



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)**

**CIVIL APPLICATION NO. NAI 4 OF 2009 (KSM 1/09)**

**IN THE MATTER OF THE INTENDED REFERENCE TO FULL BENCH**

**BETWEEN**

**HEZEKIAH MICHOKI .....APPLICANT**

**AND**

**ELIZAPHAN ONYANCHA OMBONGI .....RESPONDENT**

*(An Application for leave for extension of time to apply in writing to the Registrar for reference of the decision of a single Judge to a full bench dated 5<sup>th</sup> December, 2008*

**in**

**CIVIL APPLICATION NO. NAI 212 OF 2008 (KSM 15/08)**

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**RULING OF THE COURT**

1. This matter having been in this Court since 21<sup>st</sup> April 2008, we think it is appropriate to give a brief historical background.
2. On 18<sup>th</sup> October 2007, the late Justice Kaburu Bauni delivered a judgment in Kisii HCCC No. 207 of 1988 in which he declared that the parcel of land known as **Title No. Gesima/149** belonged to Elizaphan Onyancha Ombongi (the applicant) and restrained Hezekiah Michoki (the respondent) from interfering with the applicant’s quiet possession of it. Aggrieved by that decision, the respondent evinced his intention of appealing against it by filing a notice of appeal but he failed to serve the same upon the applicant or his advocates. The respondent also failed to file the record of appeal in time. His application for extension of time to serve the notice of appeal and to file the record of appeal out of time was dismissed by a single Judge of this Court (Onyango Otieno, J.A. as he then was) on 5<sup>th</sup> December 2007. The respondent was again aggrieved by that decision and wished to refer the matter to the full court.
3. **Rule 54 (1)(a)** and **(b)** of the Court of Appeal Rules requires any party who wishes to make a reference to the full court against the decision of a single Judge to apply “*informally to the Judge at the time when the decision is made or by writing to the Registrar within seven days thereafter.*” The respondent made neither of those applications. Instead he later applied under **Rule 4** of the Court of

Appeal Rules for leave to apply in writing to the Registrar out of time. Omolo, J.A. allowed that application and directed the respondent to make his said application to the Registrar within seven days. That decision aggrieved the applicant who has made a reference to the full court challenging it. This ruling is on that reference.

**4. Rule 4** of the Court of Appeal Rules gives a single Judge of this Court unfettered discretion on matters placed before him though of course he has to exercise that discretion judicially. As was stated in **Margaret Muthoni Muchiga v. Esther Kamori Chobi - Civil Application No. Nai 117 of 2009**, for this Court to interfere with the exercise of that discretion, the party making the reference must demonstrate that the single Judge took into account an irrelevant factor; or failed to take account of a relevant one, or that he failed to apply correct principles to the issue at hand, or that, taking into account all the circumstances of the case, his decision was plainly wrong.

5. As we have stated, the application before the single Judge was for extension of time under Rule 4 to apply to the Registrar in writing to make a reference to the full court.

6. It is now well settled that the relevant factors to be considered in an application under Rule 4 of the Court of Appeal Rules are “*the length of delay; ... the reason for the delay; ... the chances of the appeal succeeding if the application is allowed (possibly); and ... the degree of prejudice, [if any, likely to be caused] to the respondent if the application is granted.*” – **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi – Civil Application No. Nai. 255 of 1997.**

7. Having perused the respondent’s application to the single Judge and the applicant’s replying affidavit as well as the impugned ruling itself, we find that the learned single Judge of this Court considered the length of delay which, admittedly, was only 14 days. He also considered the fact that at the time the ruling was delivered, Mr. Oguttu Mboya held brief for Mr. Momanyi Aunga, the erstwhile counsel for the respondent. Soon after the ruling was delivered, Mr. Momanyi Aunga ceased acting for the respondent. By the time the respondent instructed his present advocate and taking into account the Christmas Vacation period, sometime elapsed.

8. All these are relevant factors from which the learned Judge found that the fourteen days delay was not inordinate and that that delay had, in any case, been satisfactorily explained. In the circumstances we find that the learned Judge cannot be faulted. This reference has therefore no merit and it is accordingly dismissed with costs.

**DATED and delivered at Kisumu this 19<sup>th</sup> day of June, 2015**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**