IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 448 OF 2001

BETWEEN

MRS. PHOEBE NDUNDA

NDUKU MALANDI

JOSEPH MUNYAO MWEKE

NGUMBI MULWA ……..…… APPLICANTS

AND

MWAKINI RANCHING CO. LTD

KITUI COUNTY COUNCIL ……..…… RESPONDENTS

(Application for extension of time to file a Record of Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Dugdale, J.) dated 7th March, 1989

in

H.C.C.C. NO. 2403 OF 1982)

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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 (Waki, J.A.) made under ***rule 4*** of this Court's Rules.

By a notice of motion dated *3rd August, 2001* taken out under ***Rule 4*** of this Court's Rule, the applicants sought the following orders:-

1. That this Honourable Court be pleased to extend time for serving notice of Appeal herein to such time as the Court deems fit and just.

2. That the time for filing a record of appeal be extended by such period as may be necessary to validate the filing of such record pursuant to the service of the Notice of Appeal.

3. That such further or other orders be made as this Honourable Court may deem necessary to enable the applicants to file and prosecute an appeal against the Judgment and Decree of the High Court of Kenya on its HCCC No. 2403 of 1982.

4. That the costs of this application be costs in the intended appeal.

That application was placed before a single judge of this Court for consideration. The learned single judge (*Waki, J.A.*) considered the material placed before him and in a ruling delivered on *19th November, 2004* declined to exercise his discretion in favour of the applicants and consequently dismissed the application. It is that order of dismissal that had provoked this reference to the 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 *8th June, 2010* when Mr. C. Muriithi appeared for the applicants, while Mr. P.T. Kiiru appeared for the 2nd respondent. The 1st respondent, though served, was not present.

In his brief submissions, Mr. Muriithi complained that the learned single judge put too much emphasis on the delay when, in Mr. Muriithi's view, the delay had been sufficiently explained. Mr. Muriithi also complained that the learned single judge overemphasized the lack of a draft memorandum of appeal. On those two grounds, so argued Mr. Muriithi, the learned single judge reached a wrong decision. It was further submitted that in view of the subject matter involved the applicants should be given opportunity to put their house in order so that the matter may be finally determined. Finally, Mr. Muriithi asked us to invoke the recent amendments of ***Sections 3A*** and ***3B*** of the Appellate Jurisdiction Act.

In equally brief submissions in reply to the foregoing, Mr. Kiiru stated that the learned single judge had properly exercised his discretion in that there was a long delay which had not been explained by the applicants. Mr. Kiiru further submitted that the learned single judge did not consider irrelevant matters nor failed to consider relevant matters. Finally, Mr. Kiiru reminded us that the judgment which was to be challenged was delivered way back in 1989. For these reasons, Mr. Kiiru asked us to dismiss the reference with costs to the 2nd respondent.

We have stated, time without number, that in exercising the unfettered discretion 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 this Court's Rules. As we have repeatedly stated, a reference under that rule is not an appeal to the full Court.

In his submissions before us, Mr. Muriithi complained that the learned single judge overemphasized the question of delay and in so doing came to the wrong decision. What are the basic guidelines that a single judge should take into account when dealing with an application under ***Rule 4*** of this Court's Rules? 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 under ***Rule 4*** of this Court's Rules? We think the learned judge adopted the correct approach since in the course of his ruling he stated:-

"There are numerous authorities of this court which provide the beacons to look out for as it navigates the waters of extension of time. I will only refer to the full court decision in** Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi **(C.Appl. No. Nai. 251/97) (UR) where the Court stated:-

"It is now well settled that the decision whether or not to extend 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."

Having so stated, the learned single judge considered the material placed before him in support of the application and stated:-

"I have considered the application and the submissions of both counsel. It is indeed lamentable that in a matter that the applicants assert is as special to them as all land matters are, there has been such an amazing display of inactivity, not only on their advocate's part but on their part too. There is no reason why the applicants could not have changed their advocate sooner, as they eventually did. There is a judgment of the superior court that has stood unchallenged for a period of 15 years since 1989. Only a fraction of that time can be blamed on legitimate errors or omissions which are excusable. A period of six years since this Court granted leave for the appeal to be instituted has not been explained. It is purely a period of inaction which cannot be entirely attributed to mistakes of counsel. By any standards, the delay was inordinate. Furthermore other that orally urging the hope that they will succeed on appeal there is no draft memorandum of appeal to assist the court in making any informed assessment of such chances.

It is a tenet of public policy and a central pillar of our justice system that there should be finality in litigation. It is as important for the respondents to enjoy the fruits of their litigation as it is for the applicants to pursue the opportunity to challenge that litigation. The opportunity given to the applicants was squandered and if it is their case that their advocate was to blame, they are at liberty to seek recompense from the advocate."

In view of the foregoing, can it be seriously argued that the learned single judge wrongly exercised his discretion in this matter? We do not think so. In ***AFRICAN AIRLINES INTERNATIONAL LTD. V. EASTERN & SOUTHERN AFRICAN TRADE & DEVELOPMENT BANK [2003] KLR 140*** at p. 143 this Court said:-

"Since the grant of the extension is discretionary, this Court would not normally interfere with the exercise of that discretion. The circumstances in which this Court will disturb the exercise of a discretion

of a trial judge were stated by the Court of Appeal for East Africa in the case of ***Mbogo v. Shah*** *[1968] EA 93 which has been applied on numerous occasions by this Court. In his judgment in that case Sir Clement de Lestang VP said at page 94:-*

"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

We listened very carefully to Mr. Muriithi's submissions on behalf of the applicants but at the end of it all, we remain wholly unconvinced that there is any basis upon which the Court can interfere with the single judge's exercise of discretion. That being our view of the matter, this reference must fail. We accordingly order that it be and is hereby dismissed with costs to the 2nd respondent.

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

S.E.O. BOSIRE

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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