



IN THE HIGH COURT OF KENYA

AT NYERI

Civil Application 264 of 2009

BERNARD NJERU KINYUAAPPELLANT

AND

KENYA TEA DEVELOPMENT AGENCYRESPONDENT

(An application for leave to file and serve a notice of appeal out of time in an intended appeal arising from an order of the High Court of Kenya at Embu (Khaminwa, J.) dated 28th October, 2008

in

H.C.C. NO. 33 OF 2000)

RULING OF THE COURT

The notice of motion dated 29th July 2009 and filed on 3rd August 2009 was heard by a single Judge on 12th May 2010. In a reserved ruling delivered on 24th June 2010, the learned single Judge dismissed the application stating in his concluding remarks thus:-

“In that event I have absolutely no basis for exercising the courts’ discretion in favour of the application. Consequently I dismiss the application filed in this Court on 3rd August 2009, but direct each party to bear his/its own costs thereof.”

The applicant felt aggrieved by that ruling. In a letter addressed to the Deputy Registrar of this Court dated and delivered on the same day of the ruling i.e. 24th June 2010, the applicant invoked the provisions of **rule 54** of this Court’s Rules and requested for a reference. That is what came before us on 3rd November 2010. The notice of motion which was dismissed by the learned single Judge sought only one order and an order for costs. The order sought was:-

“1. That this Honourable Court be pleased to grant the appellant leave to file and serve his notice of intended appeal out of time.”

The grounds upon which that order was sought were three and they were that:-

“(a) The delay in filing and serving the notice of appeal was unintentional and inadvertent and due to inexperience and oversight on the part of the appellant who was acting in person.

(b) The delay in filing and serving the notice of appeal will not prejudice the intended respondent.

(c) The applicant has a good appeal with overwhelming chances of success and he stand (sic) to suffer irreparable loss and damage if this application is not allowed.”

In his affidavit sworn in support of the application, the applicant stated that the judgment he intended to appeal against was delivered on 28th October, 2008, but by 29th July 2009, about nine months later, he had not filed notice of appeal. He blamed that delay on his ignorance of the law that required him to file notice of appeal within fourteen (14) days of the date of judgment. He claimed that the appeal he intended to file had high chances of success. That application was opposed and the respondent filed a replying affidavit sworn by David Kamani, head of Legal and Regulatory Affairs of the respondent. These, together with the applicants’ submission which he made in person and submissions by Miss Kimani, the learned counsel for the respondent, were the matters that the learned Judge considered before he dismissed the application.

Before us, the applicant who was in person stated in his address to us that he wanted leave to file notice of appeal and several other documents such as memorandum of appeal and affidavits which he was not allowed by the learned Judge to file. He claimed that he did not

file those documents in time because he was not aware of the procedural requirements. Miss Kimani's take in opposing the reference, was that no reasons had been advanced to warrant the reference being allowed as the learned Judge in his ruling set out all the principles to be considered and he exercised his discretionary powers properly in coming to the decision he made to disallow the application. The learned Judge also considered the issue of the applicant's ignorance of the procedural requirements, Miss Kimani added. She asked us to dismiss the reference.

We have anxiously considered the reference together with the ruling of the learned single Judge, the submissions by both the applicant and the learned counsel for the respondent. We have also considered the law. In deciding the notice of motion that was before him, brought under **rule 4** of this Court's Rules, the learned single Judge was exercising unfettered discretionary jurisdiction. That being the case, we are in law required to be very slow in interfering with that exercise of discretionary jurisdiction by a single Judge. We can only interfere with the decision that results from the exercise of such discretionary powers if we are fully satisfied that the discretion was not properly exercised, that is, we must be satisfied before we do so, that the learned Judge either considered matters he should not have considered or that he failed to consider matters he should have considered and therefore arrived at a wrong decision or that looking at his decision as a whole, he was plainly wrong in the exercise of his discretion. Sir Charles Newbold, P. stated in the case of **Mbogo and Another vs. Shah (1968) EA 93** as follows:-

“We now come to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial Judge where his discretion, as in this case was completely unfettered.

A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

The principle set out in the decision above is not confined to cases where the Court of Appeal is dealing with the decision of a trial Judge only. It applies to all cases where a court is being asked to interfere with the exercise of discretionary powers by another Judge, either where a full Court is considering the decision of a single Judge, or where a Court is sitting on appeal on the decision of a trial Judge. It applies in the matter before us.

In the reference before us, as we have stated above, the learned single Judge was considering application for leave to file notice of appeal out of time brought pursuant to **rule 4** of this Court's Rules. The principles that guide this Court when considering such an application are now well settled. The Court in exercising its unfettered discretionary jurisdiction under **rule 4** is expected was to consider several matters, among them, the length of the delay, the reason or explanation for such delay, the chances of success of the intended appeal (if not filed) but without going into the merits of the appeal, and the degree of prejudice that the respondent would suffer if the application is allowed. These are all spelt out in several decisions of this Court one of which is the case of **Fakir Mohamed vs. Joseph Mugambi and two others, Civil Application No. 332 of 2004.**

The record before us shows that the learned single Judge was fully aware of these principles. He in fact set them out at page 3 of his ruling where he stated:-

“Much as I appreciate that the applicant is acting in person in this application, an application under rule 4 of the Rules of this Court requires that certain factors be considered before the Court can exercise its discretion either in favour of or against the applicant. The factors are:-

- (a) The length of delay***
 - (b) The reason for the delay***
 - (c) Possibly the chances of the appeal succeeding if the application is granted, and***
 - (d) The degree of prejudice to the respondent if the application is granted.***
- See Mutiso Leo Sila vs. Rose Hellen Wangari Mwangi – Civil Appeal No. 255 of 1997.”***

Having clearly set out these principles in his ruling, the learned single Judge proceeded to consider each of them and as appears at page 2 of his ruling, he was also aware that the applicant was acting in person and that the applicant had claimed he was not aware of the rules of this Court which required him to file and serve a notice of appeal within 14 days. In our view, the learned single Judge considered all he needed to consider and did not consider anything irrelevant nor did he fail to consider anything he was required to consider. It must be clear that in law, we are not sitting on appeal upon the Judge's decision. All we need to do is to consider as we have already done whether he exercised his discretionary powers in accordance with the law. We are satisfied he properly exercised his discretion and we have no basis for faulting him.

The above being our view of the matter, this reference cannot succeed. It is dismissed, with costs to the respondent.

Dated and delivered at Nyeri this 19th day of November, 2010.

S. E. O. BOSIRE

.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

J. G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR