



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Civil Appli 4 of 2009 (KSM 1/2009)

HEZEKIAH MICHOKI APPLICANT

AND

ELIZAPHAN ONYANCHA OMBONGI RESPONDENT

(An application for leave for extension of time to apply in writing to the Registrar for reference of the Ruling of a single Judge to a full bench dated 5th December, 2008

In

H.C.C. Application No. NAI 212 OF 2008 (KSM 15/2008)

RULING

This is a rather rare sort of application, but I suppose it is allowed under **Rule 4** of the Court’s Rules. Mr. Oonge, learned counsel for the respondent, Elizaphan Onyancha Ombongi, did not raise any issue as to the competency of the motion. **Rule 54 (1) (b)** of the Court’s rules provides that:-

“Where under the proviso to section 5 of the Court of Appeal for East Africa Act, any person being dissatisfied with the decision of a single Judge –

(a) -----

(b) in any civil matter wishes to have any order, direction or decision of a single Judge varied, discharged or reversed by the full Court, he may apply therefor informally to the Judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.”

The effect of this provision is that if a single Judge makes a decision and a party is dissatisfied with the decision, the party so dissatisfied can refer the decision to the full Court for consideration and there are two methods of making the reference, namely:-

- (i) by immediately asking the Judge at the time the decision is made to refer the decision to the full Court; or
- (ii) by writing to the Registrar within seven days of the making of the decision to have the same referred to the full Court.

Where a party chooses to use option (ii) above a time limit of seven days is set. On 5th December, 2008, a single Judge of the Court (Onyango Otieno, J.A) made a decision dismissing a notice of motion which had been filed by the applicant, Hezekiah Michoki, seeking for enlargement of time to enable him serve a notice of appeal out of time and also to file a record of appeal out of time. As at the time of the learned single Judge's decision the applicant was then represented by Mr. Joseph Momanyi Aunga Advocate; that advocate was, however, not personally present in Court at the time the decision was made but he was represented by Mr. Joseph Oguttu Mboya. The latter advocate did not ask the learned single Judge to refer the decision to the full Court. That left the applicant only with the option of writing a letter to the Registrar to refer the matter to the full Court. The letter had to be written within seven days from the 5th December, 2008 when the decision was rendered. The applicant failed to do so and that failure, i.e. to comply with the seven day period, is the basis of the motion now before me. The motion asks me to enlarge the period of seven days to enable the applicant write the letter to the Registrar to ask for a reference to the full Court. The motion was filed on 8th January, 2009.

It was agreed before me that the period covered by the delay was only from 5th December, 2008 to 20th December, 2009. The period between 21st December, 2008 and 14th January 2009 fell under the Christmas Vacation and **Rule 3 (e)** provides that:-

“unless the court otherwise directs, the period of the Christmas Vacation shall not be reckoned in the computation of time.”

Taking this provision into account the effective period of delay which the applicant had to explain was fourteen days as the day on which the decision was rendered, i.e. 5th December, 2008 is excluded under **Rule 3 (a)**.

I have taken into consideration the explanation given by the applicant for the delay of two weeks. It is extensive though not necessarily wholly correct. There is, however, no attempt to cheat or cover up anything and bearing in mind the length of the delay, I have unhesitatingly come to the conclusion that in all the circumstances of the case, the delay of fourteen days is not inordinate and does not preclude me from exercising my discretion under **Rule 4** in favour of the applicant.

In the event I allow the notice of motion dated 7th January, 2009 and lodged in Court on 8th January, 2009 and I order that the applicant shall within seven days of the date hereof, deliver the written request to the Registrar and at the same time serve a copy of that letter upon the respondent. Mr. Bosire, the learned counsel for the applicant, said the applicant was ready to pay the costs of the motion to the respondent. I accordingly order that the applicant shall pay to the respondent the costs of the motion which I assess at Kshs.20,000/-, such costs to be paid within fourteen days of the date hereof. If the said costs are not paid within the stated time the respondent shall be at liberty to execute for them forthwith. Those shall be my orders in the motion.

Dated and delivered at Kisumu this 27th day of March, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.