



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 114 OF 2008

BETWEEN

THE HON. ATTORNEY GENERAL APPLICANT

AND

JAMES ALFRED KOROSSO RESPONDENT

(An application for extension of time to service notice of appeal in an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ojwang, J.) dated 22nd February, 2008

in

H.C.C.C. NO. 2966 OF 1996)

RULING OF THE COURT

This is a Reference to full court under **Rule 54 (1)** of the *Court of Appeal Rules* (Rules) from the decision of a single Judge (Bosire, J.A.) allowing an application by the **Attorney General** (applicant) for extension of time to serve a notice of appeal.

The respondent **James Alfred Korosso**, a citizen of the Republic of Tanzania filed a suit in the superior court, *H.C.C.C. No. 2966 of 1996* against the Attorney General claiming damages for false imprisonment, malicious prosecution and for violation of constitutional rights. The superior court (Ojwang J.) on 22nd February, 2008 allowed the suit with costs and awarded the respondent damages, thus:

- (i) The torts of false imprisonment and malicious prosecution – Kshs.10,000,000/=**
- (ii) Violations of constitutional rights – Kshs.10,000,000/=**

(iii) Exemplary damages – Kshs.1,000,000/=.

The applicant being aggrieved by the judgment filed a notice of appeal on 4th March, 2008 which was served on the respondent's counsel on 14th March, 2008. On 5th June, 2008 the applicant filed the application for extension of time for service of the notice of appeal.

Rule 76 (1) of the Rules, requires that a notice of appeal should be served before or within seven days after lodging the notice of appeal on all persons directly affected by the appeal. The notice of appeal in this case should have been served on or before 11th March, 2008. It was however served three days late on 14th March, 2008 hence the application for extension of time. The process server David Mungai explained in a supplementary affidavit sworn on 18th November, 2008 he was late in serving because on 10th March, 2008 he travelled to Nyeri, Mukurwe-ini and Nanyuki on official duties and returned to Nairobi on 13th March, 2008.

He annexed an application dated 3rd March, 2008 to his superiors for authority to be away for three days on official duties; the approval to be away for 3 days from 10th March, 2008 to 13th March, 2008 and an imprest warrant showing that he was paid per diem on 6th March, 2008 for the three days.

In the supporting affidavit to the application sworn by David Mungai earlier on 19th May, 2008, he deposed that he was in Nyeri and Mukurwe-ini from 10th March, 2008 to 13th March, 2008 on official duties but he had annexed documents to the period from 9th April, 2008 to 12th April, 2008.

By the supplementary affidavit sworn on 18th November, 2008 David Mungai deposed that the documents annexed to the replying affidavit referred to another later journey and that he annexed them to the replying affidavit by mistake.

The single Judge in exercising his discretion made findings, *inter alia*, that, the delay in serving the notice of appeal was short; that the reason for delay proffered was on the face it plausible; that however the applicant had not satisfactorily explained the delay; that the intended appeal was prima facie arguable and that the case was unique in that it was the first one where damages have been awarded for breach of constitutional rights.

Regarding the explanation for the delay the learned single judge said in part:

“The reason the applicant has proffered for the three days delay is on the face of it plausible. The applicant has not however fully explained the discrepancy in the dates on the documents exhibited in support of the explanation given. I do not want to speculate on the issue of the authenticity of those documents. It can however, be safely stated that the applicant has not satisfactorily explained the delay”.

Mr. Njau Kayai, learned counsel for the respondent submitted, among other things, that delay was not satisfactorily explained; that delay for the period from 4th March, 2008 to 10th March, 2008 was not explained; that the learned single judge did not take into account the authenticity of the documents; that the documents exhibited were concoctions; that this is the only case where a court is dissatisfied with the reasons given but allows the application thereby setting a very dangerous precedent.

Mr. Njau Kayai further contended that the learned judge did not take into consideration the issue of prejudice and justice to the respondent in accordance with the overriding objective of the *Appellate Jurisdiction Act* and the Rules and that the judge should not have taken into account the question of uniqueness of the case. He asked us to impose terms that the applicant should deposit 50% of the decretal sum in the event, we agree with the decision of the single judge.

Mr. Mutinda, for the applicant on his part, contended in essence that the learned judge applied the correct principles of law and exercised his discretion judicially.

The principles which the Court applies in dealing with Reference from the decision of a single judge are settled. They were restated in **James Robert Karanja Muigai vs. Joseph Mwangi Karanja and five others** *Civil Application No. Nai. 183 of 2008* (unreported) thus:

“..... to interfere with the exercise of a discretion by a single judge who has done so on behalf of the court, the full court must be satisfied that in coming to his decision the single judge took into account what he ought not to have taken into account or failed to take into account what he ought to have taken into account or that he misapprehended some aspect of the law or that he failed to appreciate the weight and bearing of the evidence and thus reached a wrong decision in law or that the decision itself is so plainly wrong that no reasonable tribunal could have come to it taking into account all the circumstances of the particular case”.

We appreciate that in dealing with a Reference, the full court is not concerned with the merits of the decision as it is not sitting on appeal against the decision of a single judge. Rather the full Court is only required to investigate whether or not the single judge has misdirected himself on matters of fact or law in exercising his unfettered discretion.

In this case, the learned single judge had in mind the principles applicable to an application for extension of time under **Rule 4** and clearly stated them. Referring to the matters that the Court should consider as stated in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** – *Civil Application No. Nai., 255 of 1997* (unreported) the learned single judge, stated:

“That is not an exhaustive list as each case has to be looked at on the basis of its peculiar facts and circumstances. In coming to that conclusion, I recognize that there may be situations which do not fall within those, I have set out above, but which on an objective view of the matter might lead a court to lean in favour of granting an extension of time”.

With respect, that statement of principle by the learned single judge is not only pragmatically but also imminently correct. Indeed, the factors which the Court should consider as stated in **Leo Sila Mutiso**, are just guidelines as the discretion of the Court under **Rule 4** is unfettered.

In **Jenkins vs. Bushby** by [1891] 1Ch 484 Kay LJ while discussing broadly the question of judicial discretion correctly expressed the immutable characteristic of judicial discretion at page 495, thus:

“Of course in a question of discretion, authorities are not of much value. No two cases are exactly alike, and even if they were the court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion”.

It is clear from the foregoing that the contention by Mr. Njau Kayai that the single judge exercised his discretion wrongly by allowing the application after making a finding that the delay had not been satisfactorily explained and by further considering the question of uniqueness of the claim for breach of constitutional rights is erroneous.

Recognizing that we are not sitting on appeal against the decision of the single judge, it is unnecessary to examine the merits of the application for the extension of the time and the decision of the single judge thereon. Suffice to say that we are satisfied that the learned single judge took into account the relevant matters and exercised his discretion judicially.

We do not consider that it is within our province in a matter of this kind to require the applicant to deposit 50% of the decretal sum as condition for the affirming decision of the single judge. The question of deposit of the decretal sum is a relevant consideration in application for stay of execution under **Rule 5 (2) (b)** which is not the application that was before the single judge.

Lastly, the notion of justice as a component of the overriding principle under **Section 3A** of the *Appellate Jurisdiction Act* applies to all parties to the litigation. While the respondent will no doubt suffer some prejudice by the extension of time in the nature of delay in concluding the litigation and thereby

denying him the fruits of his judgment indefinitely, the applicant would suffer greater injustice, if he is prevented from exercising his statutory right of appeal to challenge the awards which the single judge considered as high and double awards solely on the technical ground that he was late in serving the notice of appeal by three days.

We find no merit in the Reference which we hereby dismiss with costs to the applicant.

Dated and delivered at Nairobi this 24th day of March, 2010.

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR