IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), MWERA & SICHALE, JJ.A)

CIVIL APPLICATION NO. NAI 321 OF 2013

BETWEEN

DEL MOTE KENYA LIMITED…….……...…....…APPLICANT

AND

PATRICK NJUGUNA KARIUKI……..…….....…..RESPONDENT

(Application for extension of time to serve a Notice of Appeal out of time and to apply for proceedings and Judgment out of time from the Judgment and decision of the Industrial Court of Kenya (Ongaya, J.) dated 26th October 2012

in

Industrial Cause No. 953 of 2011)

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RULING OF THE COURT

1. On numerous occasions, this Court has commented on the nature and of the discretion exercised by a single judge under ***Rule 4*** of the Court of Appeal Rules. For instance, in ***Mwangi v Kenya Airways Ltd [2003] KLR 486*** at ***487,*** this Court stated that:

> ***"Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported), the Court expressed itself thus:-***
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> *"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".*
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> ***These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words***

"in general". Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway."

2. If the single judge exercises his discretion improperly, then on reference to the full Court, that decision of the single judge can be set aside. In ***Peninah Mongina & Another v Walter Masese Makori & Another [2005] eKLR (Civil Application No. 20 of 2004),*** it was held that:

"… under rule 4 of this Court's Rules, the learned single Judge [exercises] unfettered discretion. In a reference to the full court before we can interfere with that discretion, we must be satisfied that the learned single Judge misdirected himself in some matter and as a result arrived at a wrong decision or, that the learned single Judge misapprehended the law or failed to take into account some relevant matter."

3. And in ***Trans National Bank of Kenya v Hasam Said Amdun [2006] eKLR (Civil Application No. Nai. 133 of 2005),*** the Court reiterated that:

> ***"… in exercising the discretion under Rule 4, a single member of the Court is doing so on behalf of the whole Court…. the Court has now settled the circumstances under which it will interfere with the exercise of the discretion by a single Judge. The full Court will only interfere where it is shown that in coming to his decision, a single Judge has taken into account a matter which he ought not to have taken into account, or that he has failed to take into account a matter which he ought to have taken into account, or that he misunderstood some law or principle of law and thus misapplied the law, or that there was no evidence at all before him to support a particular conclusion, or that he failed to appreciate the weight or bearing of circumstances, admitted or proved, or that everything taken into account, the decision is plainly wrong."***

4. These are the well established principles that we must apply to the application now before us, which is a reference to the full court from the decision of Musinga, J.A. rendered on the 9th May 2014. That ruling arose from an application dated the 28th February 2013 and filed by Del Monte Kenya Ltd on the 25th November 2013. It sought on order that the time within which it could file a notice of appeal against a decision of the Industrial Court made on the 26th October 2012 be extended.

5. During hearing of that application before Musinga, J.A., Mr. A. K. Maruti, learned counsel for Del Monte Kenya Limited, submitted that he had drawn up a notice of appeal against the decision on the 8th November 2012, and that he instructed his litigation clerk to lodge it in Court. A copy of the notice was to be used as an exhibit in an application for an order of stay of execution. Mr. Maruti then instructed his clerk to attend to the compiling of that application and thereafter to file both the notice of appeal as well as the application for an order of stay of execution within seven days of the decision of Ongaya, J. in the Employment and Labour Relations Court.

6. It later emerged that on the 15th November 2012, the litigation clerk served only the application for the order of stay of execution, but inadvertently failed to serve the notice of appeal. This omission was realized on the 20th November 2012 and the notice of appeal was eventually filed on the 29th November 2012. It was after this that the applicant brought the application to extend time within which to serve the notice of appeal.

7. The learned single judge, after considering the material that was before him, found that the delay had been sufficiently explained; that the delay of only 14 days and was not inordinate; and consequently allowed the application with costs to the respondent.

8. The respondent was aggrieved with that finding and holding, and accordingly made this application under ***Rule 55*** of this Court's rules to refer the matter to a full bench of the court.

9. Before us, the respondent contends that the learned single judge failed to take into account the delay in making the application for extension of time, which was over a year long. In addition, he argued that in allowing the application, there would be prejudice suffered by him as he had worked at the company (the applicant) for a period of 22 years, and there has been no substantive appeal filed to date against the award made to him by the Employment and Labour Relations Court.

10. Del Monte Kenya Limited, on its part was of the view that there would be no such prejudice to the applicant as the notice of appeal had already been brought to his attention as it was annexed to the application for the order of stay that was argue before the Court; the applicant, therefore, had adequate notice that such notice had been filed, and that there was an intention to appeal the award of the Employment and Labour Relations Court.

11. As we have stated hereinabove, this Court can interfere with the unfettered discretion of the learned single judge only if he had exercised his discretion injudiciously, or if he had misdirected himself by considering a matter he ought not to have considered. For emphasis, see ***Benson Mbuchu Gichuki v Evans Kamende Munjua & 2 Others*** ***[2006] eKLR (Civil Application 79 of 2004)***

    wherein it was stated that:

> ***"However, in doing so, the full court must consider that the single Judge was exercising an unfettered discretion though he was enjoined to exercise it judicially. The applicant must demonstrate in a reference such as this that the single Judge took into account some irrelevant factor or that he had failed to take into account a relevant fact or that taking into account all the circumstances of the case, his decision is plainly wrong."***

12. Mr. Mwangi, for the respondent, submitted that the single judge failed to properly consider the length of delay, as he only considered the period of fourteen days; he, however, did not consider that the time taken before filing the application was a delay of over a year. This period of time was not explained at all and this was a relevant factor which the learned single judge ought to have considered.

13. Rule 75 of this Court's rules requires a person who intends to appeal to the Court of Appeal to file, within fourteen days of the date of the decision from which is intended to appeal, a notice evincing such intention. Rule 77 (1) further require that such a notice must be served on all persons directly affected by the appeal, and that this should be done within seven days of filing of the notice. It is apparent that the notice of appeal was filed in time, but due to some omissions in the advocate's office, it was not served in time. It was eventually served, but fourteen days late.

14. We agree with the assessment of the single judge that this was not an inordinate delay, and that this delay was properly explained. The period of delay that is in issue in this reference is the period of over one year which applicants' counsel took to file the application to regularize the notice of appeal that was served late. This delay is not attributable to the applicant, but to his advocate, and in our view, it would not serve the interests of justice to lock out the applicant from pursing his appeal on the basis of an omission of his advocate. We are guided by the obiter statements of Madan J.A. in ***Murai v Wainaina*** ***(No. 4) 1982 KLR 38*** that;

> ***"A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or***

condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

15. While we certainly do not condone the mistake by Mr. Maruti, we do not think that it would serve the interests of justice to lock out his client's appeal.

16. We also find that there would be no prejudice to the respondent. There has already been argued an application for an order of stay of execution of the order of the lower superior court. In that application, there was exhibited a copy of the notice of appeal. The respondent therefore had adequate information that the applicant intended to appeal against the award made.

17. Ultimately, we find that the learned single judge had enough material before him which enabled him exercise his discretion to the applicant's benefit. We are not persuaded that the learned single judge injudiciously exercised his discretion or that he breached any of the well established principles in ***Mwangi v Kenya Airways Ltd (supra)***. In the result, this reference is without merit and we accordingly order that it be and is hereby dismissed with costs.

Dated at Nairobi this 9th day of October, 2015.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR