IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 195 OF 2008

BETWEEN

ERIC GOR SUNGUH ……..…… APPLICANT

AND

GEORGE ODINGA ORARO ……..…… RESPONDENT

(Application for extension of time for lodging of an application to re-hear an application to strike out notice of appeal from the ruling and order of the High Court of Kenya at Nairobi (Osiemo, J) dated 31st July, 2006

in

H.C.C.C. NO.1250 OF 2004)

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RULING OF THE COURT

By his notice of motion dated 23rd July, 2008 the applicant asked a single Judge of this Court ***(Githinji, J.A.)*** under ***rule 4*** of the Rules of this Court to extend the time for lodging an application to re-hear the respondent's notice of motion dated 23rd January, 2007 which application had sought the striking of the notice of appeal filed by the applicant. The application was heard and allowed on 17th April 2008 in the absence of the applicant's counsel ***Mr Amuga***. Essentially, what was before our brother Justice Githinji, J.A. was an application under ***Rule 55(4)*** to extend the stipulated 30 days because for the reasons given to the Court, the applicant could not file an application for restoration within 30 days. The applicant further sought an order that the notice of motion dated 18th July, 2008 filed in ***Civil Application No. Nai 10 of 2007*** under ***Rule 55(3***) be deemed as properly filed and served.

The motion was eventually heard and by a ruling delivered on 12th November 2008, the learned single Judge dismissed the application.

The aggrieved applicant has applied for a reference to the Court under ***rule 54(1)(b)*** of the Rules against the ruling of the single Judge. This rule entitled a full Court to vary, discharge, or reverse any order direction or decision made by a single Judge.

When the reference came before us on 15th July, 2010 the appellant was represented by ***Mr Chacha Mwita***, advocate, while the respondent was represented by ***Mr Kemboy***, advocate.

In his submissions, Mr Mwita submitted inter-alia that, the learned single Judge failed to consider the real issues before him as set out in the affidavit of Mr Amuga in support of the application, wherein Mr Amuga, after discovering that his clerk had failed to record the hearing in the advocate's diary he took 14 days to rectify the position; that the learned judge did, with respect, take into account irrelevant consideration such as asking for a copy of the ruling being appealed against in order to determine if the appeal was as of right or by leave yet this was a matter for consideration by the Court hearing the appeal; that the issue of the disallowed document was an interlocutory matter which could be aimed at the stage of the hearing of the main appeal; and finally, that the learned Judge failed to take into account a relevant matter in that, ***Mr Ougo*** for the respondent was not opposed to the disallowed application.

On his part, Mr Kemboy in opposing the application stated that, the applicant has not demonstrated that the learned single Judge had erred in the exercise of his discretion and that, the judge in his five page ruling had paid homage to a long line of decisions by this Court which had laid down the relevant considerations. In particular, the learned counsel urged the Court to note that the learned single Judge had noted that the applicant had failed to place before him the application that was not exhibited, dated 8th July, 2008, which had already been filed out of time in ***Civil Application No. Nai 10 of 2007,*** so as to enable the Judge to ascertain the chances of the intended appeal and whether the application was frivolous or arguable and whether the order was appealable as of right or by leave and further that an extract of the advocate's diary was never exhibited to explain the lapse. In his final submission, the respondent's counsel drew the court's attention to the reasoning of the single Judge concerning the issue of possible prejudice in that, the ruling that the applicant's intended to appeal against was made in August, 2006 and it was in an interlocutory application concerning a single document and if the application was not allowed, the applicant had the chance to appeal against the final judgment after full hearing.

As has been stated often, a reference does not constitute an appeal and therefore an applicant must demonstrate to the full Court that, the single Judge in exercising his discretion did misdirect himself in some matter and as a result, arrived at a wrong decision; or unless it is manifest from the case as a whole, the Judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice as put by ***Sir Charles Newbold P*** in the case of ***Mbogo & another -vs- Shah [1968] EA 93 at page 95*** or as put differently in the same case by ***Sir Clement de Lestag VP*** where the Court has acted on matters on which it should not have acted, or because it failed to take into consideration matters which it should have taken into consideration and in doing so, arrived at a wrong conclusion.

The decision to extend time under the invoked provision is essentially discretionary, and it is well settled that in general, the matters that this Court takes into account in deciding whether to grant an extension of time are; firstly, 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. With respect to the applicant's counsel from the single Judge's ruling, it is fairly evident that he considered all the aforesaid benchmarks in the exercise of his discretion. Thus, the applicant failed to provide sufficient material for the purpose of the judge's exercise of his discretion in favour of the applicant. The Judge has clearly described the material he needed, but which was not furnished; the delay in filing the application for restoration was to the extent of two months and was unexplained; failure to attend court by the applicant counsel was also not explained by the production of an extract of his diary; the ruling of the superior court that, the applicant intended to appeal against was not availed to the learned Judge; and finally, the learned Judge considered the factor of prejudice by observing that the applicant's appeal was filed in August 2006 and that what he was pursuing was essentially interlocutory applications whose outcome could be sorted out in the final determination of the appeal, and impliedly, both parties in pursuing the interlocutory application were delaying the finality of the matter.

With the above in view, we are satisfied that the court did take into account all the necessary considerations and further took a broad view of the situation in dismissing the application

The learned single Judge cannot be faulted for claiming to peruse the relevant materials so well described in his ruling because those materials had a bearing on the clause of success of the appeal. The factors of delay, length of delay, and reasons for the delay are also well captioned and explained in the ruling including the futility of pursuing an interlocutory application and the resulting prejudice in terms of delay to both the applicant and the respondent in reaching finality.

In the circumstances, we think the court's discretion was properly exercised. Accordingly, and for the reasons stated above, this reference is dismissed with costs to the respondent.

It is so ordered.

DATED and delivered at Nairobi this 24th Day of September, 2010.

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

……..…

JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR