



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 236 OF 2006

BETWEEN

NATIONAL INDUSTRIAL CREDIT BANK LTD..... APPLICANT

AND

BARCLAYS BANK OF KENYA LTD. 1ST RESPONDENT

NANCY WAIRIMU MURIITHI..... 2ND RESPONDENT

(Application for leave to file appeal out of time being an appeal from the ruling and order of the High Court of Kenya at Milimani Commercial Court at Nairobi (Kasango, J.) dated 27th day of June, 2005

in

H.C.C.SUIT NO. 293 OF 2001)

RULING OF THE COURT ON

REFERENCE TO THE FULL COURT

This is a reference to the full Court from a decision of a single member of the Court, (Deverell, J.A.) made under **rule 4** of this Court's Rules.

The background to this matter is as follows:-

The applicant, **NATIONAL INDUSTRIAL CREDIT BANK LTD.**, through its advocate, filed a notice of motion (dated 16th October, 2006) under **rule 4** of this Court's Rules seeking orders that:-

- “1. The time limited for lodging appeal, from the Ruling and Order by the Honourable Mrs. Mary Kasango delivered at the High Court of Kenya at Nairobi, Milimani on the 27th June, 2005, be extended.**
- 2. Costs of this application be provided for.”**

The application was brought on the following grounds:-

“(a) The Notice of Appeal was filed in the Superior Court on 28th June, 2005, a day after delivery of the ruling that the applicant seeks to appeal from;

(b) The request for typed uncertified copies of the proceedings and a certified copy of the judgment was also filed in the Superior Court on 28th June, 2005, however due to an inadvertent omission, the same was not sent to the Respondents and/or their advocates.

(c) The applicant was granted leave to serve the Notice of Appeal out of time by a ruling dated 4th July 2006 by Honourable Justice Githinji and the same has since been served.

(d) By a letter dated 2nd August 2006 the Deputy Registrar notified Messrs Mohammed Muigai Advocates that copies of proceedings were ready for collection which proceedings were collected on 7th August 2006 upon payment of the requisite court fees.

(e) A certificate of delay was issued on 13th October 2006.

(f) No prejudice has been caused to the Respondents as a result thereof;

(g) It is in the interest of justice that this Honourable Court exercise its discretion in favor of the applicant to enable it ventilate its otherwise very arguable appeal.”

In addition to the foregoing, there were two supporting affidavits by David Majanja the advocate who had the conduct of the matter and Lawrence Gichana, a court clerk working in the firm of Mohammed & Muigai Advocates which firm had the conduct of the matter on behalf of the applicant.

The application was placed before a single judge of this Court (Deverell, J.A.) for consideration. The learned single judge considered the material placed before him and the submissions by counsel appearing for the parties and in a ruling delivered on 29th August, 2007 declined to exercise his discretion in favour of the applicant and consequently dismissed the application. It is that order of dismissal that has provoked this reference to full court. This reference must have been brought pursuant to **Rule 54(1)(b)** of the Rules of this Court which provides that any person being dissatisfied with the decision of a single judge:-

“(b) in any civil matter wishes to have any order, direction or decision of a single Judge varied discharged or reversed by the Court he may apply therefore informally to the Judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.”

The reference came up for hearing on 17th June, 2010 when Mr. Emmanuel Wetang'ula appeared for the applicant, while Mr. S.T. Wanjohi appeared for the 2nd respondent. Before Mr. Wetang'ula addressed us Mr. Wanjohi submitted that it would appear that the reference was filed out of time as it was filed on the eighth day and hence contrary to **rule 54(1)(b)** of the Rules of this Court. Although there was no response to the point raised by Mr. Wanjohi, we would like to state that although on the face of it the reference might have been filed a day out of the stipulated period, we are of the view that apparent delay of only one day should not deny the applicant the opportunity to pursue the reference. This is more so in view of the provisions of **Sections 3A and 3B** of the Appellate Jurisdiction Act which provides:-

“3A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

“3B. (1) For the purposes of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

- (a) *the just determination of the proceedings;*
- (b) *the efficient use of the available judicial and administrative resources;*
- (c) *the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and*
- (d) *the use of suitable technology.”*

In view of the foregoing, we are satisfied that this reference is not incompetent.

In his submissions, Mr. Wetang’ula faulted the learned Judge in that he put the issue of prejudice to the respondent over other matters. Mr. Wetang’ula gave a detailed account of what transpired leading to a delay which, in his view, was sufficiently explained. Mr. Wetang’ula cited some of the decisions of this Court to buttress his submissions.

On his part, Mr. Wanjohi submitted that **Rule 4** of this Court’s Rules gives a single judge unfettered discretion, which should not be easily dislodged. He further submitted that the learned single judge had not misapprehended any fact or law nor did he consider any irrelevant matters. For these reasons Mr. Wanjohi asked us to dismiss this reference.

As we have stated on various occasions under **Rule 4** of this Court’s Rules, a single member 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 applicable. 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. The full Court if it were to do that would be replacing the single Judge’s exercise of discretion with its own and that is really not permissible under **Rule 54** of the Court’s Rules. As we have repeatedly stated, a reference under that rule is not an appeal to the full Court.

In his submissions Mr. Wetang’ula complained that the learned single judge overemphasized the question of prejudice to the respondent without considering the fact that the delay had been adequately explained. There might be justification in that submission because in concluding his ruling the learned single Judge stated:-

“I am satisfied by the contents of these affidavits sworn by Nancy that further delays resulting from granting of any extension would cause considerable prejudice to Nancy.”

How did the learned single Judge deal with the issue of delay? In the course of his ruling he stated:-

“Mr. Majanja’s explanation as to why there is the delay of 12 days in filing the current application was that the applicant did not discover the mistakes of his clerk until 11th October, 2006 while arguing the Notice of Motion application dated 12th July, 2006 whereupon he took only 7 days to file the present Motion on 18th October, 2006. It would have been prudent for the firm of advocates employing the clerk who had already made the mistake of failing to serve the notice of appeal on the respondent to check on whether the other vital steps to be taken such as copying to the respondent the letter to the registrar bespeaking the copies of the proceedings to the respondent.”

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.”

Did the learned single Judge have the foregoing in mind as he considered the application before him? It would appear that the learned single Judge adopted the correct approach as he sought explanation for the delay. It would also appear that there was indeed explanation given only that the learned single Judge wanted further and better particulars to explain the delay. In our view, once an explanation has been given and is satisfactory, the applicant would be entitled for extension of time. What is to be considered is the length of the delay, the explanation given, the chances of the appeal succeeding and finally the degree of prejudice to the respondent if the application is granted.

It is our view that the learned single judge considered what was irrelevant such as the fact that the firm of advocates should have employed clerks who would not repeat mistakes in failing to serve the notice of appeal on the respondent. In MURAI V. WAINAINA (No. 3) [1982] KLR 33 Law JA held:-

“An advocate’s bona fide mistake but not inordinate delay on the advocates part, may amount to sufficient cause.....

The only delay was due to the advocate’s bona fide but mistaken view that a formal order was not necessary.”

Taking into account what we have already stated, we are of the view that this is a proper case in which we are entitled to interfere with the unfettered discretion of the learned single Judge. In the result, we allow the reference, set aside the orders of the single Judge made on 29th August, 2007 and substitute therefor an order allowing the notice of motion dated 16th October, 2006. We direct that the applicant do file its appeal within 21 days from the date hereof. Costs of this reference and the motion be in the appeal.

Dated and delivered at NAIROBI this 16th day of July, 2010.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

M. KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR