IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MWILU & GATEMBU, JJA)

CIVIL APPLICATION NO. NAI 366 OF 2009

BETWEEN

CATHERINE NJUGUINI KANYA.....1ST APPLICANT

RAPHAEL JONAH MUTAHI.....2ND APPLICANT

VIOLET MUMBUA NDAMBUKI.....3RD APPLICANT

AND

COMMERCIAL BANK OF AFRICA LIMITED.....RESPONDENT

(Application for leave to serve record of appeal out of time, from the ruling and decree of the

High Court of Kenya at Nairobi (Kimaru, J) Dated 21st March, 2009

in

H.C.C.C. No. 531 of 2002)

****

RULING OF NAMBUYE, JA

The applicants herein ***Catherine Njuguini Kanya and 2 others*** presented the application under review by way of a notice of motion dated the 18th day of December, 2009 and lodged in this Court on the 22nd day of December, 2009. It is predicated on **rule 4 and 42(1)** of the Court of Appeal Rules. It substantively sought an order for an extention of time to allow the 1st, 2nd and 3rd applicants to file and serve their record of appeal for the intended appeal out of time. The application was placed before a single Judge ***J.W Onyango Otieno JA*** (as he then was) who after reviewing the rival arguments before him *inter alia* made the following observation.

"This application is brought under rule 4 of this Court's Rules. The law is now well settled in regard to the principles that would guide the court when considering such an application. The Court in considering such an application exercised or *(sic)* ***discretion, but like all such discretionary powers, it must be exercise judicially and not upon Judges own whims nor capriciously. In order to ensure that the discretion is exercised judicially, the principles that guide court have been set out in several decisions of this Court one of which is the ruling in the case of MaJoR Joseph MweTeri Igweta Vs.***

Muhura M'Ethare & Attorney General Civil Appl. No. Nai.8/00 (UR) where this Court stated:-

"The application made under rule 4 of the rules is to be viewed by reference to the underlying principle of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini-appeal) the effect of the delay on public administration, the importance of the compliance with time limits bearing in mind that they have to be observed, and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required has to bear in mind that time limits were there to be observed and justice might seriously be defeated if there was laxity in respect of compliance to them."

The above factors cannot be exhaustive in view of the fact that the court hearing such an application has unfettered discretion. Other cases decided by this Court such as those of Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi,- Civil Application No. Nai 251 of 1997. Kenya Tea Development Authority Vs. Microfilm Equipment Ltd & Another, civil Application No. Nai 221 of 1999 (UR) and Husamudin Gulamhussein Pothiwalla and others Vs. Kidogo Basi Housing Co-operative Society Limited & others Civil Application No. Nai 286 of 2003, to mention but a few, all echo the same principles."

Applying the above principles to the rival arguments before him, the learned Judge made findings *inter alia* to the effect that ***Kimaru, J's*** ruling sought to be impugned was delivered on the 27th March, 2009; notice of appeal was filed on 8th April, 2009 in time, Khaminwa & Khaminwa Advocates then on record for the applicants applied for and received a copy of the proceedings in time; the said firm of Khaminwa & Khaminwa advocates could have filed the record of appeal by 27th September, 2009 but did not till the statutory period ran out on the appellant; that any delay after 27th September, 2009 needed to be explained; on that account, the learned Judge concluded that the only delay that had been sufficiently explained was that attributable to Khaminwa & Khaminwa Advocates is the delay upto and including 2nd November, 2009.

There is further observation that the applicants changed advocates who then filed the application under review a period of 85 days from the date the record of appeal ought to have been filed on the 27th September, 2009; the delay from 2nd November upto 22nd December, 2009 could not be attributed to Khaminwa & Khaminwa advocate who had already handed over the file to the incoming advocates; the delay from 2nd November, 2009 to 22nd December, 2009 when the application was presented to court a total of fifty (50) days needed to be explained.

As to the issue of prejudice, there is observation that the respondent had set out in its affidavit the actions they had already taken on the judgment of ***Ransley, J*** and as had been observed by ***Tunoi, JA*** (as he then was) in the part of his ruling the learned trial Judge had reproduced in his ruling; it appeared that granting the application would have seriously prejudiced the respondent; that ***Miss Kwinga*** had asked the judge to invoke the provisions of **Article 159** of the constitution as well as **section 3A and 3B** of the Appellate Jurisdiction Act but to the learned trial Judge's view, these provisions were not meant to aid an indolent party. They were meant to ensure justice to a party who had taken proper action to comply with the law but finds technicalities a stumbling block on his way to justice and cases where unnecessary delay and expenses would ensure. They are certainly not as has been said time and again, *panacea* to every case where a party has failed to comply with the law as is in this case, neither were they meant to replace the Rules, opined the judge. On that account, the learned Judge withheld the exercise of his discretion in favour of the applicants which decline a three judge bench has been invited vide the applicants' advocates letter dated the 7th day of March, 2012 to overturn pursuant to rule 55 of this Court's Rules.

In his oral highlights to Court, ***Mr. Ezekiel Oduk*** urged the Court to reverse the decision of the learned single Judge on the grounds that delay in failing to lodge the appeal in time was attributed to the lawyer then on record for the applicant (Khaminwa & Khaminwa advocates) which delay was excused by the learned Judge. ***Mr. Oduk*** agrees that he became seized of the matter as from the 2nd day of November, 2009; they would have lodged the record of appeal within the remaining ten (10) days of the sixty days

within which they ought to have filed the record of appeal after presenting the application for leave within 50 days of becoming seized of the conduct of the matter but they could not do so as time to lodge the record of appeal had already run out on the applicants hence the need to regularize that position through an application for extention of time before the record of appeal could be lodged.

Mr. Oduk further concedes that indeed there was no memo of the intended appeal exhibited, but to them this should not have been reason enough to compel the learned Judge to withhold relief from them as the arguments laid before ***Kimaru, J*** were the same ones that would have formed the content of the memo of appeal and lastly, that the learned judge should not have overlooked the fact that the respondents stood to suffer no prejudice had the applicants been accorded leave to file their appeal out of time. On that account he urged the Court to reverse the single Judges' findings by allowing this application.

In response thereto, ***Mr. K.A. Fraser*** for the respondent urged the Court to dismiss the application on the grounds that the applicants arguments had not met the threshold for faulting the single judge because, they had not demonstrated existence of any error that the learned judge fell into when he declined to exercise his discretion in favour of the applicants; the learned single Judge was entitled to look at the totality of the entire period comprising the delay; the explanation given for that delay; to whom it was attributed; apportion the blame and then determine whether to exercise his discretion in favour or with hold the exercise of his discretion in favour of the applicants.

It was further ***Mr. Frasers'*** argument also that whereas the learned Judge was justified on the facts before him to excuse the delay attributed to the first lawyer that, is Khaminwa & Khaminwa Advocates, there was no justification for him to excuse the delay of 50 days attributed to the incoming advocate, and was therefore entitled to hold that no explanation had been given for the delay attributable to the incoming advocate.

On prejudice ***Mr. Fraser*** argued that the learned Judge was entitled to consider the substance of the intended appeal; it was the responsibility of the applicants to lay before the Judge proof that they had serious issues to be interrogated in the intended appeal and that the said intended appeal was not just an exercise in futility. It was not enough for the applicants to refer the learned Judge to the arguments before the High Court. They should have drawn out their grievances resulting from their argument before the learned High Court Judge and lay them before the Judge. On that account, ***Mr. Fraser*** urged the Court to withhold the exercise of its discretion in favour of the applicants reiterating that the applicants have not satisfied the threshold for granting leave to file an appeal out of time under rule 4 of this Court's Rules; and two, neither have they proved that they have met the threshhold for the Court to interfere with a merit decision of the single Judge. The Court should therefore affirm the single Judge decision and dismiss this application.

In response to the respondent's submission, ***Mr. Oduk*** urged the Court to find that although the learned trial Judge was aware of the correct principles applicable for the exercise of his discretion under **rule 4** of this Court's Rules, he nonetheless mis applied them to the facts before him and on that account arrived at a wrong conclusion on the matter and with that in mind he urged the Court to interfere with that decision in the applicants' favour.

The respondent invited the Court to be guided by the decision in the case of ***Ocean Freight Shipping Company Limited versus Oakdale Commodities Limited [1997] eKLR*** for the proposition that the discretion given by **rule 4** is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of that discretion it must be shown that the discretion by the single Judge was exercised contrary to law i.e that the single Judge misapprehended the applicable law or that he failed to take into account a relevant factor or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong; the decision in the case of ***Mwangi Mathenge*** suing as legal representative of the estate of ***Moses Kinyua Mwangi DCD versus Charles Mwai and the Attorney General [2006] eKLR***, for the proposition that it is now accepted that in the exercise of his/her unfettered discretion conferred on him by **rule 4** , a single member of the court is really acting on behalf of the full court and the full court can only interfere with his exercise of discretion where it can be shown that in coming to his decision, the single Judge took into account an irrelevant factor which ought not to have

been taken into account or that he failed to take into account a relevant factor which he ought to have taken into account or that he applied a wrong principle of law or that he/she misapprehended the nature or bearing of the evidence placed before him and thus arrived at a wrong conclusion or, short of the foregoing factors that his decision is plainly wrong, all factors and circumstances considered; the decision in the case of ***Beatrice Wambui Kigondu & 4 others versus Beatrice Muthoni Thumbi [2007] eKLR*** for the proposition that (i) a single Judge hearing a matter under rule 4 of this Court's Rules is exercising powers vested on him alone on behalf of the whole court by virtue of rule 55(1) of the Rules; (ii) the full court can only interfere with the exercise of those powers which are entirely discretionary for very specific reasons; (iii) the circumstances under which the full court would be entitled to interfere with the exercise of the discretionary powers by the single Judge are similar to those under which an appellate Court would be entitled to interfere with the exercise of a discretion by a trial Judge as specified by the Court of Appeal for Eastern Africa in ***Mbogo & another versus Shah [1968] EA93*** namely, that in arriving at the decision sought to be reversed, the single judge took into account some irrelevant factor or that he failed to take into account a relevant factor or that he has not applied a correct principle to the issue before him or that taking into account all the circumstances of the case , his decision is plainly wrong.

On matters of delay generally, reference was made to the decision in the case of ***Diamond Trust of Kenya Limited versus Bidaly [1995-1996] 1EA45 (AK)*** in which the court declined to exercise its discretion in favour of the applicant because (i) the application was made six years after the appeal had been made; (ii) this amounted to not only an in excusable but also an in ordinate delay; (iii) no explanation had been proffered for the entire period of the delay; (iv) the applicant had also shown a lack of diligence in applying for a certificate of delay; and, lastly

(v) the fact that no prejudice would be caused to the respondent by the extention of time sought by the applicant is not in itself a factor in the exercise of the court's discretion; (vi) nor is the fact that the respondent does not oppose the application acriteria; the decision in the case of ***Mutiso versus Mwangi [1999] 2EA CAK*** for the proposition that the decision whether or not to extend time is discretionary save that in deciding whether to grant an extension of time or not the court takes into account matters such as the length of the delay; second, reasons for the delay and third (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 grated; the decision in the case of ***Charles Orwa versus Justus Munyinyi Macharias CA Nai 155 of 2002 (80/2002 UR),*** wherein, ***Okubasu, J*** as he then, declined to exercise his jurisdiction in favour of the applicant because there was a delay of three years occasioned by the advocates' (on the records') failure to appeal instead of applying for review on the one part and the applicant's failure to make a follow up on the matter on the other part and also that the decree had already been executed. The decision in the case of ***Migwani Family Helpers Project versus Hamidas Boutique CA Nai 219 of 1999 (UR)*** in which **A.B shah JA** (as he then was) declined to exercise his discretion in favour of the applicant because he was not satisfied that the 49 days delay on account of obtaining instructions was excusable, nor that the 33 days delay in lodging the application after obtaining instructions in the circumstances of that case had been reasonably explained. Lastly there is the case of ***Njau Nyanjui Thito and Joel Mungai Nyanjui versus Lawrence Kimani Nyanjui and 7 others CA Nai 311 of 2007 (UR) 211/2007)*** for the proposition that the list of factors that this Court takes into consideration when deciding either to grant or withhold the exercise of discretion set out in the case of ***Mutiso versus Mwangi (supra)*** is not exhaustive. Other factors can still be cited including, the importance of compliance, the conduct and resources of the parties particularly the applicant or whether the matter raises issues of public importance and when the court is exercising its discretion Judicially it would be perfectly entitled to consider any other factors outside those listed in ***Leo Sila Mutiso case (supra)*** and lastly any attempt to limit the possible grounds for not granting an extension of time to those few listed in the ***Leo Sila Mutiso's case (supra)*** would amount to fettering the discretion allowed under rule 4(see also the decision in ***Mwangi versus Kenya Airways Limited [2003] KLR 485).***

As observed by ***J.W Onyango Otieno JA*** in the ruling sought to be reviewed herein, facts forming the background information are not only clear but also straight forward. They are that the applicants were aggrieved by the decision o***f Kimaru, J*** of 21st (27th) March, 2007 and desired to appeal against that decision. They engaged the services of learned counsel Khaminwa & Khaminwa advocates. They were

obligated to comply with the provisions of ***rule 75(1) and (2)*** of this Court's Rules as regards the time lines within which to lodge a Notice of Appeal.

It is on record that the firm of Khaminwa & Khaminwa advocates lodged the notice of appeal in time; applied for a certified copy of the proceedings for purposes of appeal in time; the certified copy of the proceedings was also received in time but for reasons not brought out in the deposition, Khaminwa & Khaminwa advocates did not lodge the record of appeal in time. It is also undisputed that the applicants changed advocates from Khaminwa & Khaminwa advocates to the current firm of advocates on record namely Oduk & Co. Advocates; the incoming firm of advocates received the record from the firm of Khaminwa & Khaminwa advocates on 2nd November, 2009 by which time, time for the lodging of the appeal had run out on the applicants; it took them a total of fifty (50) days from 2nd November, 2009 to 22nd December, 2009 to lodge the application under review seeking the extention of time within which to lodge the record of appeal.

When placed before ***Onyango Otieno JA*** the learned Judge did what was expected of him namely, determine the factual base, apply known principles of law to the factual base and then arrived at a determination. On my revisit to the learned trial Judge's reasoning in the ruling sought to be reversed, I have no doubt that the learned judge addressed his mind correctly to the applicable principles of case law in that he was clear in his mind that the correct position in law was that before moving to exercise or withhold his discretion as invited by the rival arguments before him, he had to call for an explanation for the delay. According to the learned Judge two explanations were called for but he received only one. The first explanation related to the delay occasioned by Khaminwa & Khaminwa advocates who received the record of the proceedings on 29th July, 2009 but failed to lodge the record of appeal by the 27th September, 2007 which was the last day for lodging the said record. This delay was excused by the learned judge. In doing so the judge had this to say:-

> "***I note that Mr. Frazer did not address me on the delay occasioned by Khaminwa & Khaminwa Advocates and in my view, that was proper as though Khaminwa and Khaminwa Advocates were applicants' agents, none-the-less, I take the view that on matters such as the time limits set by the Rules of court, the agent's mistakes should not be visited upon the clients for those are technical matters that clients cannot comprehend and are some of the reasons why they hired the lawyer. I therefore will accept the delay between 29 th July, 2009 when copies of the record were released to the former advocates of the applicants as properly explained by their statements on oath that it is their former advocates who let them down. That explanation is accepted as Mr. Frazer also did not address me on that aspect."***

The excusal of the delay caused by the firm of Khaminwa & Khaminwa advocates not withstanding, the applicants did not access the relief sought. The learned Judge withheld the exercise of his discretion in their favour on three grounds, first failure to explain the delay of fifty (50) days from 2nd November, 2009 to the 22nd day of December, 2009 when the application under review was filed; two, failure to demonstrate existence of an arguable appeal; and lastly that the respondent would be prejudiced on account of their having taken steps to execute the judgment. This is what the learned Judge observed with regard to each of the above three reasons:-

On delay:

> ***" However the delay between 2 nd November and 22nd December, 2009 i.e the delay of 50 days has not been explained. I gave Miss Kwinga time to explain it and she had no explanation. I am prepared to accept that part of this time was taken in processing and preparing the record of the notice of appeal although that is not alleged in the affidavit before me but if I were to allow fifteen (15) days for that exercise, I still have over thirty (30) days unexplained delay"***
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> **...**
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> With regard to arguability of the appeal:-

"On the issue of whether the intended appeal is arguable or not, without dealing with the merits of the appeal, I also have difficulty as there is no draft memorandum of appeal annexed to the application. Upon my own reading of the ruling of Kimaru, I see no prima facie grounds that can help me decide on that issue"

...

With regard to prejudice to the respondent:-

"As to the issue of prejudice, the respondent has set out in its affidavit the action they have already taken on the judgment of Ransley, J and as observed by Tunoi, JA (as he then was) in the part of his ruling I have reproduced above, it would appear that granting the application would seriously prejudice the respondent as was observed earlier on"

...

In moving to fault or find otherwise on the above three grounds, I have been told to stick to the applicable principles which now form a well beaten path as reflected above. I have applied these to the above rival arguments and considered them in the light of the three grounds identified above on the basis of which the learned judge's above observations were made. I am of the opinion that the learned judge fell into an error. My reasons for saying so are that with regard to the delay, the learned judge failed to appreciate that the applicants as ligants had no role to play in the second delay just as they had not been in the first delay. They never handled the record in any way. The record moved from the hands of Khaminwa & Khaminwa advocates into the hands of Oduk and Company advocates. It is the firm of Oduk & Company advocates who failed to explain that delay. This was advocates' in advertence. If the learned Judge did excuse the first advocates inadvertence, he could only have failed to do so with regard to the second advocates inadvertence on strong grounds. I have found none on the record.

As correctly observed by the learned Judge, litigants place a lot of trust in the good workmanship of their agents but sometimes this fails and where there has been apparent failure on the part of the advocate in the performance of that role, a court of law has to play a balancing act so as not to visit the sins of such advocate on to his client. As observed by the learned Judge such lapses do occur. In ***Maina versus Mugiria [1983] KLR 78, Chesoni Ag JA*** (as he then was) by way of Obiter had this to say:-

"***It is unfortunate that advocates' sins and omissions are sometimes visited on their clients, who are left without the remedy they sought but to sue the advocate for professional negligence, but where the litigant shows that his default has been due to the advocates' mistake in an application of this nature, unless injustice would be occasioned to the other party the court should consider the applicant's case with broad understanding.*** In ***Joseph Njuguna Muniu versus Medicino Giovanni [1998] eKLR*** and ***Lee Muthoga versus Habib Zurich Finance (K) Limited and Joseph M. Githoro Nai 236 of 2009 (UR)*** this Court excused the advocate's failure to diarize hearing dates resulting in default orders being made against their clients. In granting reprieve in the ***Joseph Njuguna case*** (supra) the court observed that such administrative mistakes sometimes do occur in offices of busy practicing advocates and when these do occur the business of the court is to note that it has power to revoke the expression of its coercive power where that has been obtained by failure to follow any of the rules of procedure and also that there are no limits or restrictions on the judge's discretion except that it be exercised or withheld on terms as may be just, the main concern of the court being to do justice between the parties. Herein the learned Judge placed blameworthiness onto a litigant's second agent not withstanding that he had executed similar inadvertence with regard to the litigants first agent and thereby failed to do justice as between the parties as was required of him.

As for lack of demonstration of existence of an arguable appeal, the very celebrated land mark decision on the criteria for either granting or withholding such a relief, the ***Sila Leo Mutiso case*** (supra) makes this ingredient a mere possibility, meaning it is not a mandatory requirement. Failure to so annex the intended grounds of appeal on the part of the applicant should not have weighed heavily on the mind of the learned

Judge so as to make him tilt the scales of justice against the innocent litigant. I find that this is a proper case where the learned judge should have moderated the harshness of his power with regard to the need for parties coercive to any litigation complying with timelines set by the rules of this Court by allowing the innocent litigants leave of court to exercise their undoubted right of appeal. Any prejudice and or inconvenience likely to be suffered by the respondent can safely be compensated for by way of costs.

As for prejudice to the respondent on account of part or full execution of the judgment intended to be impugned, I find that this is not one of the major considerations under rule 4 notwithstanding, the fact that case law stated above indicates that the factors in ***Leo Mutiso case*** (supra) are not exhaustive. Worth of mention is the issue of the importance of compliance with time lines which falls squarely on the advocate where one is on record as rightly found by the learned Judge. Secondly the issue and the implication of a fully executed judgment can be best handled at the hearing of the main arguments in the intended appeal.

In the result and for the reasons given above, I find sufficient cause to interfere with the learned single judge's exercise of his discretion and which I hereby do. I set aside the dismissal order of 2nd March, 2012 and substitute it with an order allowing the applicant's application dated the 18th day of December, 2009 and lodged in this Court on the 22nd day of December, 2009, on condition that the record of appeal is lodged and served within thirty (30) days from the date of the reading of this ruling. In default, the order on extention of time shall stand lapsed. The respondent will have costs of the application to be paid personally by the firm of Oduk & Company advocates.

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

R.N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.

RULING OF GATEMBU, J.A

1. This is a reference by the applicants to the Court from the decision of a single Judge (The Hon. Mr. Justice Onyango Otieno, JA) under rule 55 of the rules of the Court. The learned single Judge dismissed with costs the applicants' application dated 18th December 2009 seeking extension of time to file and serve their record of appeal out of time. That application was made under rule 4 of the rules of the Court.

2. The background to this reference, the arguments made by learned counsel before us, and the legal principles upon which the Court may interfere with the decision of a single judge are set out in the opinion of the Honourable Lady Justice Nambuye, JA. It is in the application of the legal principles to the circumstances of this case where I part company with my learned sister Judge. I do not share the view that a basis for interfering with the learned single Judge's exercise of discretion has been made out.

3. To fully appreciate the context of this reference, the additional relevant history is this: Approximately nine years ago on 25th May 2006 the High Court (P.J. Ransley) delivered judgment in two consolidated suits between the parties hereto. The applicants asserted in those suits that as employees of the respondent they became entitled to certain benefits including concessionary loans; that the respondent terminated their employment and converted the subsisting concessionary loans to commercial loans attracting commercial rates of interest; that the Industrial Court declared the dismissal improper and that the applicants should be deemed to have been declared redundant; that they should therefore be treated as

approved retirees to continue enjoying the concessionary interest rates on their loan facilities. The applicants accordingly sought injunctive and declaratory relief. The applicants were partially successful in their claims.

4. The applicants were aggrieved by that judgment which was delivered on 25th May, 2006. They intended to appeal. They filed a notice of appeal on 6th June 2006. That notice was however not served in accordance with the rules for what the applicants described as failure "*wholly attributed to the applicants' advocates on record at the time*." With a view to remedying that situation, they presented an application, being Civil Application No. 280 of 2006 before a single judge of this Court seeking an order *"that the time for serving the notice of appeal dated 6th June 2006 be extended."*

When rejecting that application, the Hon. Mr. Justice P. K. Tunoi, JA (as he then was) in a ruling delivered on 21st March 2007 stated as follows:

> ***"Though I am prepared to excuse the delay in failing to serve the notice of appeal within time and also, the ignorance of the Rules, there has not been any explanation whatsoever about the delay in the lodging of this motion which was done on 6 th November 2006, a period of about four (4) months after the omission was noticed. The delay was inordinate and the applicants were guilty of laches."***

5. Regarding the judgment the applicant's intended to appeal from, the learned Judge stated:

> ***"I have read the judgment the subject matter of the intended appeal. It concerns certain issues of mutual debts and rates of interest. It is my view that prolonging the settlement of the dispute may be prejudicial to the parties. Moreover, further prejudice will be caused to the respondent if the time to serve the notice were extended."***

6. Undeterred by that turn of events, the applicants filed an application on 29th January 2008 (some nine months after the delivery of the ruling 21st March 2007 and one and half years after the judgment of the High Court) seeking orders to "*review, vary, and/or set aside the judgment delivered on 25th May 2006 by the Honourable Mr. Justice P. J. Ransley*."

7. In a considered ruling delivered on 27th March 2009, the High Court (L. Kimaru J) dismissed the application for review on grounds that the court did not have jurisdiction to review the judgment as the applicants *"having exercised their right of appeal cannot come before this court to seek to review the same decision"* and that the applicants were guilty of unexplained delay. In that regard the learned judge of the High Court stated:

> ***"An aggrieved party is also required to present to the court his application for review without unreasonable delay. It cannot be said that the current application was brought without undue delay when the same was presented to court eighteen (18) months after the judgment sought to be impeached was delivered. Even if this Court were to reach a finding that the Court of Appeal had not rendered a conclusive judgment on merits in respect to matters in dispute, there was no explanation for the delay of a period of more than ten (10) months from the time the Court of Appeal dismissed the application for leave to serve notice of Appeal out of time to the time the present application was filed on 29th January 2008."***

8. That is the ruling against which the applicants intend to appeal. As I have already indicated, that ruling was delivered on 27th March 2009. According to the applicants, they instructed their advocates on record at the time, M/s. Khaminwa & Khaminwa Advocates to challenge that decision. A notice of appeal was duly lodged on 8th April 2009. The record of appeal was however not filed at all. In his affidavit sworn on 18th December 2009 in support of the application for extension of time for the record of appeal to be filed out of time the 2nd applicant gave the reasons for the omission and delay in filing the record of appeal as follows:

"13. That for unexplained reasons, the firm of Khaminwa & Khaminwa Advocates did not file the appeal within sixty (60) days, despite having been paid the fee requested. Annexed and marked RJM-4, the receipts.

