IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 264 OF 2004

TAMIL ENTERPRISES LTD.....APPLICANT

AND

1. OFFICIAL RECEIVER AND PROVISIONAL

2. LIQUIDATOR OFCONTINENTAL CREDIT FINANCE LTD.....RESPONDENTS

(An application for leave to file an appeal out of time in an intended appeal from the ruling of the High Court of Kenya at Milimani commercial court (Ibrahim, J) dated 5th November 2003

in

H.C.C.C. NO. 1914 of 1999)

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RULING OF THE COURT

This is a reference from the decision of a single Judge of this Court (Deverell, JA) delivered on 20th September 2005 in which he dismissed the applicant's application for extension of time within which to file and serve the record of appeal against the ruling of the High Court (Ibrahim, J).

When the matter came up for hearing before us on 2nd February, 2010 Mr. C. Agwara appeared for the applicant but there was no appearance for the respondents. In his submissions Mr. Agwara stated that in declining to grant extension of time to the applicant the learned single Judge acted oppressively against the applicant; that the supporting affidavit had given the reasons for the delay; that the learned Judge failed to consider that the issue of **section 228** of the Companies Act should have been considered as a sufficient ground to warrant an extension of time. Finally Mr. Agwara reminded us that the application before the single Judge was not opposed.

It has been stated time and again that in an application under **rule 4** of this Court's Rules, the learned single Judge is called upon to exercise his unfettered discretion. It may be appropriate to re-emphasize this principle by referring to the decision of this Court in **Mwangi V Kenya Airways Ltd [2003] KLR 486 at pp 489** in which this Court stated:-

"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."

In the present matter the learned single Judge considered the material placed before him, and in the course of his ruling stated:-

"The current application was filed on 29th October 2004, which is seventeen days after 12th October, 2004.

This delay of seventeen days need to be explained by the applicant. This time the applicant attempts to do by relating in paragraphs 7 to 16 of this supporting affidavit the difficulties the applicant had in obtaining the certificate of delay which the applicant wrongly thought needed to be included in the record of appeal whereas it has been frequently stated in this Court that the certificate of delay is not required to be part of the record of appeal.

However though not required for the record of appeal it does seem to me to be a document, which should be produced in support of the application for extension. The delays in obtaining the certificate are therefore, on the facts of this particular case, an adequate explanation of the reason for most of the delay on filing the applications.

There remains a delay of a week from 2nd October to 29th October, when the application was filed as to which there was no explanation.

Hence the learned Judge was of the view that there was no sufficient explanation for the delay. In concluding his ruling the learned single Judge stated:

"On the question of the merits of the appeal the applicants did not produce any draft memorandum of appeal. Learned, counsel for the applicant Mr. Otieno could only say that the learned Judge exceeded his powers by granting orders, which were not applied for stating this was the main ground. He also claimed that the learned Judge failed to consider the correct meaning of section 278 of the Companies Act without any further elaboration.

Having considered all of the above and the very brief submissions by Mr. Asinuli learned counsel for the respondent I have in the exercise of my discretion, come to the conclusion that this application should be dismissed with costs. It is so ordered."

Under **rule 4** of this Court's Rules the learned single Judge is exercising his discretion. In a reference to the full Court we would say that before we can interfere with the single Judge's discretion, we must be satisfied that the single Judge misdirected himself in some matter and as a result has arrived at a wrong decision, or that he misapprehended the law or failed to take into account some relevant

matter. Or looking at the entire decision its manifestly clear that it is entirely wrong. In **Mbogo And Another V. Shah[1968] E.A. 93 at P.95** Sir Charles Newbold P put it thus:

" …a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.."

And more recently in **Mwangi V. Kenya Airways Ltd**(Supra) this Court stated:

"Before a full Court can interfere with the exercise of a single Judge's discretion it would have to be satisfied that in coming to his discretion the single Judge has taken into account some irrelevant factor or that he has not applied a correct principle to the issue before him or that taking into account all the circumstance of the case, his discretion is plainly wrong."

In this reference it is to be observed that the learned Judge had the correct approach to the application before him. He had to consider the length of delay, the explanation for that delay, the chances of success in the intended appeal and prejudice to the respondent if the application for extension were to be granted.

We have carefully considered the submissions by Mr. Agwara, having regard to what was before the learned single Judge and bearing in mind the principles set down in **Mwangi** case (supra), we have come to the conclusion that there was no misdirection on the part of the learned single Judge in the manner he exercised his discretion in this matter.

Accordingly this reference has no merit and is dismissed with costs.

Dated and delivered at NAIROBI this 5TH day of March, 2010.

E.O. O'KUBASU

…….……

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

ALNASHIR VISRAM

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR