



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 6 OF 2015 (UR 6 OF 2015)

BETWEEN

THE CLERK OF THE NATIONAL ASSEMBLY.....1ST APPLICANT

HON. KENNETH O. MARENDE (RTD) SPEAKER OF THE NATIONAL

ASSEMBLY & 207 OTHERS..... 2ND APPLICANT

AND

REV. DR. TIMOTHY NJOYA & 17 OTHERS....1ST TO 18TH RESPONDENT

THE HON. ATTORNEY GENERAL..... 19TH RESPONDENT

THE MINISTER FOR FINANCE20TH RESPONDENT

HEAD OF PUBLIC SERVICE & SECRETARY TO THE CABINET HON.

FRANCIS MUTHAURA 21ST RESPONDENT

-AND-

COMMISSION ON THE IMPLEMENTATION OF

THE CONSTITUTION (CIC).....1ST INTERESTED PARTY

KENYA REVENUE AUTHORITY..... 2ND INTERESTED PARTY

(A reference from the ruling of a single Judge (Gatembu, JA) delivered on 24th April, 2015 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 Nairobi, (Warsame, J) (as he then was) delivered on 17th January, 2013

in

HIGH COURT CONSTITUTIONAL PETITION NO. 137 OF 2011)

RULING ON REFERENCE TO FULL COURT

Background

1. On 24th April, 2015, the Hon. Gatembu, JA. sitting as a single Judge under rule 4 of the Court of Appeal Rules, (the Rules) dismissed the

applicants' motion for extension of time within which to file and serve the Notice of Appeal and Record of Appeal against the judgment of the High Court, (Warsame, J) (as he then was) delivered on 17th January, 2013. The applicants are now before us by way of a reference under **rule 55 (1)(b)** of the **Rules**.

2. The application that was before the learned single judge was premised on a Notice of Motion dated 10th December, 2014. In dealing with the motion, the learned single judge was exercising a discretionary power under rule 4 of the Rules. The circumstances in which this Court can interfere with the exercise of such power, by a single judge were stated in **Benson Mbuchi Gichuki vs Evans Kamende Munjua & 2 Others [2006] eKLR** 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 the instant case, the learned single judge was guided by the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application No. Nai 255 of 1997** (unreported) and took into consideration the factors that should be considered by a single judge in an application for extension of time. The learned single judge stated as follows:-

“14. Up until there, I am satisfied that the inaction in either filing or pursuing the appeal is satisfactorily explained even though the decision to change advocates was not taken until 11th September, 2014. The High Court having granted Mr. Anthony Njoroge Advocate leave to come on record on 7th October, 2014, is the lapse of time between 7th October, 2014 and the time the present application was filed on 13th January, 2015 satisfactorily explained? ...

17. In view of the conclusion I have reached that there is delay of over two months that is not satisfactorily explained, I need not delve into the question of the chances of the appeal succeeding even though I do not consider that the intended appeal is frivolous.”

4. The learned single judge dismissed the application for extension of time with costs to the 1st to 18th respondents who attended the hearing of the application.

5. Rule 55 (1)(b) of this Court's Rules provides as follows:-

“55(1). Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single judge-

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 therefor informally to the judge at the time when the decision is given or b writing to the Registrar within seven days thereafter.”

Submissions

6. At the hearing of the reference before us, **Mr Sheriffsam Mwendwa**, holding brief for **Mr Anthony Njoroge**, learned counsel for the applicants faulted the learned single judge contending that he was wrong in finding the explanation for the delay unsatisfactory. Counsel submitted that given the circumstances of this case the delay was not inordinate and the mistakes of counsel should not be visited on the applicants; that the intended appeal raises a matter of general public importance regarding the implementation of the Constitution specifically the transitional provisions regarding the benefits and remuneration of members of the 10th Parliament and whether they are exempted from taxation of their allowances. Counsel maintained that the delay was explained; that the respondents and the interested parties did not oppose the instant application; that the 1st to 18th respondents have commenced execution against the members of the 10th Parliament as per the orders of the impugned judgment; that this Court should exercise its discretion in favour of the applicants; and that the intended appeal should be heard on merit as it raises a matter of great public importance. Counsel urged us to set aside the orders of the learned single judge and allow the application for extension of time.

7. There was no appearance for counsel for the 1st to 18th respondents. **Mr Eric Obura** who held brief for **Mr Mutinda**, learned counsel for the 19th to 21st respondents submitted that they were not taking any position in respect to the instant application. **Ms Mary Ngoirii** who held brief for **Mr Ado**, learned counsel for the 2nd interested party also submitted that they were not taking a position in respect of the instant application.

Determination:

8. We have considered the reference, the submissions made before us and the law. It is trite law that a reference is not an appeal and as a full court, it is not our duty to substitute our decision for that of a single Judge on the basis that we do not agree with the decision or that we may have reached a different conclusion on the matters that were before the learned single Judge.

9. In the case of **George Itotia Ng'ang'a vs. Mary Wanjiku Kimaru [2007] eKLR**, this Court set out the principles which govern references to the full court as follows:-

“The full court can only interfere with the exercise of the discretion by (sic) single Judge if it is shown that the single Judge did

not exercise his discretion judicially either, inter alia, by failing to take into account a relevant matter or taking into account irrelevant matters or that he misapprehended the facts or the law or on the ground that the decision is plainly wrong.”

See **Mbogo vs. Shah (1968) EA 96**).

10. We are guided by the case of **Wasike V Swala [1984] KLR 591** where this Court held:-

“1.As Rule 4 of the Court of Appeal Rules was, at the time that the matter came before the single judge, a person applying for an extension of time within which to serve or institute an appeal had to account satisfactorily the delay in filing his appeal and if he succeeded in doing that, then he had to show that there was some merit in his appeal. The applicant did not have to show that his appeal had an overwhelming probability of success.

2.As Rule 4 now provides that the court may extend the time on such terms as it thinks just, such an applicant must now show, in descending scale of importance, the following factors:

a. That there is merit in his appeal;

b. That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and

c. That the delay has not been inordinate.” (Emphasis added)

11. We are further guided by the case of **Fakir Mohammed vs. Joseph Mugambi & 2 Others, [2005] eKLR** (unreported) where this Court rendered itself thus:-

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors.” (Emphasis added)

12. The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In **Mwangi V Kenya Airways Ltd, [2003] eKLR 486**, the court having set out matters which a single judge should take into account when exercising his discretion held:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge 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 so long as the factor is relevant to the issue being considered.”

13. In the reference before us, it was not in dispute that the learned single Judge in hearing the application which was brought under Rule 4 of this Court’s rules, was exercising unfettered discretionary jurisdiction. He was aware of this aspect and incorporated it in his ruling. He was also aware that in doing so he had to have reasons upon which to exercise that discretion and that it should not be exercised upon his own wish nor capriciously.

14. The learned single judge was aware of the requirements for the exercise of that discretion which are that the applicant seeking orders under Rule 4 of this Courts’ Rules had to explain the reasons for the delay; and consider, if possible, the merits of the intended appeal and whether the respondent in such an application would suffer prejudice if the application is granted.

15. In the instant case, the learned single Judge considered the length of the delay and the explanation given for the delay. The learned Judge found that there was a delay of **over two months** after the current advocates came on record and the filing of the application for extension of time. The learned single judge found that the delay of over two months was not satisfactorily explained.

Having so found, the learned judge stated that he found no reason to delve into the question of the chances of the appeal succeeding.

16. The learned single judge found that the appeal was not frivolous. On the question of prejudice, the learned single judge echoed the words of Mwera, JA in **Joyce Akinyi Ochieng vs Anthony Chinedu Ifefigbo, Civil Application No. Nai 122 of 2013** that **“Litigation must come to an end and the applicant should not be seen to unnecessarily extend it...”**

17. Delay has to be considered together with other relevant factors. With respect, the learned single judge did not consider the likelihood and nature of undue prejudice to the applicants if the application was declined or the public importance of the subject matter nor give due weight to the merits of the intended appeal. We think that in the circumstances of this case, those were relevant and necessary considerations, the failure of consideration of which invites our intervention.

18. It is evident from the record that the intended appeal has merit as it raises matters of general public importance regarding the

interpretation of the transitional provisions of the Constitution and the powers, rights and remuneration and tax exemptions of the Members of the 10th Parliament; that the intended appeal also raises fundamental issues on the legality of legislation that was saved by the Constitution at the time when the Constitution was promulgated in 2010 and that the intended appeal raises important Constitutional issues of immense public importance and interest which merit resolution by this Court.

19. With the greatest respect to the learned single judge after considering all the circumstances of the motion before us, we find that the learned single Judge while conceding that the intended appeal is not frivolous did not consider all the facts and that the issues raised in the intended appeal relate *inter alia* to the interpretation of the Constitution and are of public importance. This was a misdirection which resulted in the improper exercise of the learned single judge's discretion, the consequence of which is an injustice to the applicants. Accordingly, we allow the reference and set aside the order of the learned single judge. We substitute therefore an order that the Notice of motion dated 10th December, 2014 be and is hereby allowed.

20. We direct as follows;-

- 1. That the notice of appeal dated 30th January, 2013 be deemed to have been duly filed.**
- 2. The applicants shall file their Memorandum of appeal and record of appeal within Thirty (30) days from the date hereof.**
- 3. The costs of this reference shall abide by the outcome of the intended appeal.**

Dated and delivered at Nairobi this 9th day of November, 2018.

E. M. GITHINJI

.....

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