14. That further and in addition to the foregoing, the said firm failed, refused or neglected to file the substantive appeal against the ruling of Justice Kimaru within the mandatory sixty (60) days after the receipt of court proceedings on the 31st day of July, 2009. Annexture marked RJM-5 and annexed hereto.

15. That efforts to have Khaminwa & Khaminwa Advocates present the intended appeal came to nought culminating in the writing of a letter by the 2nd applicant to the said advocate's firm, withdrawing his instructions and demanding the return of his file. Annexture marked RJM-6 and annexed hereto.

16. That the said advocate firm acceded to the 2nd applicant's request and handed over the file, leading to the instructions of MESSRS ODUK & COMPANY ADVOCATES to conduct this appeal on the 2nd day of November, 2009.

17. That the appeal is now ready for filing save that I request for leave to be allowed to file out of time."

9. It is critical to note that the period for which there is an explanation for the delay or omission to file the record of appeal is the period up to 2nd November 2009. There is no mention, leave alone an explanation, why the present application was not filed until 22nd December 2009. The learned single Judge had this to say in that regard:

"This notice of motion was filed as I have stated and as is agreed by both parties on 22nd December, 2009. That is 85 days delay. The applicants blame Khaminwa and Khaminwa Advocates for that entire delay period. But is that correct? In my view, the delay attributed to Khaminwa & Khaminwa Advocates is only the delay up to and including 2nd November, 2009. Thereafter, the delay from 2nd November, 2009 upto 22nd December 2009 cannot be put on Khaminwa & Khaminwa, as by 2nd November, 2009 they had passed on the file to the applicants who had instructed the present advocate to act for them. That delay of 50 days from 2nd November, 2009 to 22nd December, 2009 needed to be explained."

10. And later in the same ruling the learned single Judge stated:

"However, the delay between 2nd November, 2009 and 22nd December, 2009 i.e. delay of 50 days has not been explained. I gave Miss. Kwinga time to explain it and she had no explanation. I am prepared to accept that part of this time was taken in processing and preparing the record of the notice of appeal (sic) ***although that is not alleged in the affidavit before me but if I were to allow fifteen (15) days for that exercise, I still have over thirty (30) days unexplained delay."***

11. In the absence of any explanation by the applicants, I am unable to fault the learned single Judge for refusing to exercise his discretion in favour of the applicants. The authorities are consistent that in dealing with a reference, 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 misdirected himself on matters of fact or law in exercising his unfettered discretion. [See **The Hon. Attorney General vs. James Alfred Korosso Civil Application No. NAI 114 of 2008.** Other relevant decisions include

Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. NAI 255 OF 1997;; **Justice Said Juma Chitembwe vs. Edward Muriu Kamau and others Civil Application No. NAI 95 of 2010**; **James Robert Karanja Muigai vs. Joseph Mwangi Karanja and others Civil Application No. NAI**

12. The applicants explained the omission to file the record of appeal when the matter was with the firm of Khaminwa and Khaminwa Advocates. There was no explanation at all for the further delay in presenting the present application thereafter. On my part, I am not satisfied that the learned single Judge in reaching his decision took into account what he ought not to have taken into account or that he misapprehended some aspect of the law or that he failed to appreciate the weight and bearing of evidence and thus reached a wrong decision or that his decision is plainly wrong.

13. There is therefore no basis in my view for us to interfere with the decision of the learned single judge. As I am alone in the view I take, the orders will be as proposed in the ruling by the Honourable Lady Justice Nambuye, JA.

Dated and delivered at Nairobi this 6th day of March, 2015.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEA

RULING OF MWILU -JA

I have had the advantage of reading the Ruling of ***Nambuye, J.A.*** in draft. I concur fully with the reasoning and findings made therein.

I agree entirely that the application should be allowed for the reasons and in the terms she has proposed

Dated and delivered at Nairobi this 6th day of March, 2015.

P.M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.