IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, KIAGE, & M'INOTI, JJA's)

CIVIL APPLICATION NO. NAI. 250 'A' OF 2011

BETWEEN

J. M. MWANGI …….....……...……APPLICANT

AND

TIMOTHY JOWELL KAMANO …….....…..…..1ST RESPONDENT

INDUSTRIAL AND COMMERCIAL

DEVELOPMENT CORPORATION ….....…2ND RESPONDENT

(Being an application for extension of time within which to file serve a Notice of Appeal against the Judgment and decree of the High Court of Kenya at Nairobi (The Hon. Lady Justice Ruth Nekoye) dated 10th August 2011

in

High Court C.C. No. 2314 of 1975

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RULING OF THE COURT

The applicant's motion dated 4th November 2011 seeking extension of time for the filing of a Notice of Appeal against Sitati J's judgment made on 10th August 2011 was dismissed by a single Judge of this Court. Dissatisfied, the applicant invoked the provisions of **Rule 55(1)** of the **Court of Appeal Rules** for the Court to reverse that dismissal.

When a reference to the Court is made from the decision of a single judge of the Court, the Court proceeds in a circumspect fashion and is very reluctant to interfere with the exercise of discretion by the single judge. The reason for this is two fold: first, as a general rule, the exercise of a judge's unfettered discretion must be accorded due respect so that interference has to be on narrow and well-established bases. Second, it must always be remembered that when a judge of the Court exercises discretion alone,

it is on behalf of the Court so that a reversal of a single Judge's decision is actually a reversal of the Court's decision and the Court cannot be seen to be eager to do so. The Court does not sit on appeal against the decision of a single judge (**see MARGARET MUTHONI MUCHIGA V. ESTHER KAMORI GICHOBI [2010]eKLR.**

Whereas the second consideration requires no elaboration, of the first we need only state that the single judge's exercise of discretion can be interfered with only if it is shown by the applicant that the learned single judge took into account some irrelevant factor or factors or failed to take into account some relevant factor or factors; made an error on principle, or that the decision is in the circumstances of the case plainly wrong or perverse. All of these considerations were succinctly captured by the Court in **JAMES ROBERT KARANJA MWIGAI –VS- JOSEPH MWANGI KARANJA & 5 OTHERS Civil Application No. Nai. 183 of 2008** (unreported) which we reiterate;

"… to interfere with the exercise of discretion by a single judge who has done so on behalf of the court, the full court must be satisfied that in coming to decision the single judge took into account what he ought not to have taken into account or failed to take into account what he ought 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 the evidence and thus reached a wrong decision in law or that the decision itself is so plainly wrong that no reasonable tribunal could have come to it taking into account all the circumstances of the particular case."

Applying those principles to the present reference, we are not at all satisfied that the learned single judge exercised his discretion perversely or otherwise than judicially. The matters he was bound to consider in an application for extension of time under Rule 4 of the Rules are settled. They were summarized in **MWANGI –vs- KENYA AIRWAYS [2003] KLR 486** thus;

"(a) The length of the delay

(b) The reason for the delay

(c) Possibly, the chances of the appeal succeeding if the application is granted

(d) The degree of prejudice to the respondent if the application is granted."

The matters are merely indicative, of course, and should not be seen to be cast in stone as that may amount to imposition of a fetter on discretion or, as long ago expressed by Lord Kay in **JENKINS –vs- BUSHBY [1891] 1 Ch.484;**

"… in a question of discretion, authorities are not of much value. No two cases are exactly alike, and even if they were the court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion."

We are satisfied that the learned single judge bore these proper matters, principles and considerations in mind when he rejected the applicant's motion. The applicant has not demonstrated to our satisfaction, or at all, in what respect the learned single judge failed to apply his discretion in the correct manner. We are inclined to agree with both Mr. Machira and Mr. Thangei for the 1st and the 2nd respondents, respectively, that the applicant's motion was devoid of merit and was properly dismissed by the learned single judge. The delay was both inordinate and unexplained. Even though Mr. Ng'ang'a contends that the merit of the appeal need not be considered, the respondents' submissions that it is "petty and hopeless" are not entirely without substance.

In the final analysis the applicant has failed to provide us with reason or basis sufficient for us to *"vary, discharge or reverse"* the single judge's decision and this preference therefore fails. The same is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 27th day of June 2014.

P. K. KARIUKI KIHARA (P.C.A)

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JUDGE OF APPEAL

P. O. KIAGE

…….

JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR