



IN THE COURT OF APPEAL

AT NYERI

CIVIL APPLICATION 150 OF 2008

ELIZABETH WAMBUI GITHUKUAPPLICANT

AND

ALICE WANJIKU NGATIARESPONDENT

(Application for extension of time to file notice and record of appeal from a decree and order

of the High Court of Kenya at Nyeri (Mr. Justice J.M. Khamoni) dated 17th May, 2006

in

H.C.C.A. NO. 78 OF 2000)

RULING OF THE COURT

Before us is a reference to the full Court pursuant to **rule 54 (1) (b)** of the Court of Appeal Rules. The notice of motion dated 14th May 2008 and filed on the same day sought an order:-

1. That this Honourable Court be pleased to extend time and grant leave to the applicant to lodge and serve notice of appeal and record of appeal out of time.”

It also sought an order for costs to abide the result of the intended appeal. The grounds for that application were:-

“(a) That the applicant was not aware that her appeal had been dismissed for want of prosecution until 5 months after the Court order.

(b) The applicant applied for an order of review of the dismissal order by a notice of motion dated 13/10/06, and the application was dismissed on 22/4/08.

(c) The applicant thereafter decided to apply for leave to appeal against the order of 17th May, 2006, as her appeal was dismissed under XL1 rule 31 (2) of the Civil Procedure Rules.”

In the affidavit sworn by the applicant in support of that application, she deponed that the genesis of the entire saga was a decision of the Resident Magistrate at Karatina in which the estate of her deceased son was shared out in what she alleged was an inequitable manner among the entitled beneficiaries. She appealed against that decision in H.C.C. Appeal No. 78 of 2000 at Nyeri. That appeal was not prosecuted

for a time which the learned superior court found was inordinate. A notice to show cause why it could not be dismissed for want of prosecution was issued but on the date set for showing cause the applicant's advocate sent another advocate who informed the superior court that the applicant's advocate had not been served with that notice. The respondent appeared in person and sought the dismissal of the appeal. The learned Judge of the superior court (Khamoni J.), in a short order dismissed that appeal on 17th May 2006. The applicant, upon advice from her advocate, filed application for review on 13th October 2006 and that application was dismissed on 22nd April 2008 by the superior court (Kasango J.). The applicant felt aggrieved by the dismissal of her application for review. She applied for extension of time to lodge and serve notice of appeal and record of appeal from the order of Khamoni J. dismissing the appeal for want of prosecution. As we have stated, the application was filed on 14th May 2008. The respondent opposed the application in a replying affidavit sworn on 30th October 2008.

That application was placed before a single Judge of this Court, who, after full hearing, dismissed it in a ruling dated and delivered at Nyeri on 5th November, 2008. In his ruling dismissing the application, the learned single Judge stated inter alia:-

“In the circumstances as those in this matter the conduct of an applicant who seeks exercise of judicial discretion in his favour is relevant. It was incumbent upon the applicant to explain the delay in taking action on record both before and after the order against which an appeal is intended. The applicant has not satisfactorily explained the delay in prosecuting her appeal, the delay in bringing her review application, and even the delay in bringing this application. Her application for review was dismissed on 22nd April 2008, but this application was not filed until 14th May 2008. The applicant has not explained why upon filing her appeal she did not inquire from her advocate the progress of her appeal. For about six years she sat pretty and only woke up when she saw surveyors on the suit land. While it is true the Court's power under rule 4 is wide and discretionary as this matter stands the applicant has not satisfied me that I should exercise my discretion in her favour.”

The applicant still felt aggrieved by that ruling and hence this reference sought by the applicant vide her firm of advocates in their letter dated 7th November 2008. In her submissions before us, Miss Mwai, the learned Counsel for the applicant urged us to allow the reference as according to her, the learned single Judge did not consider that there were grounds for delay in that the delay to lodge appeal was caused by the applicant seeking review of the orders of Khamoni J. She also urged us to consider that the learned Judge did not consider that the subject matter was land, an immotive matter in Kenya which required to be heard by the highest Court in the land. She also contended that the intended appeal had good chances of success. On the other hand, Mr. Muthigani, the learned counsel for the respondent submitted that the learned single Judge exercised his unfettered discretion properly in that the learned Judge considered the principles set out in law to guide the court when considering an application such as was before him, premised upon **rule 4** of this Court's Rules, and came to an inevitable conclusion on the matter. He urged us not to disturb the decision of the learned single Judge.

The principles to guide this Court when considering a reference under **rule 54 (1) (b)** of the Court of Appeal Rules are now well settled. They are succinctly set out in this Court's holdings in the case of ***Mwangi vs Kenya Airways Ltd KLR 486*** where this Court held as follows:-

- “1. A single appellate Judge sitting alone and acting under rule 4 of the Court of Appeal Rules (Cap 9 sub leg) is exercising the powers vested in him on behalf of the whole court. A full court can only interfere with the exercise of those entirely discretionary powers for very specific reasons.***
- 2. The circumstances under which the full court would be entitled to interfere with the exercise of the discretionary power by a single Judge are similar to those under which an appellate court would be entitled to interfere with the exercise of a discretion by a trial Judge.***
- 3. Before a full court can interfere with the exercise of a single Judge's discretion it would have to be satisfied that in coming to his decision, the single Judge has taken into account some irrelevant factor, or that he has failed to take into account a relevant factor or that he has not applied a correct***

principle to the issues before him or that taking into account all the circumstances of the case, his decision is plainly wrong.”

The Court also set out in that case, the matters which the single Judge is enjoined to consider when considering an application for extension

of time brought under **rule 4**, and which the full court would also look into when considering the decision of a single Judge on a reference. It held, *inter alia*, as follows:-

“4. Matters which the court takes into account in deciding whether or not to grant an extension of time are:-

(a) the length of the 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.

5. The chances of the appeal succeeding if the application is granted is merely stated as something for a “possible” consideration, not that it must be considered.

6.

7.

8. The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap.9 sub leg) gives the single Judge 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 so long as the factor is relevant to the issue being considered.”

We have considered the submissions by both counsel, the record, the ruling of the single Judge, the history of the case, the authorities to which we were referred, all with the above legal principles in mind. We are also aware that a reference such as this is not an appeal and as stated in the decision of this Court above, so long as the learned single Judge is shown to have exercised his unfettered discretion judicially, we would not disturb his ruling. Having done so, our view is that the learned single Judge has not been shown to have failed to take into account a relevant factor or took into account any irrelevant matter. We cannot also come to a conclusion on the facts of this case and the law, that the learned single Judge’s decision is plainly wrong. We are not persuaded that the learned single Judge misapprehended the applicable law. It is clear from the record that the applicant’s appeal in the superior court was dismissed for want of prosecution on 17th May 2006. That appeal was registered in the appeal’s registry of the superior court at Nyeri in the year 2000. Thus by the time it was dismissed six years had lapsed since it was filed. Secondly, after its dismissal on 17th May 2006, the appellant did nothing about that till 13th October 2006, close to five months after dismissal when she sought review of that order. The applicant’s explanation for that delay is that her advocate did not tell her the position. Surely, she needed to check with her advocate about her appeal if she was indeed interested. That she did not know of the date set for notice to show cause why the appeal could not be dismissed is neither here nor there as her advocate knew and that was her agent. Thirdly, even after her review application was dismissed on 22nd April 2008, she again delayed for about 22 days before filing the notice of motion now before us on 14th May 2008. No explanation is offered for that delay. In the circumstances, the learned single Judge cannot be faulted in exercising his discretion against the applicant. He had justifiable reasons for doing so. That a matter concerns land is no licence for indolence, otherwise the law would need to be amended to accommodate such situations. But as the law stands, that aspect is only one aspect to be considered in

case the delay is not inordinate or in case the explanation for the delay would require additional buttressing.

We have said enough to indicate that this application is for dismissal. It lacks merit. We will not interfere with single Judge's discretion. It is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 12th day of June, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR