file and serve a notice of appeal and to appeal out of time against the whole ruling of Hon. Justice Koome delivered on 12<sup>th</sup> March 2010.*
  4. *That the costs be on the cause.”*

The application was made on the grounds that the applicant had filed an appeal in this Court being Civil Appeal No. 80 of 2015 challenging the exparte judgment obtained by the respondent in Milimani HCCC No. 1705 of 1997 which appeal was struck out on 19<sup>th</sup> May 2017 as the record of appeal had not been served on the respondent. It was also contended that the respondent had obtained a warrant of arrest to have the applicant committed to civil jail, and that if the orders sought were not granted, his appeal would be rendered nugatory, and he would be condemned to suffer irreparable damage. His plea was that the decree holder should give him an opportunity to prosecute his appeal.

In his affidavit in support of the application, the applicant reiterated the matters contended in the grounds, save to add that the application had been brought in good time.

During the hearing of the application, **Mr. Momanyi**, learned counsel for the applicant and holding brief for Mr. Omwonyo submitted that his application was in respect of a reference from the ruling of W. Karanja, JA to a full bench of this Court, and that they would be relying on the

averments set out in the applicant's affidavit in support of the application.

**Mr. V. Odhiambo**, learned counsel for the respondent submitted in response that, the learned single judge properly exercised her discretion. It was argued that the Court was *functus officio* having previously granted leave to file an appeal out of time in December 2010 in Civil Application No. 201 of 2010. Counsel took the view that the application for extension of time before the learned single judge ought to have been filed in the same file as the earlier application for extension of time and where the order was previously granted. It was further argued that the applicant had abused the Court's exercise of discretion when he failed to file the notice and record of appeal as earlier directed by the Court; that the applicant now comes to court after a period of six years and has failed to provide any explanation as to the reason for the delay in filing the intended appeal. Counsel concluded that the delay was inexcusable and urged us to dismiss the application.

It has been stated time and again that in an application under **rule 4** of the rules of this Court, the learned single judge is called upon to exercise their discretion, which discretion is unfettered. We reiterate this well-worn principle by referring to the decision in **Mwangi vs Kenya Airways Ltd [2003] KLR 486** in which this Court stated:-

***“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI, (Civil Application No. Nai. 255 of 1997) (unreported), the Court expressed itself thus:-***

***It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.***

***These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.”***

It is appreciated that in a reference, the full court is slow to interfere with a single judge's discretion, and before doing so, it must satisfy itself that the single judge misdirected himself or herself, and in so doing reached the wrong conclusion or, that the learned single judge misapprehended the law or failed to take into account some relevant matter.

In the ruling, the single judge considered whether the applicant was deserving of the favourable discretion of the Court, and came to the conclusion that the applicant was guilty of laches and indolence. In addition, he did not seek to explain the delay in filing the application. The single judge was of the view that the applicant should have prior to having the record of appeal struck out, sought to file the application in the same file, but had instead sought to circumvent that file, as he was unable to explain the delay of 5 years.

In the words of the learned judge;

***“The applicant moved the Court before. The Court exercised its discretion in his favour; he abused that discretion; he comes back to the same Court without caring to offer any explanation for his previous conduct and in my view, he is clearly undeserving of the favourable exercise of this Court's discretion.”***

Our analysis of the record shows that indeed the applicant filed a Notice of Appeal dated 25<sup>th</sup> March 2010, but when he failed to file the appeal within the prescribed time, he sought leave to do so out of time in an application dated 16<sup>th</sup> August 2010. This Court granted leave on 7<sup>th</sup> December 2010 on condition that the record of appeal be filed within 30 days. But the applicant failed to comply with that order and instead, without leave lodged the record of appeal on 7<sup>th</sup> April 2015. The respondent thereafter filed a motion on 14<sup>th</sup> March 2016 seeking to have the record of appeal lodged on 7<sup>th</sup> April 2015 struck out as it had been filed out of time and without leave of the Court. On 19<sup>th</sup> May 2017, the Court struck out both the Notice of Appeal and record for failure to abide by the rules of this Court.

As observed by the learned single judge, though the application, which is before us seeks to extend time to file an appeal in respect of the same ruling, the applicant has sought to file a fresh application some 5 years later. The learned judge posited that the reason for filing a fresh application was so as to circumvent the complexity of having to provide an explanation as to why the appeal was not filed as ordered by the Court on 7<sup>th</sup> December 2010, and to explain the further delay of 5 years in filing this application after the initial appeal was struck out.

The single judge further observed that the applicant had not provided any explanation whatsoever as to the reason for the delay in filing the application.

**In Trade Bank Ltd (In liquidation) vs L.Z. Engineering Construction Ltd & Another Civil Appl. No. NAI. 282/98**, the court stated thus;

***“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”***

The instant application is brought after a delay of 5 years. The applicant has not had the courtesy to explain this inordinate delay except merely to state that; *“I have filed this application in good time and without delay.”* It is also instinctive that, the application follows an earlier one where time was extended to file the appeal out of time, but the applicant failed to do so within the stipulated period, as a result of which, the appeal was struck out.

We find the applicant’s manner and approach to this issue to have been rather cavalier and distinctly lacking in discernment of the court and its process.

Clearly, there was no material or basis upon which the single judge could rely upon to exercise her discretion to extend time, once again, to file a notice and record of appeal and, like the judge, we are unable to find any reason to extend time to lodge the appeal. As a consequence we cannot fault her for having declined so to do.

Accordingly, we do not find any merit in the motion dated 29<sup>th</sup> May 2017 which we hereby dismiss with costs to the respondent.

*It is so ordered*

*Dated and delivered at Nairobi this 13<sup>th</sup> day of July 2018.*

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**