IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, MWILU & GATEMBU, JJ.A.)

CIVIL APPLICATION NO. NAI.107 OF 2011

BETWEEN

LUCAS ODONYA (*Suing on his behalf and on behalf of 42 Others (All being former employees of the Rift Valley Railways (Kenya) Ltd*.....APPLICANTS

AND

RIFT VALLEY RAILWAYS (KENYA) LTD.....RESPONDENT

(Application for leave of extension of time for lodging of the Notice of Appeal and Record of Appeal out of time from the Judgment and Orders of the High Court of Kenya at Nairobi (Rawal J.) delivered on 3rd December, 2010

in

H.C.C.C. NO.33 OF 2009)

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RULING ON REFERENCE TO FULL COURT

One Lucas Odonya filed the notice of motion dated 14th April, 2011 under Rules 4 and 47 of the Rules of this Court stating that he had filed that motion on his own behalf and on behalf of 42 others, all former employees of the respondent, Rift Valley Railways. The orders sought were:

i. that time be extended by thirty days or as the court may deem fit and just for the applicants to lodge a notice of appeal;

ii. that time be extended for sixty days to enable the applicants to file record of appeal;

iii. for any other or further relief.

It was stated in the grounds that Rawal J, as she then was, delivered a judgment in No. HCCC 33/09 on 3rd December, 2010 in favour of the applicants with a direction that payment be made to them by the respondent, of a certain sum of money by 31st December, 2010. As it transpired at the hearing of this application and as we gathered from the affidavits and submissions, the applicants waited for the said payment to be made first before considering whether or not to appeal the judgment. And that it took their lawyer considerable effort over the court's Christmas vacation to mobilize all the applicants, who had moved to different parts of Kenya, to give him instructions to appeal.

Finally they all agreed to file the appeal but by which time the time to lodge notice of appeal under Rule 59(2) and then the appeal itself (Rule 82) of the Rules of he Court had long lapsed, hence the present application. The supporting affidavit by the said Lucas Odonga more or less repeated what was stated in the grounds and only added that the applicants applied for typed proceedings on 3rd February, 2011 and that their appeal had high probability of success. Further that if the orders sought were not granted the applicants could suffer loss and damage. A draft memorandum of appeal was annexed. Bosire JA heard the matter as a single judge. It has now come to us as a reference to the full bench under Rule 55 of this Court's Rules.

The short background of the applicants' claim in the High Court was that once upon a time they were employees of Kenya Railways Corporation (KRC). Then the respondent came on board to take over the running of the services formerly rendered by KRC and the two companies signed a concession agreement whereby the services of the applicants were transferred to the respondent. Soon thereafter the respondent gave them a month's notice declaring them redundant. The applicants were given one month's severance pay and they signed clearance certificates to the effect that they had no further claims against the respondent. Being dissatisfied with the whole process, the applicants sued the respondent claiming, among other things, special and general damages, costs and interest. On 3rd December, 2010, Rawal J delivered the judgment in which she found for the applicants, directing that they be paid one month's salary and interest at 2% per month on the 2 months' salary they had been paid. As stated above the applicants did not file a notice of appeal or the appeal itself in the statutorily stipulated time.

Ms Akuno, learned counsel for the applicants submitted that they had wanted to be paid dues as directed by Rawal J on 3rd December, 2010 before filing the appeal. To her, that payment was precedent to appealing and that it had taken quite a while to mobilize the 42 applicants scattered all over Kenya to take instructions as whether to appeal. The failure to appeal was not intentional. The applicants had since received certified copies of proceedings. So if we grant them their prayers they would proceed to lodge the notice of appeal as well as the appeal itself.

Mr. Thuo, learned counsel for the respondent resisted the application saying that in a reference like this, the way to approach it, was for the applicant to demonstrate where the single Judge erred in the decision dismissing the application. While referring to the parameters set out in ***Mombasa Development Ltd vs Jimba Credit Corporation Ltd & Another*** ***Civil Application No.317 of 2004*** Mr. Thuo told us that the single judge (Bosire JA) addressed the issues of length of delay to file the respective processes required; reasons for the delay; whether there was an arguable appeal; and degree of prejudice likely to occur.

Counsel proceeded to point out incidents of delay. The notice of appeal was not filed within 14 days or at all, following Rawal J's judgment and the same was never served on the respondent; the present motion was filed 5 months after that judgment; typed proceedings were applied for 2 months after the judgment. Even after the single judge's ruling of 7th October, 2011, the prayer seeking a reference to the full bench was not copied to the respondent. The respondent had to request for the notice of motion when its hearing date was served on it.

Still on this point of delay, Mr. Thuo posited that it was not necessary for the applicants to get payment as directed by Rawal J before lodging their appeal and that there was no reason why the appellants had to be mobilized before setting the appeal process in motion.

Moving to the intended appeal, we were told that the draft memorandum did not clearly attack Rawal J's decision and instead it focused on the remedies the High Court should have awarded. Nothing pointed to the error/omission committed by the trial judge.

Mr. Thuo then addressed the aspect of prejudice and told us that when his client rested sure that after making payments as the learned judge ordered, that had brought litigation to an end, the applicants sprung this process to try to lodge an appeal. That the respondent is likely to be further prejudiced, in the event, this application is dismissed with costs. It is not sure how it will recover the costs with the applicants scattered all over Kenya. The respondent did not get costs in the High Court and it has not been shown the authority of the 42 applicants to pursue this matter. Mr. Thuo concluded that Bosire JA. covered all the relevant aspects of the motion and correctly dismissed it. We were asked to do likewise.

In deciding this reference we had before us the background of the cause and what had transpired since Rawal J determined the cause. We moved to the decision of the single Judge (Bosire JA) and gave particular attention to the basis of refusing the leave sought to file a notice of appeal as well as the record itself out of time. Then we have ourselves addressed the aspects an applicant coming before us on a reference from a single judge's decision, should address.

It is not in doubt that the learned single judge was aware of the discretion he had under Rule 4 of the Rules namely, to exercise the power to assist a party who through inadvertence or explainable and excusable delay was unable to comply with requirements of Rule 75 of the Rules, that is, an aggrieved party filing a notice of appeal within 14 days of the disputed decision. The exercise of the power under Rule 4 is not intended to aid the indolent and those who cannot satisfactorily explain a given delay to take essential steps in filing notice of appeal and/or the appeal itself.

The learned judge then went into the various aspects of delay we have stated above, long periods that were not explained or explained satisfactorily like waiting for payments from the respondent before moving to appeal; mobilizing all the applicants before filing a simple document like the notice of appeal; failing to serve or notify the respondent of the present motion. To the learned judge, all these were not good enough to warrant discretion to extend time for any purpose. He dismissed the application.

As for this reference the governing regime of deciding the same is found in ***Mombasa Development Ltd Case*** (supra) wherein this court delivered itself:

> ***"Although such a reference is not an appeal, it is in the nature of one. By dint of Rule 54(1) of the Rules, a dissatisfied party may seek to have the decision of a single judge varied, discharged or reversed by the full court. To succeed however, the applicant must show that the single judge took into account an irrelevant matter, or that he failed to take into account a relevant matter; or he misapprehended the law applicable to the case; or that he misapprehended the facts of the case and hence misapplied the law to them or that his decision, taking into account all the circumstances of the case, is plainly wrong."***

To paraphrase the above, the applicants ought to show us that either:

i. the single judge took into account an irrelevant matter; or

ii. he failed to take into account a relevant matter; or

iii. he misapprehended the law applicable to the case; or

iv. that he misapprehended the facts of the case and hence misapplied the law; or

v. that his decision taking into account all the circumstances of the case, is plainly wrong.

We do not forget what was earlier referred to regarding the judge's wide discretion while considering whether to extend time under Rule 4 or not, namely the length of delay; the chances of the appeal succeeding if the appeal is granted and the degree of prejudice to the respondent if the application is granted (see ***Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. Nai 255 of 1997***).

We have set out the respective arguments by both counsel in this reference. They need no repeating. All we can say at this point is that the learned single judge considered all the relevant facts, law and circumstances of the application before him and dismissed it, giving reasons at every stage.

On this reference Ms Akuno learned counsel for the applicants did not demonstrate or even try to demonstrate where the learned single judge erred, according to the conditions set out in the ***Mombasa Development*** case (above) whereupon he came to a wrong decision in dismissing the motion. We are satisfied that the learned judge properly exercised his discretionary power under Rule 4 of the Rules of this Court and came to the right conclusion. We are of the view that allowing the prayers sought, would prejudice the respondent.

In the result we dismiss this reference with costs.

Delivered and dated at Nairobi this 12th day of July, 2013

J. W. MWERA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. GATEMBU-KAIRU

…….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

/jkc