



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI, (PCA), OUKO & GATEMBU, JJ.A)**

**CIVIL APPLICATION NO. NAI 283 OF 2013**

**BETWEEN**

**KENYA BREWERIES LIMITED ..... APPLICANT**

**AND**

**LAWRENCE NDUTU & 6000 OTHERS ..... RESPONDENT**

*(Application for extension of time to file and serve a Notice of Appeal and Memorandum of Appeal in an appeal against the Ruling of the High Court of Kenya at Nairobi(Ang'awa, J) dated 16<sup>th</sup> December, 2011 in*

**NAIROBI H.C.C. NO. 279 OF 2003)**

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**RULING OF THE COURT**

1. This is a reference to the Court from the decision of a single Judge (Nambuye, JA) under rule 55(1)(b) of the rules of the Court. In her ruling delivered on 28<sup>th</sup> November 2014, the learned single Judge dismissed the applicant's application lodged in the registry on 18<sup>th</sup> October 2013 seeking an order that the time for filing and service of the notice of appeal and the record of appeal against the decision of the High Court given on 16<sup>th</sup> December 2011 be extended.

2. According to Mr. P. M. Gachuhi learned counsel for the applicant, the decision of the High Court that the applicant intends to appeal against has rendered the conduct of the proceedings before the High Court untenable as there are, as a result of that decision, three advocates appearing for the plaintiffs; that the issue of representation requires resolution before the matter can proceed before the High Court; that the applicant has not been guilty of delay in presenting the application under consideration; that there was a notice of appeal on the basis of which an appeal against the decision of the High Court would have proceeded that following the striking out of that notice the opportunity for the Court to pronounce itself on the important question of representation has been lost; that the learned single Judge misdirected herself when in her ruling she stated that the applicant had not annexed a draft memorandum of appeal when in fact one was annexed and grounds of appeal indicated; and that this is a proper case for the Court to interfere with the exercise of discretion by the learned single Judge.

3. Learned counsel Mr. Ngoge and Mr. Harrison Kinyanjui who appeared for different parties named as respondents supported the reference. They urged that it should be allowed so that the applicant can be

heard on the question of representation. Mr. Kinyanjui however argued that the proceedings in the High Court should not be stayed.

4. Learned counsel Mr. Namada who appeared for some of the respondents strenuously opposed the reference. He submitted that the learned single Judge properly exercised her discretion; that the Judge's finding that the applicant is guilty of inordinate and unexplained delay is factually correct and cannot be challenged; that the attempt by the applicant to ride on a notice of appeal that had been filed by a different party as a basis for contending that there was no delay on its part is lame; and that a reversal of the decision by the learned single Judge will be adverse to the interests of the litigants.

5. We have considered the arguments by learned counsel. In an application for extension of time under rule 4 of the rules of the Court, a single judge is called upon to judicially exercise a wide discretion. As stated by this Court in **Macharia Njoroge vs. Gakure Kuria [2005] eKLR**:

***“As to the circumstances in which the full court should interfere with the discretion of a judge, this Court in C. App. NAI. 255/97 LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI (UR) cited with approval, MBOGO vs. SHAH [1968] EA 93 per Sir Clement De Lestang, V.P. at page 94 thus:-***

***“..... I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself, or because it has acted on matters on which it should not have acted, or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”***

And SIR CHARLES NEWBOLD P. at page 96:-

***“ ..... a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”***

6. In dealing with a reference therefore, the full court is not, as stated by this Court in **The Hon. Attorney General vs. James Alfred Korosso Civil Application No. NAI 114 of 2008**, concerned with the merits of the decision by the single judge, as it is not sitting on appeal against the decision of the single judge. Rather, the full Court is only required to investigate whether or not the single judge has misdirected herself on matters of fact or law in exercising her unfettered discretion. [See also; **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 183 of 2008**].

7. Applying those principles to the present reference, it is clear to us that the learned single Judge was conscious of the factors that required consideration in the exercise of her discretion. That is manifest from the ruling where the learned Judge stated:

***“The parameters within which to extend the time so requested is what has now come to be popularly known as the exercise of this Courts judicial discretion under the said rule. It is now trite that the ingredients to be applied in the said exercise of this Courts discretion to either, grant or withhold this relief are those set by the decision of this Court in the case of Leo Sila Mutiso versus Rose Hellen Wangari Mwangi Nairobi CA No. 255 of 1997 wherein, this Court laid down this guiding principle.***

***‘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.’***

8. After setting out the legal principles, the learned single Judge went on to consider that the decision the applicant intends to appeal against was given on 16<sup>th</sup> December 2011; that a period of “*one year nine months and two days*” had lapsed from the date when the decision of the High Court was made to the time the applicant presented its application for extension of time; and that no reasonable explanation was offered by the applicant for its “*inability or alternatively for failure to comply.*”

9. We are not persuaded that the learned single Judge misdirected herself in reaching that conclusion. The decision the applicant intends to challenge was made on 16<sup>th</sup> December 2011. Under rule 75 of the rules of this Court, any person desiring to appeal is required to give notice in accordance with that rule. The applicant did not do that. It says that it was relying on a notice of appeal filed by its adversary; that once the notice of appeal filed by its adversary was struck out; the applicant was left exposed and now wishes to have leave to file a notice of appeal of its own so that a fundamental legal issue is determined by this Court. It is evident from her ruling that the learned single Judge addressed her mind to that plea but was not impressed. She stated:

***“The explanation the applicant has given is basically that, they had hoped to joyride or band wagon on the notice of appeal that had been promptly filed by the firm of Ngoge & Co. Advocates on 16<sup>th</sup> December, 2011 intending to appeal against the same decision of Ang’awa, J; that upon a new firm of advocates coming on record for some of the respondents who had previously been represented by the firm of Ngoge & Co. Advocates, an application was successfully lodged by this incoming advocate vide which the notice of appeal, the applicant intended to joyride and band wagon on was withdrawn and subsequently struck out, hence this fresh move to file a notice of appeal of their own. They contend they are still aggrieved; the point to be taken by them on the intended appeal is an arguable point of fundamental importance...”***

10. The conclusion reached by the learned Judge that there was no reasonable explanation for the delay is founded on the material placed before her. We are therefore n that in reaching the conclusion that there was no reasonable explanation for the omission or delay in filing a notice of appeal the learned single Judge took into account matters she ought not to have or that she failed to take into account matters she should have taken into account so as to justify our interference with her discretion.

11. That said, there is however, justification in the applicant’s complaint that the learned single Judge overlooked that a draft memorandum of appeal was indeed attached to the application for extension of time. Considering however that the learned Judge was satisfied that no reasonable explanation had been offered by the applicant for the delay, the import of the omission to refer to the draft memorandum of appeal is not, in our view consequential. It would not have remedied the absence of explanation for the inordinate delay in taking steps to challenge the decision of 16<sup>th</sup> December, 2011 by the High Court.

12. For those reasons, the reference has no merit. It is dismissed with costs.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of April, 2015.**

**P. K. KIHARA KARIUKI, PCA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**