IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M KARIUKI, OUKO & MURGOR JJ.A)

CIVIL APPLICATION NO. NAI. 176 OF 2010

BETWEEN

WANDU LIMITED……..……..…….. ……..…….. APPLICANT

AND

AFRICAN BANKING CORPORRATION LTD. ….....….RESPONDENT

(An application for extension of time to file an intended appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (F.A Ochieng', J.) delivered on 7th December, 2006)

in

H.C.C.C NO. 402 OF 2002)

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RULING OF THE COURT

Wandu Limited, the applicant in an amended motion of 1st December 2010 had applied to a single judge of this Court under Rule 4 of the Court of Appeal Rules for an order that the time within which to file and serve the notice and record of appeal be extended. The single judge *(Maraga, JA)* allowed the application and ordered that the notice of appeal (with no mention of the record of appeal) be filed and served within 10 days from the date of the order. Before us therefore is a reference to a full court from that decision under **Rule 55 (1) (b)** of the Court of Appeal Rules.

The background to this reference may briefly be stated as follows; The applicant, the registered owner of property **L.R. NO 209/8559 NAIROBI** was advanced a loan facility by the respondent in the sum of **Kshs. 31,000,000/=** secured by a charge on the aforesaid property. The applicant evidently defaulted in the repayment and agreed with the respondent to look for prospective third party buyers to salvage the property from auction. For the purposes of the intended sale, both parties gave instructions to their independent valuers to value the property and submit their reports. The resultant valuation reports from both valuers had a huge variance in price. The applicant valuer set the price at **Ksh. 80,650,000/-** while the valuer for the respondent set the market price at **Ksh. 57,000,000/-** leading to a contention as to the actual market price of the property. When no concrete consensus was reached, the respondent exercised its statutory power of sale under the charge by selling the property through a public auction on **17th September 2001** realizing **Ksh. 31,000,000/-.**

Aggrieved by the action, the applicant filed a suit before the High Court on **3rd April, 2002**. The applicant's case was that the respondent had a duty to sell the property at the market value, and further that the respondent was by reason of negligence liable for the said deficit and under-valuation. During the trial, both parties framed three issues for determination by the court as follows;

1. **What was the value of the market price of the property?**

2. **Whether respondent was obliged to sell the property at market price?**

3. **Who was to be responsible for the costs?**

After evaluation of the evidence, the applicable laws and rival arguments by both parties, the learned Judge dismissed the suit with costs on **7th December 2006.** Aggrieved by that decision, the applicant filed a Notice of Appeal on **15th December, 2006** and on the same date filed an application requesting proceedings and judgment. Since then, no steps have been taken to file the intended appeal. Instead the applicant brought the instant application dated 20th July 2010, 3 years and 7 months after the filing of the Notice of Appeal, and nearly 6 years from the date of the judgment.

The application which was later amended on 1st December 2010 pursuant to leave of this Court is premised on the grounds contained in the supporting affidavit of Dawood Khan Mohammed Khan, the only local (Kenya) director and shareholder of the applicant company, summarized as follows:-

i. That on or about August 2008 the deponent fell gravely ill and was admitted into a local hospital; and

ii. That he was eventually flown to India in May 2009 where he underwent a heart surgery and has been recuperating until end of 2009.

It is the applicant's position, therefore that, due to deponent's poor health it was unable to instruct counsel to file and lodge the record of appeal as the only other director of the applicant company is domiciled in the United Kingdom. It was also submitted before the single judge that the intended appeal is arguable as the property was sold for a grossly undervalued amount and further that the respondent will not suffer any prejudice. The application was opposed on the grounds that it was brought after inordinate delay and without explanation for the delay.

After considering these rival submissions, the learned single judge found as follows:-

> **"….One of the major grounds in an application for extension of time like this is whether or not the delay is explained. In this case, whereas <u>I agree with Mr. Fraser that there is some exaggeration of the heart problem of the applicant's director,</u> it cannot be said to have been a simple ailment. By any standards, in my view, a heart problem requiring surgery out of the country is not a simple sickness. <u>I find that at the critical time when the applicant's advocates received copies of the proceedings and Judgment, the applicant's director was in and out of hospital and therefore unable to give the applicant's lawyers instructions</u> on the appeal in time. In the circumstances I am satisfied that the delay in filing the record of appeal in time has been satisfactorily explained…"** (Our emphasis).

Following this decision, as we have already said a reference to a full bench of the court has been made. It is now accepted that in exercising his unfettered discretion under **Rule 4** of the Court of Appeal Rules, a single member of the court is said to be acting on behalf of the full court by virtue of **Rule 55 (1) (b)** of the Rules. Equally, it must be borne in mind that this reference does not constitute an appeal from the decision of a single judge to a full bench.

It is also settled that the full court can only interfere with the exercise of a single judge's discretion where it can be shown that in coming to his decision, the single judge took into account an irrelevant factor

which he ought not to have taken into account, or that he failed to take into account a relevant factor which he ought to have taken into account, or that he applied a wrong principle of law, misapprehended the nature of the evidence placed before him and thus arrived at a wrong conclusion, or short of these factors, that the single judge's decision was plainly wrong, all factors and circumstances considered. See **Thuita Mwangi V. Kenya Airways Ltd,** Civil Application No. Nai 162 of 2002.

The foregoing are the principles that must guide us in deciding this matter. But before we determine whether or not the learned single judge complied with those principles, we need to set out what the law required him to do as he considered the application under **Rule 4** of the Rules (extension of time) by reiterating what was said in **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi** Civil Application No. Nai 255 of 1997 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."

We further reiterate that the list of factors the court would take into account in deciding whether or not to grant an extension of time is not exhaustive. It follows that, so long as the discretion by the single judge is exercised judicially, the judge would be perfectly entitled to consider any other factor outside those listed above provided the factor he considers is relevant to the issue he is dealing with. In the present reference, Mr. Frazer asked us to reverse the decision of the learned single judge on the basis that, he only considered a single factor in deciding the application, the applicant's director's illness and failed to consider the prejudice to the respondent, the contradictions on the dates when the director is alleged to have been ill and whether the appeal was arguable. For the applicant, it was submitted by Mr. Abdulahi that the respondent does not stand to suffer any prejudice by the application being allowed; that the learned single judge was so persuaded and relied on one ground, that the delay was explained on the basis of the director's illness; counsel also submitted that **Rule 55** is a technical provision which is inferior to the provisions of **Article 159** of the Constitution.

One of the most important questions the Court has to ask is whether the application for extension of time was promptly made. The applicant must account for entire period of the delay. The judgment intended to be appealed from was delivered on 7th December, 2006. One week later, on 15th December 2006, the applicant's advocates applied for copies of the proceedings and judgment. It took nearly 2½ years from the date of the judgment for the High Court to avail the proceedings and judgment to the applicant's advocates. According to a certificate of delay, annexed to the application, the advocates were notified of the availability of the proceedings and judgment on 22nd July 2008.

The advocates then collected the copies of the proceedings and judgment upon payment of fees on 7th August 2008. The present application was initially brought on 20th July 2010 before it was amended. It is the period between 7th August 2008 and 20th July 2010 that the applicant was being called upon to account for. That is a period of nearly 2 years. The director of applicant company deposed that;-

> **"2. …….on or about mid September 2008 I became gravely ill and was admitted to one of our local hospitals for treatment……**
>
> **3. …….due to complications arising from the same, I was constantly in and out of the hospital until around April 2009.**
>
> **4. ……since my condition was not improving, my physician elected to have me flown to India for further treatment……and spent the better half of the year recuperating until around December 2009, ……heart transplant……..was done on or about 26th May 2009 ……**

> **5. …… Since 2008, I have been frequenting hospitals in India for further check-up and tests……."** (Emphasis supplied).

According to the deponent, due to his illness there was delay in filing the appeal. Before September 2008, when the director became gravely ill, he had instructed his advocate to challenge the decision of the High Court, demonstrated by the notice of appeal filed on 15th December 2006, just a week after the delivery of the judgment. It was one month after the copies of the proceedings and judgment had been supplied to the applicant's advocates. In any case, it is not clear whether the director was in hospital in September 2008 as deposed by him or between 18th and 20th August 2008 as explained by his doctor in a letter annexed to the supporting affidavit. Having recuperated in December 2009, no explanation has been offered why this application was not filed until 7 months later. Another interesting aspect of this matter relates to two letters by the applicant's present advocates annexed to the respondent's replying affidavit and dated 15th and 30th September 2008 respectively, the very period the applicant's director was said to have fallen gravely ill. In the first letter, the applicant's advocates wrote to the respondent's advocate as follows:-

> **"……In the meantime, our record of appeal is <u>due for filing in the Court of Appeal</u>. However, the defendant's list of documents availed to us by our predecessors M/S Rustum Hira Advocates is in complete with some documents as marked with astenix …… It is my request to your good office for the said documents to <u>complete my record of appeal for filing</u>……."**

Clearly, the applicant's erstwhile advocates having filed the notice of appeal and the current advocates having been ready to file the record, save for some documents which were later supplied to them by the respondent's advocates on 6th October 2008, the question of the director's availability to "sufficiently" instruct the advocates cannot be tenable. The second letter is in the following terms:

> **"Thank you very much for your letter……. <u>We have taken instructions from my client over</u> the same, and he has declined the offer to abandon the appeal over your costs."**

In the applicant's advocate's own words the applicant was available and had given them instructions on the offer by the respondent's advocates to withdraw the appeal. This court has repeatedly said that whenever there is delay, then, irrespective of the length of the delay, some explanation must be given to enable the single judge exercise his discretion in favour of the applicant. The explanation itself must be tenable.

The learned single judge having found that the applicant's director's ailment was exaggerated did not consider the period of his disability, if at all; the prejudice to the respondent who has waited since 18th December 2006 when the notice of appeal was served on them. Having waited for that long period the respondent was entitled to assume that the applicant had accepted the decision of the High Court and abandoned its intention to appeal. While, like the learned single judge, we sympathize with the director of the applicant company for his illness, in our view, however, his illness was more the excuse than the reason for the delay.

We come to the conclusion from what we have stated in the foregoing paragraphs that the explanation offered by the applicant did not relate to the delay hence, we find that the learned single judge failed to take into account the important and relevant factor of the delay thus arriving at a wrong decision. The reference is allowed, application for extension of time by way of amended notice of motion dated 1st December 2010 is dismissed with costs.

Dated and delivered in Nairobi this 11th day of October 2013.

G.B.M. KARIUKI

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JUDGE OF APPEAL

W. OUKO

……..

JUDGE OF APPEAL

A. **K. MURGOR**

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR