



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI (PCA), OKWENGU & AZANGALALA, JJA)**

**CIVIL APPLICATION NO. NAI. 84 OF 2011**

**BETWEEN**

**PULLIN HARAKCHAND SHAH .....APPLICANT**

**AND**

**SOUTHERN CREDIT BANKING CORPORATION LIMITED.....RESPONDENT**

*(Reference to the full court against the ruling of Omolo, J.A. on an application for an extension of time within which to lodge a notice of appeal and a record of appeal against the ruling and the order of the High Court of Kenya at Nairobi (Ringera, J.) made on the 14<sup>th</sup> March 2002 in H.C.C.C No. 759 of 1998)*

**RULING OF THE COURT**

1. On the 14<sup>th</sup> March 2002, Ringera J (as he then was) dismissed a suit filed by Pullin Harakchand Shah (hereinafter referred to as the applicant) for non-attendance. The applicant was aggrieved with that order and he lodged a notice of appeal on the 20<sup>th</sup> March 2002. He subsequently filed Civil Appeal No. 166 of 2002 which was slated for hearing on the 14<sup>th</sup> March 2007. On the hearing date, the applicant applied to withdraw the appeal, and was allowed to do so by this Court.
2. The applicant then filed an application under rule 4 of this Court's rules seeking an extension of the time within which he could lodge a fresh notice of appeal and file the record of appeal. That application was allowed by O'Kubasu J.A. The learned judge granted the applicant leave to lodge the notice of appeal within seven days of the 16<sup>th</sup> July 2007, and to file and serve the record of appeal within fourteen days from the date of lodging the notice of appeal.
3. The applicant complied with the order to file the notice of appeal. However, when he embarked on compiling the record of appeal, it emerged that the file in the High Court did not contain documents which Mr. T. T. Tiego, the applicant's advocate, considered crucial to the appeal. While the applicant was trying to secure these documents, his advocate fell ill and had to be admitted in hospital for some time. In addition, the applicant suffered some misfortune in his family life which required his personal attention. All these factors led to the applicant not complying with the order of O'Kubasu, J.A., and to a delay in filing another application for extension of time within which to comply with that order.
4. The applicant eventually filed an application dated the 14<sup>th</sup> April 2008 seeking a further extension of time within which he could file another notice of appeal and a record of appeal. This

application was heard and allowed by Onyango Otieno, J.A., who validated the notice of appeal already on record, and directed the applicant to file and serve the record of appeal within fifteen days of the 27<sup>th</sup> June 2008. However, the applicant did not comply with this order.

5. By way of another application under rule 4 of the rules of this Court and dated the 6<sup>th</sup> April 2011, the applicant moved this Court once again seeking an extension of the time within which he could lodge and serve a notice and record of appeal against the ruling and order of Ringera, J. In support of his application, the applicant stated that he had been out of the country for treatment, and was thus unable to communicate with his advocates and give them instructions to proceed with the appeal.
6. That application was dismissed by Omolo J.A., prompting the present reference before us, in which the applicant, through his advocate, Mr. Tiego, has asked us to interfere with the discretion of the learned judge. Learned counsel urged that Omolo, J.A. improperly exercised his discretion and failed to take into account that the reason for delay was well explained. The reference is opposed by the respondent through its learned counsel, Mr. D.K. Musyoka, who submitted that the learned judge was correct in his decision, which he reached after taking into account the history of the matter, and the long period of delay that remained unexplained by the applicant.
7. Rule 4 of the Court of Appeal rules gives a single judge unfettered discretion to extend time, but such discretion must be exercised judiciously. In *Mwangi v Kenya Airways Ltd [2003] KLR 486 at 487*, this Court stated of this discretion and the manner it ought to be exercised that:

***“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 VS. 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.”***

8. If the single judge exercises his discretion improperly, then on reference to the full Court, that decision of the single judge can be set aside. See the decision of this Court in *Peninah Mongina & Another v Walter Masese Makori & Another [2005] eKLR (Civil Application No. 20 of 2004)* where it was held that:

***“... under rule 4 of this Court’s Rules, the learned single Judge [exercises] unfettered discretion. In a reference to the full court before we can interfere with that discretion, we must be satisfied that the learned single Judge misdirected himself in some matter and as a result arrived at a wrong decision or, that the learned single Judge misapprehended the law or failed to take into account some relevant matter.”***

9. In *Trans National Bank of Kenya v Hasam Said Amdun* [2006] eKLR (Civil Application No. Nai. 133 of 2005) the Court reiterated that:

***“... in exercising the discretion under Rule 4, a single member of the Court is doing so on behalf of the whole Court... the Court has now settled the circumstances under which it will interfere with the exercise of the discretion by a single Judge. The full Court will only interfere where it is shown that in coming to his decision, a single Judge has taken into account a matter which he ought not to have taken into account, or that he has failed to take into account a matter which he ought to have taken into account, or that he misunderstood some law or principle of law and thus misapplied the law, or that there was no evidence at all before him to support a particular conclusion, or that he failed to appreciate the weight or bearing of circumstances, admitted or proved, or that everything taken into account, the decision is plainly wrong.”***

10. These are the principles that we will now apply to the reference before us. The applicant stated that he failed to comply with the order given by Onyango Otieno, J.A., because he was away from Kenya undergoing treatment and unable to communicate with his advocates. We have carefully considered the impugned ruling of Omolo, J.A. In it, the learned judge set out the history of the dispute between the parties, and remarked as follows:

***“... then, not only once, but two times, the applicant obtained orders from the court extending time for him. On both occasions he failed to comply with the orders. The last such order was made by Onyango Otieno, J.A. on 27<sup>th</sup> June, 2008; admittedly the applicant was in Kenya even if his health was failing. For all the delay between June, 2008 to the 6<sup>th</sup> April, 2011, when he filed the present motion, the applicant puts the blame wholly on his ill health. I personally sympathise with the applicant’s ill health but it would be wrong to let that factor over-ride the long history of default on the part of the applicant starting right from the time when his suit was heard in his absence.... Once again I sympathise with the applicant’s ill health but having taken into account all the surrounding circumstances of the case, I am not inclined, and I hereby decline, to exercise my discretion in favour of the applicant.”***

11. In *Attorney General v James Alfred Korosso* [2010] eKLR (Civil Application 114 of 2008), this Court emphasized that in a reference, such as the present one, the Court is not sitting on appeal over the decision of the single judge. In that case, it was stated that:

***“the full court is not concerned with the merits of the decision as it is not sitting on appeal against the decision of a single judge. Rather the full Court is only required to investigate whether or not the single judge has misdirected himself on matters of fact or law in exercising his unfettered discretion.”***

12. It is apparent that Omolo, J.A. fully considered the reasons that the applicant advanced and was not satisfied that he had sufficiently explained the reason why he had failed to comply with the order of Onyango Otieno, J.A. In addition, Omolo, J.A. was not persuaded that the delay by the applicant, of almost three years, in filing the application to seek a further extension of time was sufficiently explained by the applicant’s ill health. Having considered the learned judge’s ruling, we do not find that he exercised his discretion injudiciously, and would agree with him that in the peculiar circumstances of the entire matter, it would have been improper for him to exercise his discretion in favour of the applicant.

13. Accordingly, we decline the applicant’s plea to interfere with the decision of the learned judge. We find that this reference has no merit, and order that it be and is hereby dismissed.

14. In keeping with the order of Omolo, J.A., each party shall bear its own costs.

**Dated and Delivered at Nairobi this 11<sup>th</sup> day of March, 2016**

**P . KIHARA KARIUKI, (PCA)**

**JUDGE OF APPEAL**

**H. M. OKWENGU**

**JUDGE OF APPEAL**

**F. AZANGALALA**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**