



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & KIAGE, JJ.A.)

CIVIL APPLICATION NO. NAI 175 OF 2014 (UR 136/2014)

BETWEEN

LINGAM ENTERPRISES LIMITED.....1ST APPLICANT

ERWEN ELECTRONICS LIMITED 2ND APPLICANT

ARJUN RUZAIK3RD APPLICANT

BINA RAJU PATEL4TH APPLICANT

BANKIM MANUBHAI PATEL..... 5TH APPLICANT

AND

RADIO AFRICA LIMITED.....RESPONDENT

(An application for extension of time to file a memorandum and record of appeal in respect of the intended appeal against the ruling and order of the High Court of Kenya at Nairobi (Kimarua, J.) delivered 29th April, 2010

in

H.C.C.C. No. 579 OF 2008)

RULING OF THE COURT

By an application dated 11th July 2014, the applicants sought extension of time to file and serve a memorandum and record of appeal out of time. The application was heard by a single Judge, Karanja, J.A., who, in her considered ruling delivered on 7th November, 2014, dismissed the application. The applicants, being dissatisfied with the said decision, sought reference from that decision to a full court pursuant to the provisions of **rule 55 (1) (b)** of this **Court's Rules**.

This Court has stated, time and again, that a reference to a full Court is not an appeal from the decision of

a single judge. In such an application as the one that was placed before Karanja, J.A., the single judge exercises jurisdiction on behalf of the entire Court in line with the provisions of **rule 4** of this **Court's Rules**. For a full bench to interfere with that exercise of discretion, it must be shown that the discretion was exercised contrary to law, that is, the judge misapprehended the applicable law, or that the judge failed to take into account a relevant factor or took into account of an irrelevant one, or that applying the facts and the law in the particular matter the decision is shown to be plainly wrong. See **KENYA PORTS AUTHORITY V OBENGELE [2006] 2 KLR 112.**

It is therefore imperative that we take a fresh look at the grounds that were advanced by the applicants before the single judge vis-a-vis the reasons given for dismissing the application so as to determine whether the single judge exercised her discretion appropriately.

In an affidavit sworn in support of the application for extension of time, **Mrs. Milly J. Odari**, an advocate in the firm of Iseme, Kamau & Maema Advocates, who are on record for the applicants, explained the reasons that caused the delay. We summarise the salient ones as follows:

- *On 10th December 2009 the High Court struck out the applicant's defence and entered judgment for the respondent in the sum of Ksh.4,300,000/=. The application that gave rise to the said orders had been heard ex parte.*
- *Shortly thereafter M/s Mohamed Madhani & Company Advocates, who were also acting for the applicants, filed an application to set aside the ex parte proceedings and the orders but the application was dismissed on 29th April, 2010.*

On 5th May, 2010 the aforesaid advocates applied for certified copies of the proceedings, having filed a notice of appeal.

- *In May 2011 the applicants instructed M/s Iseme, Kamau & Maema Advocates to take over the conduct of the matter from the former advocates and the new advocates filed an application for stay of execution pending appeal and this Court granted the orders sought.*
- *From February 2012 to May 2014 Miss Odari wrote 13 letters to the Deputy Registrar of the High Court enquiring about the status of the proceedings. All the letters were duly received and stamped by the Court. The letters were also copied to the respondent's advocates. However, the Deputy Registrar did not respond to any of the letters.*
- *On 2nd July, 2014 the applicants' advocates were served with an application by the respondent seeking to strike out the notice of appeal. One of the annexures to the application was a letter from the Deputy Registrar advising the parties that the proceedings were ready for collection. On the said letter was endorsed the signature of one Mr. Armstone Vidonyi Vihaki, a clerk employed by M/s Iseme, Kamau & Maema Advocates.*
- *The clerk confirmed to Mrs. Odari that he had indeed collected the proceedings, on 29th August, 2012 but inadvertently failed to notify her, hence Mrs. Odari continued to write to the Deputy Registrar, with copies to the respondent's advocates, until 16th May, 2014.*

The applicants' advocate further averred that the failure to file the memorandum and record of appeal in time was occasioned by her mistaken belief that the typed proceedings were not ready for collection and in paragraph 36 of her affidavit she deposed:-

"36. That the failure to file the appeal in good time is not in any way attributable to the applicants and they should not be made to bear the consequences of a mistake not occasioned by them."

In asking the full bench to interfere with the exercise of discretion by Karanja, J.A., **Mr. Macharia**,

learned counsel for the applicants, submitted that the Judge exercised her discretion wrongly in that she misunderstood Mrs. Odari to have blamed the court for failing to respond to her numerous letters, and in particular for failing to inform her that their clerk had collected the proceedings way back in August 2012. The Judge had come to the conclusion that there was no acceptable explanation given by Mrs. Odari in her affidavit to explain the delay.

Mr. Macharia further submitted that the delay in filing the appeal was on the part of the applicants' advocates' office and in exhibiting copies of the 13 letters to the Deputy Registrar and copied to the respondent's advocates, Mrs. Odari intended to demonstrate diligence in pursuing the proceedings.

Counsel cited this Court's decision in **JOSEPH NJUGUNA MUNIU VS MEDICINO GIOVANI, Civil Appeal No.216 of 1997 (unreported)**, where the Court, having noted that the appellant's advocate had admitted that due to a mistake by her office in failing to enter a hearing date in her diary, she had failed to attend court leading to entry of an ex parte judgment, granted an application seeking to set aside the judgment. The Court remarked:

“We know that administrative mistakes of this kind do occur in the offices of busy practicing advocates and yet they have to depend upon their clerical staff for every route or secretarial matter.”

In his brief reply, **Mr. Anzala**, learned counsel for the respondent, submitted that the learned single judge exercised her discretion correctly. He added that the judge was right in holding that Mrs. Odari was wrongly faulting the court for the delay in filing the appeal whereas the court had supplied the typed proceedings to the parties in good time. He further alluded to a letter dated 16th January, 2013 from the applicants' advocates to the Deputy Registrar where the advocates had requested for issue of a certificate of delay. In his view, such a request could not have been made unless the applicants' advocates had already received the proceedings.

We have carefully considered the submissions made by both parties. We note that although the learned single Judge had found that Mrs. Odari was wrong in blaming the court for delay in filing the appeal (and we are not sure that her explanation actually amounted to blaming the court) whereas the fault was on the part of her office, at page 4 of the ruling the Judge stated:

“In a change of tone however, Mr. Munyu, learned counsel for the applicants who prosecuted this application before me owned up and stated that the delay was occasioned by their clerk who was their agent, and further, the said delay was inadvertent. Mr. Munyu sought refuge in Articles 47 and 159 (2) of the Constitution of Kenya, 2010 and urged the Court to allow the application to enable the appeal be heard and determined on merit.”

The learned Judge proceeded to consider the conditions that an applicant for extension of time to file an appeal out of time ought to satisfy as stated in **FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS, Civil**

Application No. Nai 332 of 2004. She concluded that:

“The Court cannot be blamed for the appellant's counsel's bad housekeeping. This blame lies squarely on counsel's shoulders and cannot be borne by the Court or by anybody else.”

In denying the applicants an opportunity to file their intended appeal, which this Court had found was arguable, having acknowledged that the blame lay with the applicants' advocate and/or the office clerk, we think the learned judge punished the applicants unduly. That, in our respectful view, amounted to erroneous exercise of discretion. In **NURA AWADH BAWAZIR v CHRISTOPHER STEPHEN AKILANO AKIWUMI & ANOTHER, Civil Application Number Nairobi 256 of 2000; [2001] LLR 6820 (CAK)**

Tunoi, J.A. (as he then was) held that where the omission to lodge an appeal within the prescribed time

falls entirely on the part of counsel who accepts full responsibility and the delay is otherwise satisfactorily explained, the applicant should not be denied the chance to canvass the appeal. We respectfully adopt that position herein.

In view of the foregoing, we are inclined to interfere with the single Judge's exercise of discretion and consequently allow this reference. The end result is that time for filing and service of the memorandum and record of appeal by the applicants is extended for a period of fourteen (14) days from the date of delivery of this ruling. The applicants shall however bear the respondents', costs of this application.

Dated and Delivered at Nairobi this 6th day of February, 2015.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR