



IN THE COURT OF APPEAL AT NAIROBI

(CORAM: OUKO, KIAGE & MURGOR, J.J.A)

Civil Application No. Nai 200 Of 2013 (U.R. 144/2013)

Between

MARGARET WARUGURU KUHUNYA.....APPLICANT

AND

ZAKAYO JOSEPH MWANGI.....RESPONDENT

(Application for extension of time to file Notice of Appeal and Record of Appeal out of time in the intended appeal from the judgment of the High Court of Kenya at Nairobi (Khamoni, J.) dated 12th April, 2002

in

SUCCESSION CAUSE NO. 2393 OF 1997)

RULING OF THE COURT

We remind ourselves of the settled proposition in law, laid down in a long line of cases, that a single Judge of this Court exercises unfettered discretion granted by **Rule 4** of the Court of Appeal Rules when considering whether or not to extend time for the doing of any act under the Rules or limited by an order of the court. That discretion must, however, be exercised upon proper principles of law bearing in mind that the single Judge, as a member of the Court, exercises that discretion on behalf of the whole Court; that the full bench of the Court would only interfere with the exercise of the discretion if it be shown that in the process of

exercising the discretion, the single Judge took into account irrelevant matters or failed to take into account relevant factors or that the single Judge misapprehended some aspect of the applicable law or his decision was plainly wrong and could not have been arrived at by the Court properly directing itself to the evidence presented to it and the applicable law. See **Gitetu V. Kenya Commercial Bank Ltd** (2009) KLR 545.

We further remind ourselves that a reference to a full bench from a decision of a single judge is not an appeal and it is not a consideration that the full court would have come to a different result if it had been sitting in place of the single Judge. In other words, the full bench will be slow to interfere with the exercise of judicial discretion by its member sitting alone except as explained above, because discretion is fundamental to the judicial system and its exercise is an integral part of the role of any judge, sitting alone or as a bench.

Having reminded ourselves of these well-known principles, we turn to consider how this reference arose. Khamoni, J, in his judgment rendered on 12th April 2002, distributed the estate of the late Zakayo Kuhunya Joseph between the households of his two widows in a manner that aggrieved the second widow, the applicant herein. The applicant did not file a notice of appeal or the record of appeal as envisaged under **Rule 74 (2)** of this Court's repealed rules, which was in force in 2002.

She then moved the single Judge, (Maraga, JA) by her application filed on 8th August 2013 and brought under **Rule 4** for orders that she be granted leave to file a notice of appeal and a record of appeal out of time. She explained that the delay in filing the two documents was due to the fact that her erstwhile advocate, P.K. Njoroge failed to lodge the documents and to update her even after instructing him to do so. Her ill health was another explanation for the delay. In support of this, she relied on a bundle of medical notes. When she realized that P.K. Njoroge, Advocate had not filed the appeal, she instructed Jesse Kariuki, Advocate. In 2009, Jesse Kariuki, Advocate was involved in a near-fatal road accident and was hospitalized for a while. It was not until the applicant instructed her present advocate that she learnt that the appeal had not been filed. In the circumstances, the applicant urged the single Judge to find that the delay was beyond her control; that if she does not challenge the judgment of the High Court on appeal, the execution of the decree would be prejudicial.

The respondent opposed the application citing the long delay (of 11 years) in bringing it, the insufficient explanation proffered for the delay as well as the prejudice he stands to suffer as the property in dispute has been subdivided and distributed to beneficiaries.

Following the single Judge's ruling of 19th December 2013 dismissing the application, the applicant, through counsel, has asked a full bench of the Court to consider the application afresh.

The single Judge, after properly appreciating his role in determining the application and the criteria he was required to apply in considering it and relying on two authorities, **Martim V. Kibaru** (2005) e KLR and **Muchungi Kiragu V. James Muchungi Kiragu & Ano**. Civil Application No. Nai. 356 of 1996, held that the applicant had failed to explain the 11 years delay. He found no merit or evidence that due to ill-health, the applicant could not contact her advocates or confirm whether or not the appeal had been filed; that the applicant having instructed Jesse Kariuki, Advocate in 2005, some four years before the alleged near-fatal accident in 2009, no account was offered for this period. The learned Judge finally found that to grant the application would be prejudicial to the respondent.

We reiterate that that conclusion was reached by the learned Judge pursuant to powers vested in him by **Rule 4**, which provides that:-

“4. 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.”

The consideration for the grant of leave under **Rule 4**, which we have noted were correctly articulated by the leaned single Judge, are the length of the delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and (possibly) the chances of the appeal succeeding if the application is granted.

The learned Judge, on the basis of material before him exercised his discretion to decline to grant leave for extension of time. It has not been demonstrated to us that on the facts presented by the applicant, the learned single Judge exercised his discretion arbitrarily or capriciously or perversely or that he ignored the well settled principles of law governing the grant or refusal of leave to extend time.

Even though the length of delay alone has never been regarded by the Court as being the determinative factor, (but rather) the excuse given for the delay and the prejudice likely to be occasioned to the respondent in this case all go to show that it could not be in the interests to extend time and the learned single Judge cannot be faulted for rejecting the applicant's application.

Consequently, finding no merit in this reference, we dismiss it with costs.

Dated and delivered at Nairobi this 3rd day of October 2014.

W. OUKO

.....

JUDGE OF APPEAL

P.O. KIAGE

..... **JUDGE OF APPEAL**

A.K. MURGOR

..... **JUDGE OF APPEAL**

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

DEPUTY REGISTRAR

/mgkm