



IN THE COURT OF APPEAL

AT KISUMU

CORAM: MARAGA, GATEMBU & MURGOR J.J.A

CIVIL APPLICATION NO. 212 OF 2008

BETWEEN

HEZEKIAH MICHOKI.....APPLICANT

AND

ELIZAPHAN ONYANCHA OMBONGI.....RESPONDENT

*(Application for reference to full Court in an application for leave to Appeal out of time, a judgment of the High Court of Kenya at Kisii, Bauni J, dated 18<sup>th</sup> October 2007*

*in*

*H.C.C.A. No. 207 of 1998)*

\*\*\*\*\*

RULING OF THE COURT

This is a reference to the full Court from the decision of a single judge (Onyango Otieno, J.A.) delivered on 5<sup>th</sup> December 2008 in which the learned single judge declined to grant **the applicant, Hezekiah Michoki**, an extension of time under **Rule 4** of this Court's Rules within which to file an appeal out of time against the judgment of Bauni, J.

The applicant had been aggrieved by the decision of the High Court which had declared that the parcel of land know as **Title No. Gesima/149** (*the suit land*) belonged to the respondent, Elizaphan Onyancha Ombongi, and restrained the applicant from interfering with the respondent's peaceful and quiet possession of the suit land.

The application that was before the single judge was premised on a Notice of Motion dated 16<sup>th</sup> July 2008 and sought orders that;

- 1. That the applicant be given leave to serve the Notice of Appeal dated 23<sup>rd</sup> October 2007 and received at Kisii High Court on the even date out of time.*
- 2. That the applicant be granted leave to appeal out of time against the Superior Court's judgment made on 18<sup>th</sup> October.*

The applicant set out eleven grounds all of which were appropriately outlined in the ruling of the learned single judge.

When the reference to this Court came up before us, **Mr. Gichana** learned counsel for the applicant submitted that the applicant's grievance was that the learned judge only determined one factor which was that, the delay in filing the appeal was not explained, but failed to ascertain whether or not the appeal was arguable. Counsel argued that though the memorandum of appeal was not annexed, the grounds of appeal were specified in the application and in the applicant's supporting affidavit. Further, the appeal was arguable since, the judgment concluded that the respondent did not claim adverse possession, but acquired an interest, yet the plaintiff showed that he resided on the suit land with the applicant's consent. Counsel cited ***Joseph Githahi Gachau vs Pioneer Holding (A) Limited & 2 others [2008] eKLR*** for the proposition that adverse possession is negated where the occupation is with the consent of the registered owner.

On account of this, counsel concluded that the Court should have adhered to the requirements of **Section 3A and 3B** of the ***Appellate Jurisdiction Act***, and exercised its discretion to extend time to file the appeal, and grant the applicant the reliefs sought.

**Mr Oonge**, learned counsel for the respondent opposed the application, and pointed out that the applicant had conceded that indeed no reasons for the inordinate delay had been advanced, and that the application was based on whether the appeal was arguable. Counsel stated that the learned judge recognized that no memorandum of appeal had been filed, and referred to the grounds in the application and affidavit as mere allegations. Counsel submitted that whether or not an appeal is arguable should not be the sole basis upon which an extension of time should be granted, particularly as no exceptional circumstances had been demonstrated to the Court.

We have carefully considered the facts, the submissions of parties, the ruling of the learned single judge, and are of the view that the reference turns on, whether the single judge judiciously exercised his discretion, and whether the Court ought to have extended time on the sole basis that the appeal was arguable.

In ***George Itotia Ng'an'ga vs Mary Wanjiku Kimaru Civil Application No. Nai. 38 of 2006*** this Court set out the principles which govern references to the full court:

***"The full Court can only interfere with the exercise of a discretion by single Judge if, and only if, it be shown that in coming to the decision the single Judge took into account an irrelevant matter or failed to take into account a relevant matter, or misapprehended the evidence or the law or, s hort of these, that the decision under consideration is plainly wrong."***

With these principles in mind, we need to find out if the learned single judge erred for us to interfere with his exercise of discretion. In an application under **Rule 4** of this Court's Rules, before exercising the unfettered discretion to grant an extension of time, a single judge must take into account such relevant factors as, the length of delay, the period of delay, the chances of success of the appeal, and any prejudice that the respondent may suffer in the event the application is granted. See ***Mwangi vs Kenya Airways Ltd [2003] KLR 486 and Leo Sila Mutiso vs Rose Hellen Mwangi Civil Application No. Nai. 255 of 1997.***

The applicant was required to explain firstly, the reasons for delay in serving the Notice of Appeal, and secondly, the delay in filing the Record of Appeal where there was delay of a period of 96 days between 23<sup>rd</sup> October 2007 and 21<sup>st</sup> April 2008 when the first application for extension of time was filed, and a delay of 34 days between 25<sup>th</sup> June 2008 and 22<sup>nd</sup> July 2008, when this application was filed.

In his determination, the single Judge found that the delays during the periods in question were largely unexplained, and where an explanation was offered, he set out the reasons for finding them to be unsatisfactory. Suffice it to say that, in so doing, the single Judge was exercising his unfettered discretion under **Rule 4** of this Court's Rules, as was his prerogative.

Equally, the applicant did not identify any instance where the single Judge considered irrelevant matters or disregarded relevant matters. No suggestion was made that when all was considered, his decision was patently wrong, or that in totality, the single Judge exercised his discretion outside the principles specified for the exercise of his unfettered discretion.

As to whether the single judge ought to have extended time on the basis that the applicant had an arguable appeal, he stated:

***“I have perused the judgment. I would not state either way whether the intended appeal is arguable as there is no draft Memorandum of Appeal annexed to the application. All there is are allegations in the affidavit in support of the application”.***

In our view, in making this observation, the single judge was simply exercising his opinion that he was not satisfied that the applicant has demonstrated an arguable appeal.

That an appeal or intended appeal is arguable cannot on its own be the basis for extension of time under **Rule 4** of this Court’s Rules. In arriving at this position in the case of **Joseph Muriithi Njiru vs Teresa Wanja Raymond [2008] eKLR**, this Court observed,

***“The learned single Judge looked for any explanation for the delay and found none. He then went on to consider other issues such as the chances of the intended appeal succeeding, the prejudice to the respondent if the time was extended and so on, but in our view, having found that the delay of ninety days remained wholly unexplained, it was really not necessary to consider these other issues.”***

In **Ramesh Shah vs Kenbox Industries Limited [2007] eKLR** this Court further stated,

***“It is clear to us, ...that the only ground upon which the application under rule 4 was granted was because the intended appeal was arguable. The issue therefore arises as to whether the arguability of an intended appeal would outweigh all other relevant factors open for consideration in applications under rule 4. For our part we think, that except in very exceptional and limited circumstances, that proposition is not acceptable and is not borne out by authority. Indeed it is open to abuse. At its absurd best, it would mean that a party who for no or (sic) no sufficient reason sleeps over his right of appeal for ages, may one fine morning wake up and persuade the court that he had an arguable appeal after all and ought therefore to be allowed to appeal despite the delay.”***

The single judge having found that the inordinate delay was unexplained, we consider that an application for extension of time exclusively based on the factor that the intended appeal was arguable, would be improper, and contrary to the well-trodden principles outlined above unless the position was so extreme as to lead to an injustice. We find that such situation was not apparent in the instant case.

Accordingly, we have not seen any reason upon which the single Judge’s exercise of discretion can be interfered with. The reference is without merit and is accordingly dismissed with costs.

***Dated and delivered at Kisumu this 4<sup>th</sup> day of March, 2016.***

**D. K. MARAGA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**