



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: MUSINGA, M'INOTI & MURGOR JJA**

**CIVIL APPLICATION NO. NAI. 272 OF 2012 (UR 197/2012)**

**BETWEEN**

**VINCENT KIMANI.....1<sup>ST</sup> APPLICANT**

**ARCADIUS NJORA CHEGE.....2<sup>ND</sup> APPLICANT**

**ONESMUS BURUGU "C" .....3<sup>RD</sup> APPLICANT**

**AND**

**MICHAEL NJOROGE "B" & OTHERS.....RESPONDENT**

*(An application for extension of time to file and serve a record of Appeal out of time in an Intended Appeal from a Ruling if the High Court of Kenya at Nairobi L. Njagi J, delivered on the 16<sup>th</sup> September 2009*

*in*

*H.C.C.A. No. 5 of 2009)*

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**RULING OF THE COURT**

This is a reference from the decision of a single judge (Mwera, J.A.) delivered on 24<sup>th</sup> May 2013 in which the learned single judge declined to grant the applicants, an extension of time within which to file and serve the record of appeal against the Ruling of L. Njagi, J. delivered on 16<sup>th</sup> September 2009.

The application is premised on a Notice of Motion dated 31<sup>st</sup> October 2012 seeking orders that;

1. ....
2. *That the Applicants be given leave to file and serve the Record of Appeal out of time and that time be given for filing the Record of Appeal.*
3. *That time for filing the Record of Appeal be extended*

4. *That the Honourable Court be pleased to issue any such further orders it may deem fit and convenient.*

When the matter came up before us on 4<sup>th</sup> November 2014, **Mr. Ondieki**, learned counsel for the applicants informed us that the intended appeal was in respect of a land dispute dating back to 1979, where two conflicting decrees were extracted at different times, both relating to the same award. Counsel sought to persuade us that the learned single Judge had misdirected himself when he failed to appreciate that the delay in filing the appeal arose because the High Court file could not be traced, and that it is only upon the Chief Justice's intervention that the missing file was located. As a consequence, the applicants had been unable to file the appeal within the 90 days period as ordered in Nambuye, J.'s (as she then was) ruling of 21<sup>st</sup> October 2011. Counsel submitted that the applicants should not be denied justice on account of this structural failure in the justice system, and instead, should be provided with an opportunity for their appeal to be heard. Counsel continued that the Court should have an opportunity to scrutinize the two decrees, and to make a fair and just pronouncement on the correct decree. Counsel concluded that the Court should have regard to the overriding objectives mandated by section 3A and 3B of the Appellate Jurisdiction Act, and that in any event the record of appeal was ready to be filed within a period of 14 days.

On his part, **Mr. Kahuthu** learned counsel for the respondent opposed the application, and submitted that it is the ruling of Njagi, J. of 16<sup>th</sup> September 2009 to which the intended appeal relates, and not the ruling of Nambuye, J. of 21<sup>st</sup> October 2011. Following the ruling of Njagi, J. the applicants duly lodged a Notice of Appeal on 30<sup>th</sup> September 2009. After that, no request for proceedings was lodged, and neither did the applicants file any record of appeal. Counsel pointed out that, the certificate of delay of 12<sup>th</sup> October 2012 was in respect of the appeal in HCCA No. 5 of 2009 following the ruling of Nambuye, J. and not an appeal to this Court; that no Notice of Appeal was filed in respect of this ruling, but, that there was an attempt to combine the Notice of Appeal dated 30<sup>th</sup> September 2009, with the request for proceedings of the High Court to apply for extension of time in this Court. This was wrong, and was the basis upon which the single judge declined to grant the extension. According to counsel, the file had always been available, which was confirmed by a finding of GBM Kariuki, J. (as he then was). Counsel concluded that the Court should uphold the learned single judge's decision.

It has been stated time and again that in an application under **rule 4** of the rules of this Court, the learned single judge is called upon to exercise his discretion, which discretion is unfettered. We consider it appropriate to re-emphasize this principle by referring to the decision in **Mwangi vs Kenya Airways Ltd [2003] KLR 486** in which this Court stated:-

***“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI, (Civil Application No. Nai. 255 of 1997) (unreported), the Court expressed itself thus:-***

***It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.***

***These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an unfettered discretion and so long as the discretion is***

***exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the***

***issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.”***

In a reference, the full court is slow to interfere with a single judge’s discretion, and before doing so, it must satisfy itself that the single judge misdirected himself in some matter, and as a result arrived at a wrong decision or, that the learned single judge misapprehended the law or failed to take into account some relevant matter.

In his ruling the learned single judge carefully considered the material, the facts and reasons in respect of the orders sought, and we set out an excerpt of the ruling *in extenso* thus,

***“After having heard submissions, gone over the affidavits and perused the records and all the materials placed before me, I am disinclined to grant the orders sought because the applicants appear to have misconceived and misapprehended the question of the appeals- one intended for this court and HCCA 5/09 in which judges Njagi and Nyambuye delivered rulings.***

***Njagi J. delivered his ruling in HCCA 5/09 on 16<sup>th</sup> September, 2009 declining to order a stay. The applicants sought a review of that ruling together with a stay of execution. Nyambuye J granted the orders in 21<sup>st</sup> October, 2011 in which she gave a clear condition:***

***“...to move speedily to ready the appeal for hearing and disposal within 90 days from the date ... of this ruling.”(underlining added.)***

***The appeal in question which was/is HCCA 5/09. That was the appeal in which the applicants had to ensure that it was prepared, heard and determined in 90 days. That given period of time had nothing to do with the intended appeal to this court against Njagi J’s ruling on 16<sup>th</sup> September, 2009, as the applicants appear to represent here. Thus they are entirely in error to appear to propose to this court that the 90 days were for the appeal intended to be lodged in this Court. And even if that were the position, hopefully honestly mistaken, there has been no demonstration on the part of the applicants that from the time they filed the notice of appeal here, they did anything more to file the appeal itself. It has not been shown the failure to file the appeal in time was because of this or that reason.”***

Clearly, the learned single judge was able to discern that the record incorporated materials that were extraneous and inapplicable to the intended appeal. We say this because, on the one hand, following the ruling by Nambuye, J. on 21<sup>st</sup> October 2011, which allowed the review of the orders of Njagi, J. in HCCA No. 5 of 2009, it is clear that, the ensuing request for certified proceedings and reminders, culminating in the certificate of delay of 12<sup>th</sup> October 2012 from the Deputy Registrar, were in all respects for the purposes of that review. Since this material did not appertain to the intended appeal in this Court, the learned single judge found it to be irrelevant, and an inappropriate basis for the exercise of his discretion under **rule 4**.

On the other hand, there was a Notice of Appeal lodged on 30<sup>th</sup> September 2009 in respect of an intended appeal to this Court against the ruling of Njagi, J. but subsequent to which, no further steps were taken by the applicants, either to obtain the certified proceedings, or to file a record of appeal, and no reasons or material was presented to explain this failure.

**In Trade Bank Ltd (In liquidation) vs L.Z. Engineering Construction Ltd & Another Civil Appl. No. NAI. 282/98**, the court stated thus:

***“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon***

***reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”***

What is of relevance is that, having filed the Notice of Appeal to this Court on 30<sup>th</sup> September 2009, the applicants were required to specify the reasons for the delay in failing to file the appeal within the stipulated period. As the learned single judge pointed out, no explanation was provided, and consequently, there was no material upon which he could have exercised his discretion to extend time for filing the intended appeal. Having said that, we are satisfied that the learned single judge took into account the relevant factors, and there is absolutely nothing on the record to show that he failed to appreciate any part of the evidence or law essential to the exercise of his discretion.

Accordingly, we do not find any merit in the motion dated 31<sup>st</sup> October 2012 which we hereby dismiss with costs to the respondent.

***Dated and delivered at Nairobi this 18<sup>th</sup> day of December, 2014.***

**D. MUSINGA**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**