



REBUPLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: O’KUBASU, WAKI & AGANYANYA, J.J.A.)
CIVIL APPLICATION NO. NAI. 4 OF 2009

BETWEEN
HEZEKIAH MICHOKIAPPLICANT
AND
ELIZAPHAN ONYANCHA OMBONGIRESPONDENT

(An application for extension of time to apply for reference to full Court from the ruling and decree of the High Court of Kenya at Kisii (Kaburu Bauni, J.) dated 18th October, 2007

in
H.C.C.C. No. 207 of 1988)

RULING OF THE COURT

This is a reference from the decision of a single Judge of this Court (*Onyango Otieno, J.A.*) made on 5th December, 2008 wherein he dismissed an application by the applicant for leave to serve a notice of appeal dated 23rd October, 2007 out of time and also for leave to lodge the record of appeal out of time against the superior court’s judgment delivered on 18th October, 2007. The notice of motion was dated 16th July, 2008 and was supported by the grounds set out on the face thereof and also in the affidavit in support. The supporting affidavit attempted to give the reasons for failure to serve notice of appeal upon the respondent and failure to file the record of appeal within the requisite time, hence the need for extension of time.

In his ruling the learned Judge took into account considerations set out in the case of *Leo Sila Mutiso v. Rose Hellen Wangari, Civil Application No. Nai 255 of 1997* and was of the view that the applicant did not satisfactorily explain why he did not serve the notice of appeal upon the respondent within 7 days of lodging it or at all or why it took his counsel 96 days before filing the record of appeal within 60 days of lodging the notice of appeal as required by **rule 82(1)** of Court of Appeal Rules. The learned single Judge then dismissed the application for extension of time, hence the present reference.

The reference was heard by the full bench on the 16th June, 2011 when **Mr. Oonge**, learned counsel for the applicant submitted that though the period of delay was long, reasons for it were given but rejected by the single Judge. In his view, the single Judge did not consider the degree of prejudice suffered by the applicant and that he would suffer irreparable damage. On the other hand **Mr. Bosire**, learned counsel for the respondent supported the decision of the single Judge and stated that for the single Judge to grant or reject an extension of time under **rule 4** of the Court of Appeal Rules he exercises his unfettered discretion. According to counsel, the learned single Judge did not take into account irrelevant factors nor did he fail to take into account relevant factors in order for the full bench to fault the decision reached by him.

We have perused the record in this reference and heard submissions of counsel for the respective

parties before us and are satisfied the single Judge exercised his discretion properly when he made the decision of 5th December, 2008. The applicant's counsel did not explain satisfactorily why after he gave instructions to his secretary that the notice of appeal be served upon the respondent, he did not follow up to find out if the instructions had been carried out; nor did he explain the delay of 96 days before filing the record of appeal to necessitate the filing of the application for extension of time.

For this Court to interfere with exercise of discretion by a single Judge sitting on behalf of the full Court and to vary, discharge or reverse that decision, the full Court must bear in mind that the single Judge was exercising a discretion which is unfettered, though exercisable judicially, and it has to be shown by the applicant that the single Judge took into account some irrelevant factor or factors or failed to take into account a relevant factor or factors; that the Judge failed to apply correct principles to the issue at hand, or that, taking into account all the circumstances of the case, his decision was plainly wrong, see ***Margaret Muthoni Muchiga v. Esther Kamori G. Chobi, Civil Application No. Nai. 117 of 2009***. No submissions have been laid before us to establish these factors. We find no merit in this reference which we order to be and is hereby dismissed with costs to the respondent.

Dated and delivered at Kisumu this 29th day of July, 2011

E. O. O'KUBASU

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR