IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 307 OF 2009

BETWEEN

JOHN KOYI WALUKE ……..……. APPLICANT/APPELLANT

AND

MOSES MASIKA WETANGULA ……..…….….. 1ST RESPONDENT

JAMES KULUBI OMWANGWE ……..…. 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA ...…… 3RD RESPONDENT

(Application for extension of time to serve Notice of Appeal out of time and Record of Appeal filed herein be deemed to have been properly filed from the Ruling and Order of the High Court of Kenya at Bungoma (Muchemi, J.) dated 18th day of November, 2009

in

H.C.ELECTION PETITION NO. 1 OF 2008)

****

RULING OF THE COURT

ON REFERENCE TO THE FULL COURT

JOHN KOYI WALUKE, (applicant/appellant) took out a notice of motion expressed as having been brought *"Under **Rule 4** and 42 of Cap. 9 of the Laws of Kenya* and ***Section 59** of the Interpretation and General Provisions Act Chapter 2 of the Laws of Kenya and other enabling provisions of the law"* seeking the following orders:-

"1. That this Honourable Court be pleased to extend time within which the applicant/appellant herein may serve the Notice of Appeal filed on 24th November, 2009 from the Ruling and Order of the High Court at Bungoma by Lady Justice Florence Muchemi delivered on 18th November, 2009 in Election Petition No. 1 of 2008 and the record of appeal subsequently filed be deemed to have been properly filed.

In the alternative:

2. That this Honourable Court be pleased to deem the Notice of Appeal filed by the Appellant/Applicant on 24th November, 2009 and served upon the respondents and/or affected parties on the 4th December, 2009 as properly served outside of time.

3. And for an order that the costs of and incidentals to this application abide the result of the appeal herein."

That application was based on the following grounds:-

"(a) That through an inadvertent mistake and or circumstances beyond the control of the appellant advocates on record, there was an unintentional delay to effect service of the Notice of Appeal within the prescribed time in law to the Respondents.

(b) That the delay was not deliberate on the part of the Appellant/Applicant and was occasioned by misplacement of the filed Notice of Appeal document by the clerk one Evans Nandoya Misigo who had been engaged by the Appellant's Advocates on record to effect service upon the respondents/affected parties bearing in mind that a litigant should not be punished for the mistakes of his advocates.

(c) That the applicant has been able to file the record of appeal within the stipulated time.

(d) That the appeal as filed is not frivolous and the same raises weighty issues for determination by this Honourable Court.

(e) That the delay to effect service within the prescribed time is not inordinate and this application has been filed without delay.

(f) That no prejudice will be suffered by the Respondents if this application is granted.

(g) That it is in the interest of fairness and justice that this application be allowed."

There was a supporting affidavit sworn by Mr. Alex S. Masika, an advocate of the High Court who had the conduct of this matter on behalf of the applicant and yet another affidavit sworn by Evans Nandoya Misigo, who described himself as *"a licensed Court process server with authority to effect and/or serve Court process."*

The application was placed before a single member of this Court (*Visram JA*) for consideration. The learned single judge considered all that was placed before him and the submissions for and against the said application and came to the conclusion that the application be allowed. In his ruling delivered on *2nd March, 2010* the learned single judge stated inter alia:-

"In the application before me, the applicant has by way of an affidavit in support, sought to explain the reasons for the delay in serving the Notice of Appeal. The delay was only two days, and was attributed to the misplacement of certain documents including the Notice of Appeal. I accept those reasons as legitimate, and I find the delay to be so short as not to be prejudicial to the respondent. I also cannot say that the appeal is frivolous.

Having considered all that has been urged before me, I am satisfied that sufficient material has been placed before me to enable me exercise my discretion in favour of the applicant. Accordingly the application dated 16th December, 2009 is hereby granted, and I order that the notice of Appeal filed on 24th November, 2009 and served upon the respondent on 4th December, 2009 is hereby deemed to have been served within time. I direct that the record of appeal already filed in Court if not served, be served upon all the parties within the next 14 days. The respondents will have the costs of the application."

It is the foregoing that provoked this Reference to full Court. That must have been done pursuant to ***Rule 54(1)(b)*** of the Rules of this Court. The Reference came up for hearing before us on *9th June, 2010* when Mr. R.O. Kwach (retired Judge of Appeal), Mr. A.S. Masika and Mr. E.K. Wangila appeared for the applicant, while Mr. A.B. Shah (retired Judge of Appeal) and Michael Mubea appeared for the 1st respondent, and Mr. N. Gichamba appeared for the 2nd and 3rd respondents.

In his submissions, Mr. Shah contended that the learned single judge exercised his discretion based on untruthfulness. In particular, Mr. Shah referred to paragraph 8 of the affidavit of Mr. Misigo the process server in which the said Mr. Misigo deponed:-

"8. THAT whilst I prepared to travel on 28th November, 2009 from my home in Mumias as scheduled I realized late in the evening that the envelope where I had kept copies of the notices of Appeal was missing and I frantically looked for it everywhere late into the night. I then cancelled my journey to await my going to Bungoma High Court Registry the next day in the morning which I did and after searching also in vain I was told to come back by the registry officials after three days which I did on the 3rd November, 2009."

Mr. Shah submitted that the above is untrue in that *29th November, 2009* was a Sunday when the High Court Registry at Bungoma was not open for business, and that had the learned judge considered it then he would not have granted the application before him.

To buttress his submissions, Mr. Shah relied on a number of authorities and especially the decision of this Court in ***MZAMIL V. ANSARI [1983] KLR 219*** in which it was held inter alia:-

"3. The affidavit in support of the application to extend time cannot succeed in this case as sufficient reason cannot be established on the basis of an incorrect affidavit."

In response, Mr. Kwach started his submissions by stating that this reference was a storm in a tea cup. He referred to the affidavit of Mr. Misigo and pointed out that the process server did not say that he went to court on a Sunday hence there is no substance in Mr. Shah's submissions that the affidavit was untruthful. It was his view that the learned single judge considered what he was supposed to consider in an application of this nature. He went on to submit that the appeal was not frivolous and that this was not an ordinary civil appeal but an election petition.

Having considered all that has been urged before us in this Reference we would say that we have stated time without number that in exercising the unfettered discretion under ***Rule 4*** of this Court's Rules, a single judge 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. 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.

In ***PATEL V. WAWERU & 2 OTHERS*** *[2003] KLR 361*, this Court had the following to say in respect of ***Rule 4*** of this Court's Rules:-

"This is a matter in which the learned single judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his discretion? In *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* ***– Civil Application No. Nai 251 of 1997 this Court stated:-***

"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."

And in ***MWANGI V. KENYA AIRWAYS LTD. [2003] KLR 486*** at *pp. 489-490* the 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? We think the learned single Judge adopted the correct approach. He, indeed, referred to the decisions of this Court in respect of ***Rule 4*** of this Court's Rules. The learned single Judge in his ruling stated inter alia:-

"The delay was only two days and was attributed to the misplacement of certain documents including the Notice of Appeal. I accept those reasons as legitimate, and I find the delay to be so short as not to be prejudicial to the respondent."

It would appear that the learned single judge granted the application on the ground that the delay was short and that there was legitimate explanation. But Mr. Shah submitted that the explanation was not truthful since there was no way the process server could be at the Bungoma High Court Registry searching for documents on *29th November, 2009* which was a Sunday! We have reproduced *paragraph 8* of the affidavit of the process server (Mr. Misigo) and it is clear that the process server was not truthful.

The issue of untruthful affidavit had been raised before the learned single judge but it appears that he never considered that point. We do not think the learned judge would have granted the application if he had considered the fact that the affidavit in support of the application which was intended to explain the reason for the delay was untruthful. An application seeking exercise of the court's discretion must be supported by an honest explanation. It is a serious matter to mislead the court by untruthful affidavits.

In ***MZAMIL V. ANSARI*** (supra) this Court said:-

"In view of these inconsistencies and contradictions with which Mr. Asige's affidavit bristles, we do not think the application for extension of time can succeed. Sufficient reason cannot be established on the basis of an obviously incorrect affidavit."

The application for extension of time was supported by what was obviously incorrect and untruthful affidavit. Whether we should call it an error of principle or a misapprehension of a point of law

or a plainly wrong approach, we agree with Mr. Shah that we ought to interfere with the exercise of the discretion of the learned single judge.

Furthermore, it is to be observed that the learned single judge erred in computation of the period of delay as two days. But after excluding date of filing of the notice of appeal which was *24th November, 2009* as per ***rule 3(a)*** of the Court of Appeal Rules the notice of appeal was served on *4th December, 2009* which was actually the tenth day, which is three days beyond the stipulated 7 days.

In the result, we allow the Reference, set aside the orders of the single Judge made on *2nd March, 2010* and substitute therefor an order dismissing the notice of motion dated *16th December, 2009*. The costs of this reference and of the motion shall be borne by the applicant, ***John Koyi Waluke***.

Dated and delivered at NAIROBI this 2nd day of July, 2010.

E.O. O'KUBASU

……..

JUDGE OF APPEAL

E.M. GITHINJI

……..

JUDGE OF APPEAL

J.G. NYAMU

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR