IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MWERA & MWILU, JJA)

CIVIL APPLICATION NO. NAI. 119 OF 2013

JULIUS MWAVU KIIA ……..……..……APPELLANT

VERSUS

THE REGISTRAR HIGH COURT……..…….....…..1ST RESPONDENT

ATTORNEY GENERAL ……..…..…..….2ND RESPONDENT

(An application for leave to file and serve Notice of Appeal and Record of Appeal out of time in an intended appeal against the judgment of the High Court of Kenya at Nairobi (Hayanga, J.), dated 25th February, 1998

in

High Court Civil Suit No. 3276 of 1992)

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RULING OF THE COURT

On 7th June 2013 the applicant, a former employee of the Judiciary filed the notice of motion under ***Rule 4 of the Court of Appeal Rules*** praying in the main:

i. ***to be granted leave to file and serve notice of appeal and the record of appeal against the judgment of the High Court (Hayanga, J) delivered on 25th February 1998.***

It was stated in the grounds in the body of the motion that after the applicant learnt of the delivery of the judgment in issue, he went to the offices of his lawyers, M/S Z. N. Gathaara & Co. Advocates to retrieve his file but it could not be traced. That he had instructed that firm to file an appeal which it did not do. The applicant then appeared to state in the grounds, what would otherwise constitute grounds of appeal, that the trial judge erred by finding that the applicant deserted duty; he also erred when he dismissed the suit and condemned him to pay costs, without stating what misconduct led to the alleged desertion of duty by the applicant. Further, that the judge had not noted that the applicant was suspended from duty on grounds of that desertion, whereby he was not paid salary for 9 months. And that the judgment was based on *"extraneous and illegal facts and misrepresentation."*

The applicant, acting in person, swore the supporting affidavit deponing that after he found his file missing from the chambers of his former lawyers aforesaid, on 2nd April 2013, he filed a notice to act in

person. He applied for copies of certified proceedings but got none because the court file was also missing, and even his letter of 26th August 2012 to the registry of the High Court did not yield fruit. As if going forward and backwards in time, the applicant averred in his supporting affidavit that his advocate obtained a certificate of delay from the Registrar, High Court dated 8th March 2001 when *"the file was still missing in the strong room"*. In the circumstances the applicant could not file his appeal in time, because his files were missing both from the office of his lawyers and the court registry. However, he had obtained all the relevant documents by 6th June 2013 when he filed the motion, and was ready to lodge his appeal, if leave is granted. He attached a copy of the judgment and the certificate of delay.

The application came up for hearing before a single judge ***(Githinji JA***) who, in the ruling delivered on 16th October 2014, went over the history of the applicant's employment in the Judiciary, to the time of his transfer to courts at Ukwala and Siaya, which transfer the applicant declined to honour. That was followed by a disciplinary action which ended in his removal from the service with effect from 4th April 1999 on account of desertion. His appeal to the Public Service Commission dated 27th November 1991 was dismissed. The applicant filed HCCC 3276/92, praying for damages and reinstatement. That suit was dismissed on 25th February 1998. There was no appeal filed, hence the present notice of motion.

The learned judge went over the exercise of discretion by this Court under Rule 4 and referred to the principles established in decisions including ***Wasike Vs Swala [1984] KLR 591*** and ***Leo Sila Mutiso Vs Rose Wangari Mwangi Civil Application No. Nai. 251 of 1997*** and then reiterated that:

> ***"The court is required to consider the length of delay, reasons for the delay, the chances of appeal succeeding and the prejudice which may be occasioned to the respondent, if the application is allowed."***

Further, the learned judge addressed himself to the provisions of ***Article 159(2) of the Constitution 2010,*** requiring courts to administer substantive justice without undue regard to procedural technicalities.

On the delay aspect the judge found that from the date of the judgment to the filing of the present application, it had taken 15 years, which he termed indutably inordinate *visa vis* the reasons stated in the grounds and the supporting affidavit. The judge observed that even with the claims that the court file went missing, on 11th August 2012 the office of the Chief Justice informed the applicant that the same was then available. Yet later on 26th August 2012 the applicant was complaining in writing that the court file was still missing! That the applicant retained a firm of lawyers until the 2nd April 2013 when he filed a notice to act in person. The lawyer had applied for copies of certified proceedings on 27th February 1998 and the Registrar's certificate of delay issued on 8th March 2001. Prior to that on 3rd July 1999 the advocates had been informed that the proceedings were ready for collection; they were paid for on 15th October 1999 and collected on 4th November 1999. Without an affidavit filed by the applicant's lawyers, and having regard to the date of the issuance of the certificate of delay, ***Githinji JA*** did not believe the applicant's claim that the court file went missing and therefore he could not file the appeal. The judge added:

> ***"Rather it shows the record of appeal could have been [filed] within 60 days from 4th November 1999 as stipulated by proviso to Rule 82 (1) of the Rules. There is no explanation why the notice of appeal was (not) filed by the applicant's advocates within the prescribed 14 days. There is also no explanation by the advocates why they did not lodge the appeal even after receiving the proceedings on 4th November 1999. It is significant that the applicant took 8 months to file the present application after allegedly the court file was traced in August 2012. There is thus no reasonable or plausible explanation for the inordinate delay."***

Next, the learned judge considered the grounds raised in the intended appeal. He was satisfied that it was based solely on grounds of fact and therefore not arguable.

As to the effect on the respondents, if the orders were granted, ***Githinji JA*** found that that would

constitute obvious undue prejudice to them to reopen the dispute after 16 years from the date of the judgment. The notice of motion was dismissed.

The applicant was not satisfied with the foregoing decision by the single judge therefore he sought a reference before the full bench as provided for under ***Rule 55 of the Court of Appeal Rules***, which reads:

> ***"55 (1) Where under the provisions of section 5 of the Act, any person being dissatisfied with the decision of a single judge –***
>
> a. ***in any criminal matter, wishes to have his application determined by the Court; or***
>
> b. ***in any civil matter wishes to have any order, discretion or decision of a single judge varied discharged or reversed by the Court, he may apply therefore informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.***
>
> ***(2) At the hearing by the Court of Appeal an application previously decided by a single judge, no additional evidence shall be adduced."***

We do not wish to reproduce the provisions of Rule 4 under which the applicant's motion was heard by a single judge, who had jurisdiction to hear and determine application seeking to extend the time limited by the Rules on:

> ***"--- such terms as [he] thinks just ---"***

Guided by the principles set out in the **Wekesa case** (supra) and many others including ***Shah Vs Southern Credit Banking Corporation Ltd*. *[2008] KLR 173***, a single judge exercises a discretion to grant the leave sought to extend time or to decline. So when a party comes before the full bench to impeach the single judge's decision, not only is the bench guided by the principles laid down: the length of the delay; the reasons for the delay; the merits of the appeal; the prejudice of the delay on the other party and such other factors as the court may consider, but most importantly, the applicant coming under Rule 55 should demonstrate that the single judge did not properly exercise his/her discretion when the application under Rule 4 was dismissed.

When this reference came up for hearing in the presence of the applicant, and in absence of the respondents who were duly served with the hearing notice, the applicant invited us to consider the material he placed before the single judge i.e. the notice of motion and the supporting affidavit, in the light of the submissions he filed.

We have already set out that material and noted how ***Githinji JA*** appreciated the same and concluded as he did. We need not repeat that. What we add, however, is whatever the submissions contained, if that adds anything more.

The applicant said that he worked for the Judiciary for 35 years. His lawyers, M/S Wandaka & Gathaara Advocates:

> ***"--- are the ones who had made the delay and I should not suffer their (sic) mistake".***

Then again as he did in the affidavit in support of the motion, the applicant dwelt on the errors ***Hayanga J*** allegedly committed in his judgment. That judgment *"had no facts";* the certificate of delay spoke of 632 days. And by the dismissal of the application, the single judge denied the applicant opportunity to exercise his right of appeal under the Constitution.

On our part we observe that the claim that the applicant's lawyers were the cause of the delay to file an appeal was before the single judge but with no evidence to support it. ***Githinji JA*** went over the history of the matter and observed that the applicant had not filed an affidavit from his lawyers to throw light on the claim as to why no step was taken to institute the appeal.

From the analysis by the single judge above on the part of the lawyers we do not agree that they delayed in filing the appeal. The applicant claimed in his affidavit that the appeal was not filed:

> ***"9. --- because all the records from the court file and from my lawyer had disappeared mysteriously at the same time."***

The reason therefore is not that the delay to file the appeal was occasioned by the lawyers. If the lawyers were to blame they could not inquire and be told that the certified proceedings were ready on 3rd July 1999. They paid for them and collected the same on 4th November 1999. There was no affidavit sworn by the lawyers and the applicant does not shed light on the state of affairs. He did not disclose what transpired between him and his lawyers until he filed a notice to act in person on 2nd April 2013. What appears very probable is that the applicant may not have paid his lawyers to proceed because they had all that was necessary to initiate the appeal, yet not much was done in that regard.

Besides, even as early as 11th August 2012 through the Office of the Ombudsperson, the applicant was informed that the file was available at

Milimani. He made no move at all. All in all, we conclude that the required documents were available with the applicant's lawyer on 4th November 1999 and action was not taken to file the appeal. Even when the applicant himself was told that the file was available in August 2012 he did nothing until some eight months later when this application to enlarge time was filed on 7th June 2013. All put together 16 years passed since the judgment was delivered, a delay for which no plausible explanation has been given. The delay is inordinate, so to reopen the dispute could only occasion obvious and undue prejudice to the respondents.

The single judge found that the intended appeal was based on findings of fact only, which made it inarguable. We have no reason to disturb that conclusion.

The applicant did not claim or demonstrate to us that in dismissing his application the single judge exercised his discretion improperly. On our own perusal of the ruling herein we are satisfied that ***Githinji JA*** properly exercised the discretion. In the result, we see no reason to vary, discharge or reverse the ruling herein dated 10th April, 2014. We therefore dismiss this application with no orders as to costs.

Dated and Delivered at Nairobi this 25th day of September, 2015.

M. K. KOOME

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

P. M. MWILU

…….

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR