IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, G.B.M. KARIUKI &KIAGE, JJ.A

CIVIL APPLICATION NO. NAI 286 OF 2013 (UR 149/2013)

JAMES MASILA MULI……..……...1ST APPLICANT

MUSYA MULI…….…….2ND APPLICANT

VERSUS

KWALE MATI……..…..……1ST RESPONDENT

AGNES KASYOKA……..……..2ND RESPONDENT

SHEDARCK MUNYALO NZENGE…….3RD RESPONDENT

(being an application for leave to file and serve a record of appeal out of time from the judgment of the High Court of Kenya at Machakos (Mwera, J.) dated 14th March 2001

in

H.C.C.A No 69 of 1998)

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RULING OF THE COURT

On the 30th January 2014, his lordship D.K. Maraga, J.A., sitting as a single judge,considered and dismissed an application for extension of time, made by the present applicants under Rule 4 of the Court of Appeal Rules, on the ground that the delay in filing the appeal is over twelve (12) years, which delay is not only inordinate but unexplained.

Being aggrieved and dissatisfied with the decision of the single judge, the applicants have sought reference of the said application before a full bench of this court under Rule 55 (1) of the Court of Appeal Rules.

It is the case of the applicants that they were the appellants in ***High Court Civil Appeal No. 69 of 1998*** at Machakos in which judgment was rendered on 14th March 2001. After the appeal was disallowed, they approached Kituo Cha Sheria to assist them file an appeal in this Court. Kituo cha Sheria appointed one Josephine WanguaWambua, Advocate, to lodge and prosecute the appeal on their behalf. They later came to learn thatno appeal had been lodged by the person appointed on their

behalf by Kituo Cha Sheria.

During the same time, the mother of the applicants became seriously ill, and they were forced totake her to hospital for medical attention and treatment. Later, the 1st applicant got eyesight problems, forcing him to seek medical treatment from Thika Hospital and the Shah Free Eye and ENT Camp, where he was treated for bilateral cataracts in his eyes. All these factors had the cumulative effect of preventing the applicants from filing an appeal in time, and with considerable time passage from the time the High Court rendered its decision.

The application was vehemently opposed by Mr. Kimani, learned Counsel for the respondents, who submitted that the intended appeal has no chance of success since the land in dispute is registered in the name of the respondents, and that registration cannot be defeated. He added that the applicants are canvassing an unidentified piece of land. Mr. Kimani, Advocate, urged us to consider the length of delay, the prejudice to the respondents in reopening litigation which was concluded twelve years ago, and whether the appeal is arguable as wellas the reasons offered in explaining the delay.

It is clear to us that a reference to a full bench is not an appeal and that a single judge dealing with an application for extension of time exercises unfettered jurisdiction in dealing with his discretionary powers. We appreciate that such discretion is to be exercised judiciouslyand in accordance with the law.The power of a single judge is donated and exercised on behalf of the whole Court. In essence a singlejudge enjoys the mandate and authority of the Court in dealing with an application for extension or any other application that allows a judge of this Court to sit and decide a matter as a single judge.

The question for us to determine is whether the single judge exercised his discretion wrongly and in violation of the law and/or in excess of his jurisdiction. Time and time again, it has been stated that afull bench of this Court cannot sit, and is not sitting, on an appeal on the decision of the single judge. There is no basis for us to depart from the welltrodden path. We think there is no basis to do so. It is also clear that it is not enough to demonstrate that the full bench would have come to a different or divergentdecision if it was first seized of the matter in the place of the single judge. A full bench cannot substitute its discretion withthat of the single judge as that would amount to usurpation of the discretionary powers of the court.

No doubt, Maraga, J.A. considered all the issues raised by the applicants and respondents and declined to extend time. The Judge was of the view that the applicants were obliged to file their application in time, and/or within a reasonable period despite the intervening circumstances. The single Judge also found that the intervening circumstances did not warrant a failure to file the appeal in time, or make the application for extension of time within a reasonable time.

Like the single judge, we find no basis that warrants an extension of time; there is therefore no basis to interfere with the decision of 30th January 2014. The material placed before us by the applicants is a clear demonstration of indolent litigants who are bent on delaying the determination and conclusion of a dispute which started in 1993. As a matter of good practice and logical sense, a matter that begun in 1993 and which was determined on 14th March 2001 must be allowed to rest.

The applicants have contended that immediately after the decision of 14th March 2001, they sought the assistance of Kituo Cha Sheria to lodge an appeal on their behalf. They have not stated when they sought the assistance of the said institution, we do not know whether they sought Kituo's assistance one year, two years or even five years ago.

We have also considered the alleged sickness of one of the applicants and their beloved mother. As human beings, we must extend our sympathy to the applicants for the loss of their mother during the pendency of this saga, but without doubt, and with profound respect, we see no basis or hinderance that that manifestly costthe applicants so as to make them not to file their appeal within the stipulated time, or to make an appropriate application within reasonable time. By any stretch of

imagination, a delay of twelve years is not only inordinate, but inexcusable, especially when no cogent and plausible explanation has been proffered.

In conclusion, it is our determination that the applicants have not satisfied us that the single judge took into account an irrelevant matter, misapprehended the applicable law, failed to take into account the reasons of the delay and/or that he was plainly wrong in his decision, so that a reasonable judicial mind, directing itself to the applicable law and evidence could not have reached such a decision. We think that the single judge addressed his mind to all the relevant and applicable law, as well as the factual issues as presented by the parties. The single judge in our view appreciated and addressed all the grievances raised by the applicants. In the circumstances, we decline, as mandated in law, to interfere with the said decision.

We think that we have said enough to conclude this long and tedious journey which commenced way back in 1993. As always, prudence and reason require that litigation, as painful as the outcome may be, must come to an end. We do so by dismissing the reference with no orders as to costs.

Dated and delivered at Nairobi this 11th day of July 2014

M. WARSAME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR