



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, WARSAME & MUSINGA, JJ.A.)

CIVIL APPLICATION NO. NAI. 143 OF 2013

BETWEEN

SILAS MUTHURI MUGAMBI APPLICANT

VERSUS

PAN AFRICA LIFE ASSURANCE LIMITED RESPONDENT

(An application for leave to appeal out of time the Decree/Order of the High Court of Kenya at Nairobi, (Havelock, J.) dated 18th February, 2009

in

HCCC. No. 530 of 2009)

RULING OF THE COURT

On 19th March, 2014 Githinji, JA. dismissed an application filed by **Silas Muthuri Mugambi**, the applicant, for extension of time to lodge and serve a memorandum of appeal as well as a record of appeal. Being dissatisfied with that ruling, the applicant has sought reference of the application before a full bench of this Court under **rule 55 (1)** of the **Court of Appeal Rules**.

It is trite law that a single Judge of this Court, in dealing with an application for extension of time, exercises an unfettered discretion but such discretion has to be exercised judicially and upon the applicable principles of law. In exercising that discretion, a single Judge does so on behalf of the whole Court. In **GITETU vs. KENYA COMMERCIAL BANK LIMITED [2009] KLR 545**, this Court set out the principles under which the full bench can interfere with the exercise of the single Judge's decision. It can only do so if it is shown that the judge:

- i. *took into account an irrelevant matter which he/she ought not to have taken into account; or*
- ii. *failed to take into account a relevant matter ; or*
- iii. *misapprehended some aspects of the applicable law; or*
- iv. *was plainly wrong in his/her decision such that a reasonable tribunal properly directing itself to the applicable law and evidence could not have arrived at such a decision.*

A reference to the full court is not an appeal and it is not enough to show that the full court could have come to a different result if it had been sitting in the place of the single Judge. We will therefore proceed to consider this application against the aforesaid principles.

In his affidavit in support of the application dated 1st July, 2013, the applicant stated that the judgment sought to be appealed against was delivered on 20th March, 2012. He filed a notice of appeal of 27th March, 2012 but was unable to file the memorandum and record of appeal on time or at all. The applicant alleged that he was unable to file the said documents in time because of financial constraints. He had been granted leave by the High Court to commence the suit as a pauper.

Githinji, J.A. agreed with **Mr. Jomo Nyaribo**, the respondent's learned counsel, that the delay of sixteen months was inordinate, adding that the applicant could have applied for leave to file the appeal as a pauper, just as he had done in filing the High Court case. That could have been done in terms of the provisions of **rule 115(1)** of this **Court's Rules**.

Further, the learned Judge observed that the applicant had not shown that the intended appeal is arguable. The applicant had not annexed to his application a copy of the judgment of the High Court. It was therefore impossible to tell whether the intended appeal was not frivolous.

Lastly, the learned Judge noted that the respondent will suffer undue prejudice and incur unnecessary costs defending the intended appeal, arising from a claim which arose in the 1990's and which the applicant had not demonstrated was arguable.

When this reference came up for hearing, the applicant, who was acting in person, sought to rely entirely on his affidavit sworn in support of the application as well as a further affidavit which he filed on 11th February, 2014.

On the other hand, **Miss Cheron**, learned counsel for the respondent, opposed the reference on more or less the same grounds as contained in the replying affidavit sworn by Mr. Nyaribo.

In our view, the learned Judge exercised his unfettered discretion judiciously. The applicant had not advanced any sufficient reason for the inordinate delay in filing the application. The applicant ought to have been aware of provisions in the law which would have enabled him to file the memorandum and record of appeal without paying any court fees. We say so because he had earlier made an application in the High Court to sue as a pauper. We cannot therefore accept that the delay was caused by financial constraints.

Apart from the notice of appeal, the applicant filed a draft memorandum of appeal. Without a copy of the judgment sought to be appealed against, we are unable to tell whether the intended appeal is arguable. It is trite law that for an applicant to succeed in an application for extension of time under **rule 4** of this **Court's Rules**, the applicant has to satisfy the Court that the delay was not inordinate and has been sufficiently explained and that the intended appeal is arguable. The Court should also consider whether the respondent would be prejudiced if the application to extend time is allowed. See **POTHIWALLA v KIDOGO BASI HOUSING CO-OPERATIVE SOCIETY LTD & 31 OTHERS [2005] KLR 733**. The learned Judge took into consideration all these factors and delivered himself appropriately.

In view of the foregoing, we are not inclined to disturb the ruling by Githinji, J.A. Consequently, this reference is dismissed with no order as to costs.

Dated and Delivered at Nairobi this 13th day of June, 2014.

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

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

REGISTRAR

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