**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(WAKI, WARSAME & KIAGE, JJ.A)**

**CIVIL APPLICATION NO. NAI. 245 OF 2013**

**BETWEEN**

**M A ...........................................................APPLICANT**

**AND**

**M A.........................................................RESPONDENT**

***(A reference from the decision of a single judge of the Court of Appeal (G.B.M. Kariuki, J.A) dated 28th February, 2014 for restoration of the applicant's Notice of Motion No. 114 of 2014 (Koome, JA) dated 12th July, 2013***

**in**

**H.C.D.C. No. 73 OF 1985)**

***************************

**RULING OF THE COURT**

The matter before us is fairly narrow. It is a reference from the decision of a single Judge of this Court to the full court; not an appeal as purported by a **"notice of appeal"** and **"submissions on appeal**", filed by the applicant,***M M A*** (Mrs. A). The learned single judge was Justice G.B.M Kariuki JA before whom a notice of motion dated 16th September, 2013, fell for hearing and determination on 28th January, 2014. Mrs. A represented herself in that application, as she has in other matters and still does before us. She says she does not trust advocates after she had nasty experiences with them. It is her right. Under the Constitution, courts are bound to give access and listen to all and sundry who come before them. Even the dull and ignorant; they too have their story.

But Mrs. A is neither dull nor ignorant. She has been in and around these courts for 29 years since 1985 when her husband, Dr. M A filed a petition in the High Court to divorce her on account of cruelty. At some point, the High Court (O'Connor J) decided the petition against her and she was aggrieved. She came to this Court and filed **Civil Appeal No.133 of 1986** which is still pending hearing and

determination. In the meantime, she has filed and prosecuted numerous interlocutory matters complaining all along that her record of appeal has been unlawfully interfered with by the court registry. She even obtained orders allowing her to replace the record of appeal with the record she believes is authentic. One such order was issued on 10th March, 2009 giving her 75 days to do so. Yes, she knows her rights and has a sense of seeking redress, in her own way, for perceived violation of those rights. That is evident from the documents she has filed in court over time, including a bound volume placed before us in this matter passionately narrating fears for her life and that of her son as an explanation for the delay in presenting her matter before the court. We shall examine that document shortly.

The motion before the single judge was, in his words "*in a state of obfuscation*". We have examined it too and it is not easy to decipher. But the learned judge traced back the history of the matter and was able to establish that the application before him sought to rescind an earlier order made by another single judge of this Court (Koome JA) on 12th July, 2012. This, G.B.M. Kariuki JA could do under ***Rule 57(1)*** of the **Court of Appeal Rules, 2010** (the Rules) since Koome JA was absent as a resident judge in Nyeri.

The application before Koome JA had been filed on 31st May, 2010 seeking "*extension of time for a period of three months to withdraw wrong copies of memorandum and record of appeal and to file the right copies from the judgment of the High Court of Kenya in Divorce cause No.73 of 1985*" . It is Mrs. Adalja who had filed that record of appeal on 22nd May, 2009 with leave of the court. But she says there were defects in that record too which she blamed on the court registry. The application came up for hearing on 20th September,2010 but Mrs. A had lost her own copies and sought adjournment. It was relisted for hearing on 12th July, 2012. When it came before Koome JA, on that date, none of the parties showed up and the judge dismissed it under ***Rule 56(1)*** of the Rules. In doing so, Koome JA was satisfied that both parties had been duly notified about the hearing of the application.

Nothing happened for the next one year and two months until 16 th September, 2013 when Mrs. A filed the application to rescind Koome JA's order. G.B.M. Kariuki JA examined the record before him, the affidavits on record and heard the submissions of Mrs. A and counsel for the respondent but was not satisfied that there was any sufficient cause shown for rescinding the order of Koome JA. He found that the application was filed way beyond the 30 days prescribed under ***Rule 56 (4)*** of the Rules and there was no explanation for that delay. Indeed, in his finding, Mrs. A was not candid and did not even disclose when she became aware about the dismissal of her application. He also observed from the record that the hearing of the main appeal had been largely delayed because of Mrs. A's conduct in pursuit of endless applications.

Mrs. A is now before us and she tells us that G.B.M. Kariuki JA was wrong in finding that her application was filed late; that the main appeal was not filed late and is validly before the court, which factor should have been considered; and that she had gone into hiding because of threats to her life and that of her son. She attributed the attempts to take her life to her husband, the Kenya Police and other co-conspirators as documented in the "submissions on Appeal" referred to earlier. It is a document that is as incoherent as it is disjointed, but we gather the gist of it. Suffice it to say that the document was not before G.B.M. Kariuki JA and therefore amounts to new evidence contrary to ***Rule 55(2)*** of the Rules.

**Rule 55** of the Rules, which governs References to the full court states in relevant part as follows:

**"55. (1) Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single judge –**

> **(a) ..........................................................................**
>
> **(b) In any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, he may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within**

**seven days thereafter.**

**(2) <u>At the hearing by the court of an application previously decided by a single judge, no additional evidence shall be adduced</u>."** (Emphasis added.)

As stated earlier, a reference is not an appeal,although it is in the nature of one. The application before G.B.M. Kariuki JA called for the exercise of the judge's discretion which is unfettered and the full court can only interfere with the exercise of discretion if it is shown that in coming to his decision, the single judge:

> **".......misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and that as a result there has been misjustice" – see <u>MBOGO AND ANOTHER VS. SHAH</u> [1968] E.A 93."**

The misdirection can take the form of the single judge failing to take into account a relevant matter, or taking into account an irrelevant matter, or misunderstanding some aspect of the law touching on the matter, or the decision, in all the circumstances, being plainly wrong. In sum, the full court cannot simply arrogate itself the power to substitute its own discretion for that of the single judge, and the onus is on the applicant to satisfy the full court that the single judge did not exercise his discretion judiciously.

We have considered the matter fully but we are not satisfied that there was any error in principle in the manner in which the learned single judge exercised his discretion. Despite the difficulty in making sense out of the records submitted by the applicant, the judge admirably summarised the facts and the issues at stake. The judge considered whether the procedure was complied with in issuing hearing notices. The judge also considered the period of delay in seeking the discretionary remedy and found it inordinate. The judge further considered the conduct of the applicant in disclosing or failing to disclose material facts.He was acutely aware that the applicant was unrepresented and took that into account. All those were relevant factors in the matter before him, which the judge considered and exercised his discretion in accordance with the facts and applicable law and we have no reason to interfere, for none has been disclosed.

The only factor we may perhaps consider, which was not expressly considered, was whether there was any prejudice caused to any of the parties by the dismissal of the application. We find none. The dismissal of the application before G.B.M. Kariuki JA meant that the application before Koome JA stood dismissed. That application merely sought extension of time to file some amended or missing documents in the record of appeal.Whether those were primary or secondary documents is no longer an issue after the amendment to the Rules in the year 2010. As supplementary records may readily be filed under the relevant Rules, we find no prejudice caused to either party and no reason to delay any further the hearing and disposal of the main appeal which is on its 18th year before this Court!

We dismiss this reference with costs to the respondent.

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

**P.N. WAKI**

**............................**

**JUDGE OF APPEAL**

**M. WARSAME**

**.............................**

**JUDGE OF APPEAL**

**P.O. KIAGE**

**.............................**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**