



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MARAGA & MURGOR, J.J.A)

CIVIL APPEAL NO. 85 OF 2011

BETWEEN

SAMUEL KAMAU MACHARIA1ST APPELLANT

PURITY GATHONI GITHAE 2ND APPELLANT

AND

OCEANFRIEGHT TRANSPORT COMPANY LIMITED RESPONDENT

(An application for reference to full court in an application for extension of time (Visram, JA) dated 9th December, 2011 in an

appeal from the ruling of the High Court of Kenya at Nairobi

(Rawal, J.) dated 23rd October, 2011

in

H.C.C.C. NO. 3958 OF 1991)

RULING ON REFERENCE TO FULL COURT

1. There is a long-winded factual matrix, spanning over 26 years, which informs the application before us. In considering the matter, however, we shall only make reference to such facts as are relevant for the disposal of the application.
2. The two applicants are a married couple and will henceforth be referred to as “*the Macharias*”. They are represented before us by learned counsel Dr. Kamau Kuria, instructed by M/s. Kamau Kuria & Kiraitu Advocates on record. The respondent company shall henceforth be referred to as “Oceanfreight” and is represented before us by learned counsel Mr. Raiji, instructed by M/s. Maina Murage & Co. Advocates.
3. On 9th December 2011, a single Judge of this Court, Visram JA, allowed an application filed by Oceanfreight under **Rule 4** of the Court of Appeal Rules (the Rules) for extension of time to file an application under **Rule 84** of the Rules. They intended to seek an order for striking out **Civil Appeal No 85 of 2011** filed by the Macharias on 6th May 2011. In granting that application,

Visram JA stated in part as follows:

“This application was actually presented to the Court’s registry on time, albeit on the last day – Friday, 10th June, 2011 according to the deposition in support of the application. However, the registry officials rejected it on the ground, according to the applicant. “that it did not have an index and that pagination of the documents should have began from page 1 of the motion.” Although, the registry’s refusal to accept the document in questionable, the applicant simply withdrew the documents, and corrected the bundles, re-paginating some 666 pages. This took time, and the documents were eventually filed on 16th June, 2011 (not 13th June, 2011 as stated in the applicant’s application). Consequently they were late by six days after the expiry of the time limited by the proviso to Rule 84. Is this delay excusable?”

The learned Judge was of the view that the delay in bringing the application was “*minimal and well explained*” and answered the question in the affirmative.

4. The Macharias were dissatisfied with that decision but there is no provision for appeal under the Rules. The only avenue was to seek a reference to the full court under **Rule 55** which donates the power to the court to “*vary, discharge or reverse*” the single Judge, hence the matter now before us.
5. Learned counsel on both sides of the argument were *ad idem* on the principles applicable on a reference to the full court. These have been restated various times without number by this Court and we take them from **Mombasa Development Ltd -v- Jimba Credit Corporation C.A 317 of 2004**, which was relied on by Dr. Kuria, thus:

“Although such a reference is not an appeal, it is in the nature of one. By dint of rule 54 (1) of the Rules, a dissatisfied party may seek to have the decision of a single Judge varied, discharged or reversed by the full Court. To succeed, however, the applicant must show that “the single Judge took into account an irrelevant matter; or that he failed to take into account a relevant matter, or he misapprehended the law applicable to the case, or that he misapprehended the facts of the case and hence misapplied the law to them or that his decision, taking into account all the circumstances of the case, is plainly wrong”. Those guidelines have been restated many times in this Court, for example, in The Standard Ltd. & 2 others vs. Wilson K. Kalya & Another – Civil Application No. Nai. 306 of 2002 (unreported).”

6. The decision in that authority was made on 28th January 2005, long before the amendments made to the **Appellate Jurisdiction Act** (the Act) on 23rd July, 2009 to introduce **Sections 3A and 3B** which spelt out the “**overriding objective**” of the Act. It is to facilitate the “*just, expeditious, proportionate and affordable resolution of appeals...*”. Subsequently, this Court has construed the application of those amendments to mean that the Court’s jurisdiction on the interpretation of the law and the Rules made thereunder was enhanced and given considerable latitude. However, the Court cautioned in **City Chemist (Nbi) & Another -v- Oriental Commercial Bank Ltd Civil Application No. Nai. 302/2008 (UR)** as follows:

“That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

We may add that we now have the **Constitution of Kenya 2010**, which spells out in **Article 159** the

judicial authority donated by the people of Kenya to the Judiciary and how that authority shall be exercised. It buttresses the intentions of the Legislature in enacting **Sections 3A** and **3B** of the Act one year earlier.

7. In urging the reference before us, Dr. Kuria made the profound submission that the proviso to **Rule 84** was couched in such mandatory tone that it left no room for the application of **Rule 4**. In his view, if **Rule 4** was applied, it would permit what is prohibited by the proviso to **Rule 84**. He also submitted that the “overriding objective” principle was misapplied in such a situation. On those two counts, he submitted, the single judge ignored the law and it was proper therefore that the full court reverses him. Finally, Dr. Kuria submitted that the single judge ignored a relevant fact relating to another appeal pending before this court, which is between the same parties.
8. **Rule 84**, which Oceanfreight intended to invoke, provides as follows:

“84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.”

(emphasis added.)

9. Citing three decisions of this court in the **Mombasa Development Case** (supra), **Veronica Mbogo -v- Margaret Muthoni C. App. No 311/2002**, and **Karimi -v- Khan [2005] eKLR**, Dr. Kuria submitted that they all declare the proviso to **Rule 84** as mandatory and that applications filed contrary to the proviso were for rejection, even if the lateness was one minute.
10. In response, Mr. Raiji submitted that the single judge made no error of law in accepting, and considering, the application under **Rule 4** which grants to the court the power to extend time, despite the mandatory wording of the proviso to **Rule 84**. The Judge was also right in invoking **Sections 3A** and **3B** which take precedence over the Rules. In support of his submission, Mr. Raiji cited the case of **Dorcias Ndombi Wasike-v- Benson Wamalwa Khisa & 2 Others, C.A No.87of 2004**, where the court stated:

“The overwhelming objective principle has been introduced into our law by a statute and it is, inherently a principal of substantive law. We agree as submitted by Mr. Amolo that, where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of this Court) the statute must prevail. A conflict is however unlikely to arise because Section 3A (1) of the Act not only enacts the overriding objective principle but also expressly superimposes the overriding objective to the application of the existing rules with the result that the Court is enjoined to apply the overriding objective principle in both the substantive and procedural matters. That is to say that, the rule should also be construed in a manner which facilitates the just, expeditious proportionate and affordable resolution of the appeals.”

11. He further submitted that the single judge had no business considering other appeals pending before this court, since the application before him was directed at one appeal - **C.A No. 85/2011** and no other. It would have been an irrelevant factor which is not open for consideration by a single judge. The single judge, in his view, cannot therefore be faulted for applying, as he did, the principles set out in the case of **Leo Sila Mutiso -v- Rose Wangari Mwangi C. Appl.25107 1997**, and similar other decisions of this Court.
12. We have considered the rival submissions of counsel, the various authorities cited in aid, and the applicable law. In the end, we have come to the conclusion that the reference made before us has

no merits.

13. **Rule 4** which is in issue states as follows:

“The Court may, on such terms as it thinks just, by order extend the time LIMITED BY THESE RULES or BY ANY DECISION of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act and a reference in these Rules to any such time shall be construed as a reference to that time as extended.” (emphasis added.)

14. In our view, the Rule was tailored to apply, in appropriate cases, to correct any injustice to a litigant or party who may be late in complying with time limits but may not be at fault or would have good reasons for the delay. It was not meant to assist indolent parties or litigants who by their conduct are intent on obstructing the course of justice. It is instructive that the Rule will only apply where :

“i) Time is limited by the Rules, or

ii) Time is limited by any decision of the Court...”

The time sought to be extended by Oceanfreight was limited by **Rule 84** (supra). It cannot therefore be said that it was not amenable to the application of **Rule 4**.

15. We have perused the three authorities relied on by Dr. Kuria but we do not, with respect, understand them to have decided that there cannot be an extension of time under **Rule 84** (which was **Rule 80** at the time the cases were decided in 2005). The applicants in those cases simply filed applications for striking out appeals way beyond the time limit without seeking any leave to extend the time for filing. It was a process which had been abused by litigants for a long time before amendments were made to the Rule in the year 2002, hence the statements in those authorities that the rule was couched in mandatory terms. The only way out for respondents seeking to attack appeals summarily was at the hearing under **Rule 104(b)** [previously **101(b)**] when, with the leave of the court, they could raise objections which could have been raised under **Rule 84** (previously **Rule 80**).

16. More importantly, as stated above, those cases were decided in 2005 before the enactment of the **Appellate Jurisdiction Act** and the introduction of **Sections 3A** and **3B** or the new **Constitution**. We have examined above, the impact of the amendments to civil litigation and we think, if an application for extension of time was made in the three authorities relied on here after the enactment of the two sections of the law, the approach and the decision would have been markedly different. The single judge here was operating within the environment of the amended Act and the new Constitution, and the authorities relied on are thus distinguishable.

17. We hold and find that there was a competent application before the learned single judge under **Rule 4**. The judge considered the principles applicable on such applications and applied them. It was not an error of law to do so. As a single judge, he was acting on behalf of the full court and we cannot sit on appeal on his decision, save under the guiding principles discussed earlier in this ruling.

18. Finally, the single judge did not err in failing to consider another appeal on Bankruptcy proceedings between the same parties, pending before this Court. In our view, it was not a relevant factor for purposes of the application for extension of time. The application for striking out the appeal will be heard on merits and determined in accordance with the law. We find no prejudice to any of the parties in that process.

19. For those reasons, as stated earlier, we are not inclined to grant the orders sought in the reference, and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 20th day of June, 2014.

P.N. WAKI

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR