IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 110 OF 2006

NJOGU MACHARIA ……. APPELLANT

AND

PAUL WAIRURI MWANGI ……....……..RESPONDENT

(Being an Appeal from the judgment and decree of the High Court of Kenya Civil Appeal No. 231 of 2000 at Nairobi (Aganyanya, J.A) dated 12th November, 2002

In

H.C. C. Appeal No. 231 of 2000)

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RULING OF THE COURT

By a notice on motion dated and lodged in this Court on 5th July, 2006, Njogu Macharia the applicant therein had asked a single Judge of this Court for orders:-

"1. THAT the Honourable Court be pleased to grant extension of time to file and serve Record of Appeal out of time.

2. THAT Record of Appeal filled (sic) herein be deemed as properly filed and within time."

The motion was brought under ***Rules 4*** and ***42 (1)*** and ***(2)*** of the Court's Rules. Under ***Rule 4*** the Court

"--- may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court for the doing of any act authorized or required by these Rules, whether before or after the doing of the act.----."

Applications under ***Rule 4*** are normally heard by a single judge of the Court who exercises the unfettered discretion conferred by that Rule. The Court has always held that in exercising the discretion under ***Rule 4***, a single judge is doing so on behalf of the Court. Accordingly once the single judge has

exercised that discretion on behalf of the Court, a party who feels that the exercise of the discretion by the single judge ought to be:-

"---varied, discharged or reversed by the Court,"

under ***Rule 54 (1) (b)***, must prove to the full Court that in coming to his decision the single judge took into account an irrelevant matter, or he failed to take into account a relevant matter, or that he misapprehended the facts and/or the law applicable to the case and thus reached a wrong decision or that looked at as a whole on the basis of the known facts and the law the decision of the single judge is plainly wrong.

Rule 4 (1) of the Rules requires that applications to the Court, except informal applications, shall be brought by a notice of motion while ***Rule 43 (1)*** requires that such motions shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts.

To comply with ***Rule 43 (1)*** the applicant had sworn an affidavit, the contents of which were as follows:-

" I, NJOGU MACHARIA of Post Office Box 7955-00300 Nairobi do hereby make oath and state as follows:-

1. THAT I am the Appellant herein hence competent to swear this affidavit.

2. THAT my Advocates on record inform me that the time within which the Notice of Appeal was to be filed has expired.

3. THAT I verily believe it is a matter of urgency that this Honourable Court extends the time within which to file the Notice of Appeal.

4. THAT I make this Affidavit in support for (sic) my Application.

5. THAT what is deponded (sic) to herein is true to the best of my knowledge, information and belief."

When the matter came up for hearing before a single member of the Court, it was pointed out to him that while the notice of motion sought the extension of time within which to lodge and serve the record of appeal, the affidavit in support of the motion talked about extension of time to file and serve a notice of appeal. It was, therefore, contended before the single Judge that the motion for extension of time to file and serve a record of appeal was not supported by any affidavit as required by ***Rule 43 (1)***. On that point, the learned single Judge merely pointed out that the averments in the affidavit were at variance with the orders sought in the motion. The learned Judge also pointed out that the motion itself did not contain the grounds upon which it was brought contrary to ***Rule 42 (2)*** of the Court's Rules. The learned single Judge was of the view that these procedural defects made the motion incompetent. That was probably right by the time when the learned single Judge made his decision, i.e. by 27th March, 2009. But thereafter, by Act **No. 6 of 2009** Parliament introduced in the Civil Procedure Act and the Appellate Jurisdiction Act ***section 3A*** which provides for the overriding objective of litigation, namely the facilitation of a just, expeditious, proportionate and affordable disposal of the appeals governed by the Act and the rules made thereunder. Procedural defects such as the ones pointed out in this matter will now be looked at in light of the new provisions. We, however, think the learned single Judge was basically right in the view he took of these matters. Mr. Ondieki, who argued the reference on behalf of the applicant told us that these were mistakes made by the advocate who represented the applicant before the single Judge and ought not to be blamed on the applicant personally. It may well be that in respect of the two procedural defects, namely, the failure to state on the face of the motion the grounds upon which it was brought and the contents of the motion being at variance with the contents of the affidavit, Mr. Ondieki is right that they ought not to have been visited on the applicant personally. But that was not all the learned single Judge considered. There was the question of the delay itself.

The judgment the applicant wanted to appeal against was delivered way back on 12th November,

2002. On 18th November, 2002 the applicant filed his notice of appeal; that was within time. On the same 18th November, 2002, his then advocates wrote a letter to the Deputy Registrar of the superior court asking to be supplied with copies of proceedings and judgment. A copy of that letter is at page 55 of the record before us. The letter was not copied to the advocates for the respondent or even to the respondent himself. On 8th March, 2006 the applicant's advocates were informed by the Deputy Registrar that copies of proceedings and judgment were available. The certificate of delay at page 83 of the record shows that the applicant himself collected the proceedings and judgment on 15th March, 2006. His record of appeal ought to have been filed within sixty days from 15th March, 2006, i.e. by 14th May 2006 at the latest. His record of appeal was in fact lodged on 5th June 2006. In the five-paragraph affidavit the applicant did not give any explanation at all for the delay. All he said in paragraph 4 of his supporting affidavit was that he verily believed it was a matter of urgency for the Court to extend the time within which to file the notice of appeal, actually the record of appeal. Looking at that aspect of the matter, the learned single Judge stated:-

"I must confess that the applicant and his counsel have failed to demonstrate any seriousness in their approach to this matter. Granting of extension of time cannot be considered as a matter of routine. This Court has set out the matters to be considered when dealing with an application of this nature. The applicant has miserably failed in satisfying the guidelines set out by this Court. The Rules of the Court must be complied with. As was said in RATMAN V. CUMARASAMY [1964] 3 ALL E.R 933 by Lord Guest at p. 935:-

'The rules of court must, prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure required to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of the litigation.'

I have carefully considered what has been placed before me in this application but I am not persuaded that the applicant has satisfied me on the principles that would warrant me to exercise my discretion in his favour."

With respect, we agree with the learned single Judge. Where there has been a delay, there must be some explanation for that delay and on this aspect of the matter, we do not think the provisions of ***section 3A*** of the Appellate Jurisdiction Act, even if it was applicable at the time, would materially alter that position. The purpose of that section is to ensure, among other things, expeditious disposal of appeals and where there has been a delay the reason or reasons for the same must be given. If extension of time was to be granted as a matter of routine, that would defeat one of the objectives of ***section 3A*** of the Appellate Jurisdiction Act, namely the expeditious disposal of appeals. We see no reason at all which would warrant our interfering with the exercise of discretion by the single Judge. That being the view we take of the matter we order that this reference be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 12th day of February, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

……..

JUDGE OF APPEAL

J.G. NYAMU

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.