



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME J.J.A.)

CIVIL APPLICATION NO. 26 OF 2016

BETWEEN

MOHAMED SHALLY SESE (SHAH SESE).....APPLICANT

AND

FULSON COMPANY LTD.....1ST RESPONDENT

KILIFI BEACH PROPERTIES LIMITED.....2ND RESPONDENT

(Being an application for leave to extend time within which to file a Notice of Appeal and/or Appeal from the Ruling of the High Court of Kenya at Mombasa (Emukule, J.) dated 5th June, 2015 in H.C.MISC.JR. Application No. 74 OF 2013.)

RULING OF THE COURT

[1] Under **Rule 55** of the Court of Appeal Rules, any person being dissatisfied with the decision of a single Judge and who wishes to have the same varied, discharged or reversed may apply informally to the Judge at the time when the decision is given, or by writing to the Registrar within seven days thereafter; seeking such discharge, variation or reversal as the case may be, of the single judge decision by the full bench of the court. It is under this premise that Mohamed Shally Sese (Shah Sese) the applicant sought reference of a full Bench of this Court in regard to a Ruling by a single Judge (**Makhandia J.A**).

[2] By a letter dated 3rd October, 2016, the applicant urged us to re consider the said ruling rendered on 30th day of September, 2016 in which the learned single Judge disallowed the applicant's application for extension of time sought under **Rule 4** of the Court Rules. The application which was dated 30th May 2016, principally sought an order that the applicant be granted leave to file and serve a Notice of Appeal out of time, in respect of a ruling delivered on 5th June 2015 by the High Court (*Emukule, J.*) sitting at Mombasa. The application was expressed to be brought under **rule 4** and **75 (2)** of the **Court of Appeal Rules, 2010, section 3A** of the **Appellate Jurisdiction Act, section 5** of the **Court of Appeal (Organization and Administration) Act 2015, Article 164 (3), 159 (2) (d) and 259 (1) (a) (b)** of the **Constitution of Kenya, 2010**.

[3] Upon hearing the application, it was disallowed and in so doing, the learned single Judge was of the view that the applicant was an indolent litigant who had failed to follow up on the progress of his matter and had also failed to explain his delay in lodging his appeal even though the Notice of Appeal was duly filed. This is what the learned single Judge posited in a pertinent paragraph of the impugned ruling:-

“The record shows that Nabhan Swaleh Advocate had been appointed by Shah Sese alias Shali Sese to act on his behalf in the proceedings vide a notice of appointment of Advocate dated 31st January, 2014 and filed in court on 3rd February, 2014. On 5th June, 2015 Emukule J. delivered the ruling in the proceedings. By a Notice of Appeal dated 12th June, 2015 drawn by Messers Sachdeva, Nabhan & Swaleh Advocates it is indicated that the same was filed on behalf of Mohamed Shali Sese who was a party in the proceedings. These set of facts have not in any way been controverted or challenged by the applicant nor any alternative explanation whatsoever offered. This begs the question why the applicant would be before this Court seeking extension of time to file a notice of appeal yet he had already filed one through his advocates unless of course as submitted by the respondent, the applicant was not a party to the proceedings. Nor has the applicant in any way suggested that the Mohamed Shally Sese referred to in the Notice of Appeal aforesaid is not the same person as him.

It is apparent the applicant has not been candid with this court”

[4] That decision is what has prompted the applicant to refer the matter to a full bench as aforesaid with a view to changing the fate of his application which he argued through learned counsel **Mr. Gikandi**. Counsel for the applicant submitted that the application should be allowed as the applicant was never notified of the delivery of the Ruling in respect of the Judicial Review proceedings, the subject matter of the intended appeal; that he was an illiterate lay person who was at the mercy of his lawyers and that it was thus unreasonable for the learned Judge to blame the applicant for his failure to follow up on the matter with his then counsel. Citing the decision in **Pithon W. Maina vs. Thuku Mugeria (1979) eKLR**, counsel submitted that the mistake of counsel should not be visited on an innocent litigant and that in any event, the delay of one year was not inordinate in the circumstances.

[5] Mr. Gikandi went on to submit that the intended appeal carries a lot of jurisprudential value; namely whether the **National Lands Commission** has the requisite jurisdiction to review grants relating to private land under **Section 14** of the **National Land Commission Act**. Further, that should the court on appeal find that the Commission has such jurisdiction, it would in turn mean that the trial court lacked jurisdiction in the Judicial Review proceedings. On the whole, that the learned single Judge had failed to take account of all these issues and his decision should be reversed to pave way for the determination of the applicant's intended appeal.

[6] In opposing the application, the respondents filed a replying affidavit sworn by their counsel. They contended that the applicant was a stranger to the judicial review proceedings; that the interested party in those proceedings was **Shah Sese** alias **Shali Sese**, who was represented by an advocate known as **Nabhan Swaleh**; that following the delivery of the impugned Ruling, the said Nabhan Swaleh filed a Notice of Appeal on behalf of the said Shah Sese and therefore, the applicant lacked the *locus standi* to seek the aforesaid orders. Furthermore, even if the applicant and Shah Sese were one and the same person, the Notice of Appeal already lodged by Nabhan Swaleh Advocate sufficiently caters for the applicant's interests.

[7] On her part, **Ms. Mwanasumbah** learned counsel for the respondents reiterated that the applicant lacked *locus standi* to institute the present application. According to counsel, either way, the grant of extension of time is a discretionary remedy and based on the material before the single Judge, he cannot be faulted on his finding that the applicant had failed to prove that he deserved the favourable exercise of discretion. Responding to the submission by counsel for the appellant that there was a mistake by counsel, she stated that the case of **Pithon Maina (supra)** cited by counsel for the applicant is distinguishable as it was delivered some 34 years ago and the law has since changed; citing the decision in **Ruukanya Buuri vs. Marimi Minyora & 2 others (2018) eKLR**. Counsel's view was that under the present law, a litigant has a moral and legal duty to fast track the hearing of his case. In conclusion, she submitted that the applicant had also failed to explain his inordinate delay of more than 12 months. Counsel also urged us not to entertain any arguments that were not presented before the single Judge, because under **Rule 55 (2)**, no new evidence should be presented in a referral from a single Judge decision.

[8] In considering the issues that were placed before us for determination that is whether to overturn the Ruling by the single Judge which is an exercise of judicial discretion undertaken on behalf of the Court, we find it will be necessary to look at, albeit briefly, the applicant's substantive matter before the High court so as to place this Ruling in perspective. The Ruling against which the applicant intended to appeal against emanated from **Judicial Review Application No. 74 of 2013** which was consolidated with **Judicial Review Application No. 75 of 2013**. Upon consolidation, it is apparent from the Ruling sought to be impugned that the current respondents were among the then *ex parte* applicants, while the applicant was sued as an interested party, alongside another party described therein as Edward Mzee Karezi.

[9] In those proceedings, the applicant swore an affidavit dated 5th May 2014 in which he contended that his family was in actual use and occupation of **Plot LR No 17835** (suit land) since 1954; that sometime in the late 1980s he sought to have the suit premises allocated to him by the Government, but due to his illiteracy, he entrusted Edward Mzee Karezi to pursue the allocation on his behalf. He however later learnt that Mzee Karezi had falsified the allocation and obtained the title to the suit premises in his own name. Thereafter, Mzee Karezi subdivided and alienated the land to the applicant's detriment. Consequently, he averred, he filed a complaint with the National Land Commission sometime in the year 2013 and upon investigations, the Commission directed the revocation of the title to the land. This in turn spurred the judicial review proceedings aforesaid; which were filed by other parties who also claimed competing interests in respect of the suit land. Upon conclusion thereof, Ruling was issued against the applicant, hence his desire to file an appeal.

[10] The justification for the application seeking leave to file an appeal out of time was premised on grounds that even though the applicant was always represented by counsel before the High court, the said counsel failed to inform him of the delivery of the Ruling, as a result, time within which to appeal lapsed. He stated that it was only when he visited the police station to report presence of some trespassers on the suit land that he learnt from the very trespassers he complained about, that they were authorized by an order of court to take possession. He thus contended that he was deserving of an order of extension of time within which to file an appeal and that unless he is granted leave, he stood to be unfairly deprived of his property.

[11] As earlier stated, the learned single Judge was unconvinced of the applicant's reasons for failure to lodge appeal within time and accordingly dismissed his application for extension of time. Prior to looking at the merits of the application, it is appropriate for us to deal with the issue raised by the respondents that the applicant lacks *locus standi* in this matter. All along, the respondent contended that the applicant was never involved in the impugned Judicial Review proceedings and by extension, lacks the *locus standi* to pursue this application.

[12] It is trite that *locus standi* is what clothes a litigant with the authority to be heard before a court. By definition, *locus standi* is "**The right to bring an action or to be heard in a given forum**" (See **Black's Law Dictionary, 9th Edition**). In the present application, the applicant's *locus standi* has been challenged although on the alternative. Counsel for the respondent argued that the applicant is an imposter; that though he purports to have been one of the interested parties before the trial court, in actual sense, he was never involved in those proceedings as the interested parties therein were different persons entirely. Without prejudice to the foregoing, the respondent also contended that even if the applicant were held to be the same person who appeared before the trial court, his application for extension of time would still be gratuitous; since a Notice of Appeal was already filed on his behalf before the trial court.

[13] Our perusal of the copy of the Ruling on the Judicial Review proceedings annexed to the applicant's supporting affidavit, the named parties before the High court appear to have been as follows:

“Republic..... (Applicant)

Versus

The National Land Commission

The Chief Land Registrar

The Senior Registrar of Titles Mombasa (Respondents)

And

Shah Sese (Interested party)

Edward Mzee Karezi (Interested party)

Fulson Company Limited (Ex parte applicant)”

It would thus appear the interested party in the said proceedings was one **Shah Sese**. On the other hand, in this application, the applicant identifies himself as ‘**Mohamed Shally Sese (Shah Sese)**’. This seems to imply that the name ‘**Shah Sese**’ is an alias. This disparity was never explained by the applicant despite the fact that the same issue was raised before the single Judge.

[14] Be that as it may, even if we were to give the applicant the benefit of doubt regarding the mix up in names and presume them to refer to one and the same person, like the single Judge found, there was a Notice of Appeal dated 12th June, 2015, lodged in the High court registry on 15th June, 2015; a copy was also annexed to the respondent’s replying affidavit. The said Notice of Appeal was filed in the judicial review proceedings by the firm of **Messrs Sachdeva, Nabhan & Swaleh Advocates**, acting for **Mohammed Ali Sese**. It is further indicated that the appeal is against the decision by **Emukule J.**, delivered on **5th June, 2015**. In a nutshell therefore, the Notice of Appeal for which extension of time is hereby sought was filed within time. The applicant has not denied that the Notice of Appeal was in regard to the same appeal and that it was lodged on his behalf. With tremendous respect, the applicant ought to have taken the matter from where the Notice of Appeal was filed and to proceed to take other steps required to file a record of appeal. Indeed it is on that basis, the application was dismissed by the learned single Judge Sas demonstrated in a portion of his ruling reproduced in the preceding paragraphs.

[15] What has changed since the above ruling, that clearly pointed out there was a Notice of Appeal on record which was not disputed; additionally where did the learned single Judge err or what is the purpose of the present application that is seeking to file a Notice of Appeal which was already filed? To demonstrate the contradictions by the applicant, we reproduce here what he deposed under paragraph 7 of his affidavit sworn on 30th May, 2016 in support of the application for extension of time;-

“That I did not fail to instruct my former advocates to file a Notice of Appeal on time as I was not aware of the delivery of the said ruling.”

[16] The Notice of Appeal was filed on time therefore on what grounds would we overturn the Ruling by a single Judge? 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** 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.”

[17] We find no reason(s) as outlined herein above for interfering with the Judge’s exercise of discretion in declining to extend time to file a Notice of Appeal which was already on record. Accordingly we dismiss the reference made by the applicant vide the letter dated 3rd October, 2016 and lodged in this Court on 5th October, 2016. We direct each party to bear its own costs this being a land matter.

Dated and delivered at Mombasa this 6th day of December,2018

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR