



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, AGANYANYA & NYAMU, J.J.A.)

CIVIL APPEAL NO.171 OF 2010

BETWEEN

DAIMA BANK LIMITED (IN LIQUIDATION).....APPELLANT

AND

PROF. DAVID MUSYIMI NDETEI.....RESPONDENT

*(Appeal from the judgment and decree of the High Court of Kenya at Nairobi,
Milimani Commercial Courts (Kasango, J.) dated 11th October, 2005
in*

H.C.C.NO.2198 OF 2000)

RULING OF THE REFERENCE TO FULL COURT

This is a reference to full court from a decision of a reference from a single Judge dated 19th November, 2010.

Before the single judge (O’Kubasu, J.A.) was an application to extend time within which to file an appeal to this Court out of time.

The application was founded on the following grounds:-

- 1. “The Applicant/Appellant applied for copies of proceedings and judgment on 27th October, 2005 and the same were supplied on 28th April, 2010.***
- 2. The Applicant was supplied with a certificate of delay on 24th May, 2010 and commenced the preparation of the record of appeal.***
- 3. The delay in obtaining proceedings from the Superior Court was occasioned by the numerous applications made by the Respondent in an attempt to execute the decree and therefore leaving no room for the typing of the proceedings which were voluminous in nature***
- 4. The Applicant/Appellant filed the record of appeal on 15th July, 2010 on the mistaken but honest belief that the computation of time to file the record of appeal ran from the date when the certificate of delay was issued.***

5. The appeal has a public interest aspect as it seeks to challenge:-

- a) *The Superior Court's decision that shifted the burden of proof from the plaintiff to the defendant.*
- b) *The Superior Court's decision that declared a contractual rate of interest as illegal.*

6. The outcome of the appeal will have a great impact on the entire Banking Industry and the application of bank interest rates on loans borrowed by customers

7. It is fair and just that the appeal be allowed so that parties may be heard on merit in support or in opposition of the Appeal.”

In articulating the grounds in support of the reference the respondent's advocate Mr Kyalo Mbobu urged the court to note that the single judge decision did not adequately deal with the applicant's effort to obtain the necessary documents to prepare the record of appeal and in particular the learned judge did not consider whether or not the applicant was diligent in obtaining the necessary documents from court in that the applicant obtained proceedings on 23rd February 2010 and a certified copy of judgment on 28th April 2010 and he obtained a certificate of delay on 1st May 2010 and subsequently filed the appeal on 15th July 2010. He urged the Court to note that from the foregoing there was unexplained delay of at least three months the period he considered inordinate. He further urged that initially the applicant did not need certified copies of proceedings and judgment in order to prepare a record since these documents could form part of a supplementary record. Finally the respondent's counsel lamented that in the ruling the learned single judge erroneously concluded that the overall delay was one month.

In reply Mr Mbaka counsel for the applicant submitted that the single judge had unfettered discretion under **rule 4** of this Court's rules and the full Court should not interfere with the exercise of his discretion, as the judge was satisfied with the reasons given for the delay. In particular, counsel stated that certified copies of proceedings, judgment and decree were collected on 28th April 2010, certificate of delay was collected on 24th May 2010 and that the certificate did set out the reasons for delay which reasons were considered by the single judge before granting the extension.

In **MWANGI v KENYA AIRWAYS LTD (2003) KLR 486** at 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:

“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.”

And in a ruling of this Court on a reference to full Court in **JOHN KOYI WALUKE v MOSES MASIKA WETANTULA & 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.”

In view of what this Court has stated in its various decisions including the authorities cited above touching on the single Judge’s unfettered discretion and after a scrutiny of the reasons given by the single judge, 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 think a delay of say one to three months in the circumstances of this case cannot be said to have been inordinate. 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 and 3B of the Appellate Jurisdiction Act**. After applying this provision we are satisfied that the learned single Judge did act justly in the circumstances, because, both counsel agree that the overall delay did not exceed three months and it is also fairly manifest from the Memorandum of Appeal which has been duly filed that the grounds to be articulated are far from being frivolous. In our view an applicant’s right to articulate a fairly arguable appeal should not be lightly fettered and we think that the demands of justice lean toward allowing him to pursue the appeal.

The reference is accordingly dismissed.

Costs in the intended appeal.

It is so ordered.

Dated & delivered at Nairobi this 11th day of November, 2011.

E.M. GITHINJI

.....
JUDGE OF APPEAL

D.K.S. AGANYANYA

.....
JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR