



IN THE COURT OF APPEAL

AT KISUMU

CORAM: MURGOR J.A.

CIVIL APPEAL (APPLICATION) NO. 40 OF 2013

BETWEEN

**ROZAAH AKINYI BUYU.....
.....APPLICANT**

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST
RESPONDENT**

**HANSON NJUKI MUGO.....2ND
RESPONDENT**

**JOHN OLAGO ALUOCH.....3RD
RESPONDENT**

(Application for extension of time to refer a decision on taxation of the Deputy Registrar delivered on 10th September 2015 to a judge under rule 112 of the Court of Appeal rules

in

Civil Appeal No. 40 of 2013)

RULING

By a Notice of Motion dated 3rd November 2015, **Rozaah Akinyi Buyu** the applicant has applied for time to be extended under **Rule 4** of the **Court of Appeal Rules 2010** within which to time to refer a decision of the Deputy Registrar on taxation to a single judge delivered on 10th September 2015.

The application concerns the taxation by the Deputy Registrar of the 1st and 2nd respondents Bill of Costs dated 9th May 2015 in respect of **Civil Appeal No. 40 of 2013** that was before this Court. The ruling was delivered on 10th September 2015.

In the affidavit in support of the application sworn by **Mr. S.M. Mwenesi**, it was deponed that, the applicant’s counsel became aware of the ruling on 17th September 2015 when they received a copy of a

letter from the 1st and 2nd respondents' counsel, addressed to the Deputy Registrar of the Court of Appeal requesting for the decision on taxation to be referred to a single judge. On 6th October 2015, in a letter to counsel for the 1st and 2nd respondents, and copied to the Deputy Registrar, the applicant requested to be supplied with copies of the ruling. The applicant again requested for a copy of the ruling on 15th October 2015, and on 16th October 2015, they received a copy of the ruling by email from counsel for the 1st and 2nd respondents.

The 1st and 2nd respondents in a replying affidavit sworn by **Mr. Ragot** on 24th November 2015, deponed that, when he learnt of the delivery of the ruling on 12th September 2015, he hastily filed a reference challenging the decision of the Deputy Registrar on 17th September 2015 within the stipulated seven (7) days period, and simultaneously with that, served the applicant with a copy of the reference.

Ms. Agasna learned counsel for the applicant holding brief for Mr. S. M. Mwenesi appeared before me 3rd December 2015. Counsel repeated the averments of the applicant's supporting affidavit but added that the applicant seeks to review the costs that were taxed at Kshs. 2,663,115/- for the 1st and 2nd respondents which amount was in excess of the amount taxed in the High Court. Counsel finally submitted that the 1st and 2nd respondents had also filed an application to refer the ruling to a single judge, and as a consequence they would not suffer any prejudice should the court deem it fit to extend time for the applicant to file her reference.

Mr. J. Ragot learned counsel for the 1st and 2nd respondents and holding brief for Mr. Olago Aluoch for the 3rd respondent, opposed the application. He relied on his replying affidavit sworn on 2nd November 2015, and submitted that the applicant required to explain the delay and, in the absence of an explanation, an extension of time was not automatic. Counsel conceded that the applicant cannot be held responsible for the delay in the delivery of the ruling, but stated that the applicant became aware of the ruling on 17th September 2015, when the 1st and 2nd respondents' counsel filed and served a copy of their reference to a single judge challenging the same ruling, which reference was acknowledged by the applicant's counsel on the 18th September 2015. Counsel contended that this was adequate notification to the applicant that the ruling had been delivered, and that from the time of knowledge until the date this application was filed was 47 days. No explanation has been offered for this period.

Counsel further submitted that **rule 112 (3)** of this Court's rules requires that any reference from a decision on taxation should be filed within seven (7) days. That the 47 days delay was inordinate in the light of the time frame specified for filing a reference. Counsel relied on **Reuben Muli t/a Konza Merchants vs Keshra Vishna T/a Alpesh Enterprises Mombasa Court of Appeal Civil Application No. 52 of 2006**; for the proposition that the period between knowledge of the ruling and the time of filing the application is crucial and an explanation is required.

Under **Rule 4** of this Court's rules, it is settled that, a single judge's discretion is wide and unfettered in determining whether to extend time or not. In so doing, the Court should act judiciously and not capriciously in the exercise of its discretion, taking into consideration the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the court granted the extension sought. See **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997**; **Mwangi vs Kenya Airways Limited [2003] KLR 486 and Murai vs Wainaina (No. 4) [1982] KLR 38.**

The ruling was delivered on 10th September 2015. There is no evidence that the parties were notified of the date for delivery of the ruling. According to the applicant's supporting affidavit, they were informed by counsel for the 1st and 2nd respondent of the delivery of the ruling on 16th October 2015, when they were sent a copy. The 1st and 2nd respondents counsel on the other hand contends that the applicants were notified of the delivery of the ruling when the applicant was served with a copy of their reference challenging the ruling on 17th September 2015, which notification was duly acknowledged by the

applicant on 18th September 2015. This application was filed on 4th November 2015.

In a nutshell, the applicant’s main complaint is that since they were not notified of the date for delivery of the ruling, and have to date not received a certified copy of the ruling, they should not be denied an opportunity to have their reference heard by a single judge.

In **Grindlays Bank International (K) Ltd v George Barbuor Civil Application NAI. 257/95** following the House of Lords in **Ratman v Camarasamy [1964] 3 ALL ER 933** this Court stated: -

“The rules of court must prima facie, be obeyed and in order to justify a court in extending the time during which some steps in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

I have carefully examined the applicant’s supporting affidavit to establish whether the applicant has advanced any reasons for the delay in bringing this application. It is undisputed that the parties were not notified of the date of delivery of the ruling. It is further observed that, after receipt of the 1st and 2nd respondents’ reference on 17th September 2015, on 6th October 2015 the applicant wrote a letter to counsel for the 1st and 2nd respondents and copied to the Deputy Registrar requesting for a copy of the ruling. On 15th October 2015, they wrote another letter requesting for a copy of the ruling, this time to the Deputy Registrar. On 16th October 2015, counsel for the 1st and 2nd respondents’ emailed counsel for the applicant a copy of the ruling, following which it took 19 days for this application to be filed.

There is no doubt that there had been delay in bringing this application, and the applicant has not provided any explanation, plausible or otherwise as to the reasons for this delay. But having said that, I am of the view that if the applicant had been notified of the date for delivery of the ruling as required by **order 21 rule (1)** of the **Civil Procedure Rules**, the reference might have been filed within the period stipulated. This omission is further compounded by the fact, and it is not disputed, that the applicant is yet to be supplied with a certified copy of the ruling by the Deputy Registrar. Given these circumstances, the interests of justice militate against penalizing the applicant for the delay in bringing this application seeking an extension of time a reference to a single judge.

This line of reasoning is further fortified by the fact that the record shows that, the 1st and 2nd respondents have also filed a reference challenging the same decision. With this mind, I do not envisage that any prejudice will accrue to them if time were to be extended to enable the applicant file her own reference, as it is evident that the matter is yet to be finalised.

Having regard to the reasons above, I consider it expedient to exercise my discretion to extend time for the applicant to file a reference to a single judge under **Rule 112** of this Court’s rules. I order that the time for filing and serving a reference be and is hereby extended by seven (7) days from the date hereof.

It is so ordered.

DATED and DELIVERED at KISUMU this 12th day of February, 2016.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR