IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, ONYANGO OTIENO & NYAMU, JJ.A.)

CIVIL APPLICATION NO. NAI 95 OF 2010 (UR 70/2010)

BETWEEN

JUSTICE SAID JUMA CHITEMBWE.....APPLICANT/AFFECTED PARTY

AND

EDWARD MURIU KAMAU.....1ST RESPONDENT/1ST APPLICANT

STEPHEN KIPKENDA KIPLAGAT.....2ND RESPONDENT/2ND APPLICANT

KENYAANTI-CORRUPTION COMMISSION.....3RD RESPONDENT/1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT/2ND RESPONDENT

SENIOR RESIDENT MAGISTRATE,

ANTI-CORRUPTION COURT, NAIROBI.....5TH RESPONDENT/3RD RESPONDENT

(An application for leave for the applicant/affected party to be enjoined as a party in an application staying proceedings in Anti-Corruption Case No 36 of 2009 pending in the Chief Magistrate's Court Nairobi in an intended appeal from the ruling and orders of the High Court of Kenya at Nairobi (Khaminwa, J) dated 20th April 2010

in

H.C. MISC. APPLN. NO. 128 of 2010)

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RULING OF THE COURT ON REFERENCE TO FULL COURT

This is a Reference to full Court from a decision of a single Judge dated 5th October 2010.

A brief background to this matter is necessary in order to appreciate what this reference is all about.

Before the learned single Judge of this Court (Githinji, J.A.) was one Justice Said Juma Chitembwe as the applicant who sought to be joined in application No. NAI 95 of 2010 only for the purposes of hearing and determination of an application to set aside stay orders granted by the Court on 11th June 2010.

The applicant and three others (Rachael Khavaya Lumbasyo, Stephen Kipkenda Kiplagat and Edward Muriu Kamau) were jointly charged before the Senior Resident Magistrate Anti-Corruption Court in Criminal Case No. 36 of 2009 with the offence of conspiracy to defraud contrary to ***section 317 of the Penal Code***. They were also jointly charged with an alternative count of conspiracy to commit an offence of corruption contrary to ***section 47A (3) of the Anti-Corruption and Economics Crimes Act, No. 3 of 2005***. The applicant was in addition jointly charged with Rachael Khavaya Lumbasyo with the offence of abuse of office contrary to ***section 46*** as read with ***section 48of the Anti-Corruption and Economic Crimes Act*** or alternatively with the offence of careless failure to comply with the applicable procedures and guidelines relating to management of funds.

On 5th May, 2010 Stephen Kipkenda Kiplagat filed a Judicial review application in the superior court (Criminal Application No. 128 of 2010) seeking, *inter alia*, an order of certiorari to quash the decisions to charge him and an order of prohibition, prohibiting the anti-corruption court from proceeding with the criminal charge. That application was heard by the superior court (Khaminwa, J) who dismissed the application. The applicant therein (Stephen Kipkenda Kiplagat) filed a notice of appeal and subsequently filed Civil Application No. NAI 95 of 2010 in this Court seeking a stay of further proceedings in the criminal case pending the hearing and determination of the intended appeal.

On his part Edward Muriu Kamau also filed a Judicial Review application being Criminal Application No. 80 of 2010 in the superior court seeking similar orders of certiorari and prohibition. That application was similarly dismissed. The applicant therein filed Civil Application No. NAI 112 of 2010 in this Court seeking a stay of criminal proceedings, pending appeal or alternatively a stay of criminal prosecution against him.

The two applications by Kiplagat and Kamau respectively were listed for hearing together. This Court ordered both applications to be heard together on a date to be fixed on a priority basis, but in the meantime the Court stayed the hearing of the criminal case in the anti-corruption court.

It would appear that the applicant, Justice Said Juma Chitembwe was aggrieved by temporary stay order granted by this Court in the two applications by Kiplagat and Kamau. That is when he (Chitembwe) went before the learned single Judge of this Court seeking an order that he be joined in the first application (No NAI 95 of 2010) to give him *locus standi* to apply for the vacation and variation of the order of stay. It was the applicant's contention that he was never served with the two applications made in the superior court or the two applications filed in this Court. He further contended that no prejudice would be caused to the two applicants (Kiplagat and Kamau) if the order to be joined in the applications was granted by the learned single Judge of this Court.

The application before the learned single Judge was opposed by Mr. Oriri Onyango the learned Deputy Chief Public Prosecutor mainly on the ground that there was inordinate delay on the part of the applicant in bringing his application and that the application was an abuse of the Court process as the conspiracy charge could not be tried separately.

The learned single Judge considered the submissions before him and allowed the applicant's application to be joined in Civil Application No. NAI 95 of 2010. In allowing the applicant's application the learned single Judge in his ruling delivered on 5th October, 2010 rendered himself thus:-

> **The two applicants in the pending applications who are the 1st and 2nd respondents in this application do not oppose the application. Similarly KACC does not oppose the application.**

The applicant is in essence merely asking a single Judge to clothe him with *locus standi* so as to be heard by the full court on the application for vacation or variation of order staying the criminal proceedings which order no doubt directly affects his trial. The delay alleged by the 4th and 5th respondents is not such as to disentitle him of an opportunity to be heard. The issue whether or not separate trials are feasible is best left to the full Court to decide upon hearing the applicant. The Attorney General is opposing the two pending applications for stay of criminal proceedings.

Seemingly, the applicant is on his side. It is therefore, surprising that the Attorney-General is opposing the application more so when the two applicants in the pending applications have no objection to the application.

In my view, there is no hindrance to this procedural application. I allow it and order that the applicant be joined as sixth (6th) respondent in Civil application No. Nai 95 of 2010. Costs in the application."

It is the foregoing that has given rise to this Reference to full Court. The matter came up for hearing on 20th December 2010 when Mr Waweru Gatonye with Mr. E.N. Mwangi appeared for the applicant (Chitembwe), Mr. Makori for the 1st respondent, Mr. M. Olola for the 3rd respondent, Mr. Oriri Onyango with Mr. Edwin Okello for the 4th and the 5th respondents (the parties which have filed the reference to full court) and Mr. A.B. Shah with Mr. Mubea for Rachael Khavaya Lumbasyo being a party served with the notice of motion dated 6th September 2010. There was no appearance for the 2nd respondent.

Mr Oriri Onyango addressed us at length in a bid to show that the learned single Judge erred in his ruling delivered on 5th October, 2010. It was Mr. Oriri Onyango's contention that the learned Judge failed to apply the correct principles by failing to consider relevant matters as contained in the affidavit of Mr. Edwin Okello. It was pointed out that the applicant (Chitembwe) had never been a party to the proceedings and that he only sought to come into the matter six months after the application had been filed and after the promulgation of the new Constitution which provides for vetting of Judges.

For the foregoing reasons Mr. Oriri Onyango asked us to interfere with the ruling of the learned single Judge of this Court.

In opposing the reference Mr. Gatonye submitted that the applicant was a person affected by the criminal trial and that the orders made affected him although he was not a party to the applications for judicial review. Mr Gatonye went on to submit that the applicant had made a decision that he wanted to be tried and so he did not wish to apply for a stay of proceedings. It was Mr. Gatonye's contention that the applicant cannot be faulted for any delay as he filed his application immediately the new Constitution was promulgated.

Mr Makori associated himself with the submissions of Mr. Gatonye only adding that parties should be given opportunity to be heard. He was of the firm view that this reference must fail.

On his part Mr. Olola reminded us that he had not opposed the application by the applicant and that he has not changed his position.

Mr Shah in his brief submission stated that the learned single Judge was absolutely right in his ruling as the order of stay affected all the four accused persons.

We hope we have sufficiently set out, though only briefly, the background to this reference. We have pointed out how the applicant Chitembwe and three others were charged before the anti-corruption Court and how two of the accused persons (Kiplagat and Kamau) filed applications for judicial review and stay orders. The applicant who had not been a party to those applications made an application to be joined as a party so that he could challenge the orders of stay. He felt that the orders made in those applications would affect him by delaying the trial in the Anti-corruption Court. The learned single Judge of this

Court considered the applicant's pleas and in his view the application had merit and hence allowed it. We have set out his reasoning in reaching that decision. He was, of course, exercising his unfettered discretion in the matter.

In ***MWANGI V KENYA AIRWAYS LTD*** *(2003) KLR 486at pp. 489-490* this Court said:

> **"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:**
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> **"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."**
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> **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."**

And in a ruling of this Court on a reference to full Court in ***JOHN KOYI WALUKE V MOSES MASIKA WETANGULA & 2 OTHERS, Civil Appeal (Application) No. 307 of 2009, (Unreported)*** this Court stated inter alia:

> **"Having considered all that has been urged before us in this reference we would say that we have stated time without number that in exercising the unfettered discretion under Rule 4 of this Court's Rules, a single judge of the Court is doing so on behalf of the whole Court, and the full bench of the Court would only be entitled to interfere with the exercise of discretion if it be shown that in the process of exercising the discretion the single Judge has taken into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account or that he misapprehended some aspect of the evidence and the law applicable or short of these, that his decision was plainly wrong and could not have been arrived at by a reasonable tribunal properly directing itself to the evidence and the law. It is not enough, for example, to show the full Court that had it been sitting in place of the single Judge, it would have arrived at a different result."**

Lastly, in ***AFRICAN AIRLINES INTERNATIONAL LTD VS EASTERN & SOUTHERN AFRICAN TRADE & DEVELOPMENT BANK (PTA BANK) [2003] KLR 140 at page 143,*** this Court made the following observation as regards exercise of judicial discretion:-

> **"Since the grant of the extension is discretionary, this Court would not normally interfere with the exercise of that discretion. The circumstances in which this Court will disturb the exercise of a discretion of a trial judge were stated by the Court of Appeal for East Africa in the case of *Mbogo v Shah (1968) EA 93* which has been applied on numerous occasions by this Court. In his judgment in that case Sir Clement de Lestang V.P. said at page94:**
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> **"I think it is well settled that this court will not interfere with the exercise of its discretion by**

an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Although the authorities cited relate to a reference from a single Judge's ruling under Rule 4 of this Court's Rules, we think the principles stated in the authorities apply to the reference before us since the bottom line is judicial discretion and how this court deals with such discretion by a single Judge of the Court.

In view of what this Court has stated in its various decisions, touching on the learned single Judge's exercise of discretion and on our analysis of this reference as set out elsewhere in this ruling we are satisfied that the learned single Judge exercised his discretion judicially. We have no valid reason to interfere with the learned single Judge's discretion as in his ruling he applied the correct principles in reaching his decision. We must, however, caution that the above notwithstanding, since July 2009 the ball game has changed because when interpreting any rule or provision or the exercise of any power under any rule or provision in the Appellate Jurisdiction Act, the Court is now statutorily required to give effect to the overriding objective pursuant to ***Section 3A of the Appellate Jurisdiction Act***. After applying this provision we are satisfied that the learned single Judge did act justly in the circumstances. The applicant is seeking to challenge the orders which affected him directly and justice demands that he be allowed to do so.

In the result the reference is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 28th day of January, 2011.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR