



IN THE COURT OF APPEAL

AT NYERI

CIVIL APPLICATION 117 OF 2009

MARGARET MUTHONI MUCHIGAAPPLICANT
AND
ESTHER KAMORI GICHOBIRESPONDENT

(Application for extension of time to file notice and record of appeal out of time in an intended appeal from the ruling of the High Court of Kenya at Nyeri (Juma, J.) dated 25th February, 2002

in
H.C.C.C. No. 12 of 1999)

RULING OF THE COURT

This is a reference from the decision of single Judge of this Court (*Visram, J.A.*) delivered on 13th May, 2010 in which the applicant's application for extension of time to file notice and record of appeal under **rule 4** of the Court of Appeal Rules was dismissed. In making that decision the learned single Judge was doing so on behalf of the full Court. However under **rule 54(1)(b)** of the Rules the full Court has the power to "vary, discharge or reverse" that decision. In doing so the full Court bears in mind that the single Judge was exercising a discretion which is unfettered, though exercisable judicially, and it must be shown by the applicant that the single Judge took into account some irrelevant factor/factors, or that he failed to take into account a relevant factor/factors; failure to apply correct principles to the issue at hand, or that, taking into account all the circumstances of the case, his decision is plainly wrong; see *Mwangi v Kenya Airways Ltd. [2003] KLR 486* and *Mbogo v Shah [1968] EA 93*.

On many occasions this Court has set out the principles upon which the judicial discretion under **rule 4** may be exercised. For example in the *Mwangi Case* (*supra*) the Court stated as follows:-

"Over the years this 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 vs 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 above paragraph

would be to fetter the discretion of the single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way.”

Although there is no limit to the number of factors available for consideration so long as they are relevant, there is no requirement that all these factors be considered in any application. The facts and circumstances of each application will normally dictate the exercise of the Court’s discretion; see Samuel Kinyua Mutugi v. Eutyclus Muthui (Civil Application No. Nai 334 of 2004 (unreported), underlining emphasized.

The judgment out of which the application subject to this reference arose was delivered on 2nd October, 2007. There was a delay of 16 months after the applicant properly filed a notice of appeal before the application for extension of time was lodged at the registry of this Court in Nairobi. The learned single Judge in dismissing the application rendered himself thus:

“I have taken into account all the factors indicated above, including the fact that this is an old case that was filed in the superior court in 2004. All litigation should come to an end at some point and so should this, at this point. To do otherwise would send the wrong message to the litigants – that it is all right to sleep on your rights and we will welcome you anytime you wake up. Clearly the Rules of this Court must be followed, and the applicant herein has not provided me with sufficient justification to grant her the indulgence.”

The learned single Judge quoted the necessary factors set out in the case of **Leo Sila Mutiso** (*supra*) for the exercise of the discretion under **rule 4** of the Rules but in particular stressed the delay as the basis for his decision. In his submissions before us **Mr. Njage**, learned counsel for the applicant complained that the single Judge did not take into account that the parties in the suit were disputing over family land and/or that they should be given an opportunity to ventilate their grievance to the highest Court in the land. In this matter the learned single Judge’s jurisdiction was limited to deciding whether or not to grant the extension of time and having considered the factors given in the Leo Sila case (*supra*), he was perfectly entitled in the circumstances of the application to exercise his discretion the way he did. Although a land dispute in the Kenyan set-up is usually emotive we do not believe it was a relevant factor in this application in deciding whether or not to extend time for filing a notice or record of appeal. No other factors have been laid before us to persuade us to “vary, discharge or reverse” the single Judge’s decision. In the circumstances, this reference has no merit and we order it to be dismissed which we hereby do, but since the parties are members of one family, each party shall bear their own costs of the reference.

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

M. OLE KEIWUA

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR