



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 85 OF 2010**

**BETWEEN**

**KENYA COMEMRCIAL BANK LIMITED .....APPLICANT**

**AND**

**KENYA PLANTERS CO-OPERATIVE UNION ....RESPONDENT**

*(An application for extension of time to file an application seeking leave to appeal from the ruling and order of the High Court of Kenya (Muga Apondi, J.0 dated 18<sup>th</sup> January 2010*

*in*

**H.C.C.C.NO.779 OF 2009)**

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**RULING**

This is an application by way of Notice of Motion brought under **section 3A** and **3B** of the Appellate Jurisdiction Act, **rules 4** and **47** of the Court of Appeal Rules in which the applicant, Kenya Commercial Bank Ltd, seeks the following orders:-

- 1. “THAT, this Honourable Court be pleased to extend time within which the applicant ought to have filed Civil Application No. 81 of 2010 upto and including 13<sup>th</sup> April 2010.**
- 2. THAT, this Honourable Court be pleased to deem the Civil Application No. 81 of 2010 as having been filed within the time so extended.**
- 3. THAT this Honourable Court be pleased to give such order or further orders and directions as it may deem fit and just.**
- 4. Costs of this application be provided for.**

The applicant relies on the following grounds:-

- a) The application for leave to appeal was lodged out of time by only one day.**

- b) The failure to file the application on time was inadvertent.**
- c) That due to the intervening long Easter holiday, the applicant was not able to instruct us in good time to enable preparation and filing of the application within the statutory limit of fourteen (14) days.**
- d) That the delay was further aggravated by the rejection of our bound application by the registry officials because it was in two different colours instead of one.**
- e) That the insistence on one colour by the registry officials was not foreseeable.**
- f) That the applicant has a good appeal with overwhelming chances of success.**
- g) That the respondent will suffer no prejudice if this application was to be allowed.**
- h) That (sic) its in the wider interest of justice to enlarge time within which the applicant may seek leave to appeal.**
- i) That the costs of the application be provided for.**

The applicant further relies on a long and detailed affidavit sworn by Desmond Odhiambo, an advocate in the firm representing the applicant, namely, Iseme, Kamau and Maema.

At the hearing of this application on 5<sup>th</sup> May 2010, the applicant was represented by learned counsel Mr. Martin Munyu and the respondent, was represented by learned counsel, Mr. Peter Kingara.

In his submissions, Mr. Munyu repeated the grounds set out above and further added that the delay of one day in filing an application seeking leave to appeal was not in the circumstances inordinate and that the delay of one day has been fully explained in two ways, namely, the refusal of the record by the Registry officials on the basis of the record cover being in two different colours and the consequent need to unbind and bind another record so as to comply and the intervention of the Easter holiday which prevented the firm from obtaining client's instructions to file the application for leave in time. He wound up his submissions by stating that in the circumstances, the applicant had the right of appeal with leave of either the superior court or this Court pursuant Order 42 of the Civil Procedure Rules.

Mr. King'ara submitted that the application had no merit and the same was meant to delay the determination of the real issues between the parties. Counsel further stated that in the Court of Appeal, it should have been obvious to the applicants counsel that as a matter of practice documents are never filed in rainbow colours and therefore the reasons for the delay are not plausible and in any event, no evidence of refusal to accept the documentation by the Registry officials was tendered. In his final submission, Mr. King'ara contended that the order made by the judge was in any event not appealable as a matter of law and on the additional ground that the applicants counsel had not made any formal application in the superior court.

What is before me is in essence an application for extension of time under **rule 4** of this Court's Rules and in adjudicating on the application ordinarily I need not go beyond ascertaining the requirements so ably set out in the often quoted case of **LEO SILA MUTISO v ROSE C.A. NAI 255 of 1997 (unreported)** in these words:-

***“It is now 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.”***

The other beacon concerning the exercise of a single judge's discretion was given by this Court in the case of **MONGIRA & ANOTHER v MAKORI & ANOTHER [2005] 2 KLR 103 at pp 106-107** where

the Court again cited the case of LEO SILA MUTISO (supra) and went on to state:-

***“Those, 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 it is clear from the use of the words “in general,” Rule 4 gives the 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 any way.”***

Concerning the contention that no appeal lies to this Court and therefore no extension of time should be given that is a point for determination by the appeal Court. However, for the purposes of this application, all I am entitled to consider is whether the application has a chance of success. **Order 42 rule 2** clearly states that an appeal shall lie with leave of the court from any other order made under the Rules. Again, the applications for leave are usually made as stipulated in **Order 42 rule 2(3)(4)** of the Civil Procedure rules.

Applying the foregoing to the circumstances before me in the application, a delay of one day cannot by any standard be said to be inordinate and the two reasons given for the delay namely the need to undo the record so as to again bind it in acceptable colours and the intervening Easter holiday which delayed the taking of instructions cannot be said to be a frivolous reason and the two reasons are acceptable to me. Again, although I have seen the exhibited memorandum of appeal, I cannot comment on the chances but it suffices to observe that the grounds raised are not frivolous. As to the prospect of prejudice to the respondent, a one day delay would not cause any noticeable prejudice since the applicant has moved the court with an element of reasonable expedition in the circumstances.

While having a one colour record, is no doubt an excellent administrative step the requirement represents an unwritten rule which cannot be allowed to defeat the applicant’s right to seek justice such as in this case.

Perhaps, in addition, I should add that since the application before me was principally grounded on **sections 3A and 3B** of the Appellate Jurisdiction Act, the decision by this Court in the case of **MONGIRA supra** that the list of factors to be considered is not exhaustive, was prophetic in that after the enactment of the O<sub>2</sub> principle, this Court is statutorily required when exercising its powers either under the Act or the rules made pursuant to the Act or in interpreting the provisions of the Act or the rules to give effect to the overriding objective (which was elsewhere baptized “O<sub>2</sub> principle” (or “the oxygen principle”)). Under the O<sub>2</sub> principle, the court’s mandate in each case or appeal is to act justly and as far as is practicable, to act fairly. Expressed differently and broadly, the principal aims of O<sub>2</sub> principle is to achieve or attain justice, and fairness in the circumstances of each case; reduce cost and delay; deal with each matter in ways which are proportionate; and ensuring that the parties are on an equal footing and finally, allotting to each case an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

In my opinion, in the circumstances described in the case before me I would fail in my duty to give effect to the O<sub>2</sub> principle if I did not grant the order for extension as sought so as to enable the parties to have the merit of the application determined outside the prescribed period. The reason for this is that, although the court rules have a very special value as handmaiden of justice as often expressed, and in ensuing certainty, efficiency, predictability and curtailing arbitrariness, the O<sub>2</sub> principle now demands that whenever this Court is exercising any of its powers under the Act or the rules or interpreting them, the Court must give effect to the O<sub>2</sub> principle. Therefore since in the circumstances of this case, I am called upon to exercise the powers conferred on me by Rule 4 of this Court’s rules, I must as a matter of statute law give effect to the O<sub>2</sub> principle. The net effect in my view is that, while the four factors will continue to assist the Court in assessing whether it has discharged its duty under **sections 3A and 3B**, it is the considerations set out in the sections which take precedence and which must prevail. The considerations are in my view not exhaustive because the concept of good management is vast. Thus,

technicalities of procedure non-compliant precedents or the exercise of power in a manner that would defeat the court's core business of acting justly would have to give way. Indeed, I could not agree more with the recent decision of this Court in the case of **DORCAS NDOMBI WASIKE v BENSON WAMALWA KHISA & 2 OTHERS ELD C.APPEAL NO. 87 of 2004** where the Court held inter alia:-

***“The overriding objective principle has been introduced into our law by a statute and it is, inherently a principle of substantive law. We agree as submitted by Mr Amolo that, where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of this Court) the statute must prevail. A conflict is however unlikely to arise because section 3A(1) of the Act not only enacts the overriding objective principle but also expressly superimposes the overriding objective to the application of the existing rules with the result that the Court is enjoined to apply the overriding objective principle in both the substantive and procedural matters. That is to say that, the rule should also be construed in a manner which facilitates the just, expeditious proportionate and affordable resolution of the appeals.”***

In my view, in an application of this nature, it would not suffice for the Court to merely have regard to the four requirements without the Court at the same time demonstrating that it has also given effect to the O<sub>2</sub> principle. I think the scope of the O<sub>2</sub> principle was in my view, eloquently and accurately put in the WASIKE case (supra) but perhaps nothing explains the scope of the O<sub>2</sub> principle better than the marginal notes to **section 3A** of the Appellate Jurisdiction Act to the effect that the O<sub>2</sub> principle is the **“Objective of the Act,”** I think what this means is that, the O<sub>2</sub> principle represents the entire purpose of the Appellate Jurisdiction Act and the rules made under that Act and in the case of the Civil Procedure Act, the Act itself and the rules made pursuant to the Act by dint of **sections 1A** and **1B** of the later Act which are substantively in pari materia with the Appellate Jurisdiction Act. In my opinion, although the rules have their value and shall continue to apply subject to being O<sub>2</sub> compliant, the O<sub>2</sub> principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O<sub>2</sub> principle or attainment of justice and fairness in the circumstances of each case. In my view the O<sub>2</sub> principle inspires the formulation of rules which are O<sub>2</sub> oriented and the giving effect to the existing rules which are O<sub>2</sub> compliant. In this connection, it is apt to add that it is not sufficient for an advocate as has happened here to cite the O<sub>2</sub> provisions and await a digest from this Court on what they entail; on the contrary, counsel must in every case lay a basis for invoking the sections, taking into account the unique circumstances of each case. Similarly, it is utopian in my view for counsel to broadly cite the O<sub>2</sub> provision as if they also cover situations aimed at subverting the expeditious disposal of cases or appeals. In my opinion, the provision is not at a flash meant to cover mistakes or lapses of counsel or negligent acts, dilatory tactics or acts constituting abuse of the Court process; on the contrary in all these situations and many more (the list is not exhaustive) the Court shall continue to strike out applications under the O<sub>2</sub> principle if the circumstances in the application would have the effect of violating the O<sub>2</sub> principle. Advocates and their clients have a duty to assist the court in managing the cases. Thus, the furthering of the O<sub>2</sub> principle by the courts is not likely to be helped or assisted where advocates or the parties in the applications fail to lay the basis for the application of the O<sub>2</sub> principle or fail to comply with the rules practice directions or court orders. In the case of applications seeking the invocation of O<sub>2</sub> principle a firm basis whether factual or legal must be laid and expressed in the application. In short, a party must explain why he thinks he is embraced by the O<sub>2</sub> principle or why he thinks the court should apply it. In the case before me, this being the beginning of the application of the O<sub>2</sub> principle and since it was quite apparent to me that what was being sought is an extension of time, I considered that a proper factual basis for the application had been laid by the applicant. The reason for this is that the heart of the O<sub>2</sub> principle in my view, will be the rigorous enforcement of the rules touching on case management. In other words, the full benefits of the O<sub>2</sub> principle will be realized by the courts enforcement and practice of active case management of cases; encouraging use of ADR and the adoption of court based technology. Active case management entails adherence to the deadlines set by case management rules at all levels of the court systems and it is my take that some of the existing rules fall within this category especially those which set defined time lines for the taking of various steps in the proceedings so as to achieve just, fair and quick resolution of cases and appeals.

This is the second application I have personally come across which is grounded on **section 3A** and

**3B** of the Appellate Jurisdiction Act and also on rule 4 of this Court's rules and for this reason, I consider that I have a duty to call attention although by way of an obiter that since rule 4 is recorded in discretionary terms and **section 3A(1)** and **3B(1)** are recorded in mandatory terms, there appears to be a conflict because when a single judge is handling applications under rule 4 he exercises an unfettered discretion on behalf of the Court and both section 5 of the Appellate Jurisdiction Act and **rule 54** of this Court's Rules allow a reference from a decision of a single judge to a full Court to ascertain whether the discretion has been exercised judicially. After the enactment of **section 3A** and **3B** the single judge is required as a matter of law (statute) not discretion to give effect to the overriding objective when invoking his powers under rule 4. Since the overriding objective is the whole purpose of the Appellate Jurisdiction Act and the rules where a single judge invokes the overriding objective a reference to a full Court is in my opinion not contemplated or necessary since he is not exercising a discretion but in fact discharging a statutory duty. However, this is a point that should await the determination by a full court and also taken up by the Rules Committee. On the ground, nearly 99.9 per cent of the references hardly succeed and therefore Rule 54 could be regarded as a bottleneck in terms of encouraging unnecessary delays in the determination of appeals and it is one of the rules which could rightly be considered as not furthering the O<sub>2</sub> principle. It represents an unnecessary duplication of effort and inefficient use of Court resources. Should my interpretation be correct, references would have to give way due to the conflict analysed above and also for the reason that they cannot be safely regarded as furthering the overriding objective. In this regard, perhaps it would be appropriate to point out that the O<sub>2</sub> principle in Kenya just as in Australia, is anchored in an Act of Parliament whereas the position in the U.K. is that the principle is set out in the Civil Procedure Rules (CPR). When we are all building up a new jurisprudence principally based on the overriding objective, I would suggest that this distinction is kept in perspective. Our courts in my opinion have a much wider latitude than the position prevailing in the U.K. for this reason. In the case of Kenya, the latitude extends to both substantive and procedural matters whereas in the U.K. the principle appears confined to procedural matters like extension of time et cetera. Thus, our call is not limited to being broadminded about justice and fairness but we have a statutory duty to discharge and in the course of exercising that duty, should there be a conflict between any of the Civil Procedure Rules, or the rules of this Court, with the statute or the O<sub>2</sub> principle the later must prevail.

In managing the appeals, perhaps consideration should be given by the Rules Committee to making rules pursuant to **section 5 (d)** of the Appellate Jurisdiction Act to provide for summary determination of any appeal which appears to the Court to be frivolous or vexatious or to be brought for the purposes of delay. Such rules together with the anticipated case management rules to be incorporated in the Civil Procedure Rules would in my opinion greatly enhance the efficient management of cases and appeals and the furthering of the O<sub>2</sub> principle.

The upshot is that in the special circumstances of this matter after exercising the powers conferred on me as a single Judge, I believe in so doing, I have also given effect to the O<sub>2</sub> as explained above and for this reason, I hereby allow the application dated 15<sup>th</sup> April 2010 in terms of prayers 1 and 2 of the application. In the result, **Civil Application No. 81 of 2010** shall therefore be deemed to be properly on record.

Costs to abide the outcome of the application. It is so ordered.

***Dated and delivered at Nairobi this 7<sup>th</sup> Day of May, 2010.***

**J.G. NYAMU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**