



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**Civil Appli. 47 of 2008**

**SIMON KABURU .....APPLICANT**

**AND**

**JANE NKUENE KIRIMA.....RESPONDENT**

*(Application for extension of time to file notices and record of appeal from a decree,  
order of the High Court of Kenya at Meru (Lenaola, J.) dated 24<sup>th</sup> July 2007*

**in**

**H.C.Succ. No. 31 of 2001)**

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**RULING OF THE COURT**

On 24<sup>th</sup> July 2007, the superior court at Meru (Lenaola, J) delivered a ruling in Succession Cause No. 31 of 2001 which was filed to determine, among other matters, the distribution of the estate of Kirima M’Mungania who died on 27<sup>th</sup> December 2000. We observe from the record before us that that ruling was delivered in the presence of the advocate for the objector and the petitioner. The applicant Simon Kaburu who was the Petitioner in the Succession Cause felt aggrieved by that ruling and claims that he instructed his advocate Mr. Kiogora Arithi to file Notice of Appeal on his behalf. By 11<sup>th</sup> March 2008, over seven months later that Notice of Appeal had not been filed and served as required by the Rules of this Court. On 13<sup>th</sup> March 2008, he moved to this Court through a different firm of advocates, B. G. Kariuki & Company and filed a Notice of Motion dated 11<sup>th</sup> March 2008 under Rules 4 and 42 of the Court’s Rules in which he sought orders that:-

- “1. The time for filing and services (sic) of the Notice of Appeal be extended.
2. The time for the filing and service of the record of appeal be extended.
3. The costs for and incidental for this application abide the result of the proposed appeal.”

The grounds cited from the application were:-

“(i) The applicant’s advocates in the superior court never filed the Notice and Record of Appeal as instructed by the applicant.

- (ii) The non-filing and serving of the Notice and Record of Appeal was not the mistake of the applicant.
- (iii) The intended appeal has high chances of success.
- (iv) It is in the interest of justice that the application be allowed.”

That application was supported by an affidavit sworn by the applicant Simon Mburu in which the applicant stated that he was absent when the ruling complained of was delivered but later when he learnt of it, his advocate said he had filed Notice of Appeal but again said he would not appeal and asked him to get the services of another advocate. The applicant did not however state in that affidavit when he instructed his advocates to file Notice of Appeal and when he was told by that advocate to get another advocate. He did not also state when he got his present advocate. Suffice it to say he blamed the delay on his former advocate’s failure to act on his instructions and maintained that he had an arguable appeal and should not be punished for what he called his advocate’s mistakes. The respondent Jane Nkuene Kirima, who was the objector in the superior court opposed the application and also filed replying affidavit in response to the allegations in the applicant’s affidavit.

That application was placed before a single Judge of this Court, who after hearing both parties dismissed it with costs to the respondent, in a ruling dated and delivered at Nyeri on 31<sup>st</sup> October, 2008. The applicant still felt aggrieved by that ruling and in a letter dated 5<sup>th</sup> November 2008, addressed to the Registrar of this Court (*we presume it was meant to be addressed to Deputy Registrar of this Court*) through his advocates on record, he sought a reference under Rule 54(1) of this Court’s Rules and hence this Reference before us.

Mr. Koin, the learned counsel for the applicant urged us to consider that the learned single Judge did not take into account relevant factors as to why the applicant was late in filing the relevant documents and in particular that the learned single Judge did not consider that the mistake leading to delay in doing so was that of the applicant’s advocate, and that he did not consider that the applicant should not be punished for the sins of his advocate. Further, Mr. Koin contended that the learned single Judge should have considered that the subject matter was a family land and that being so, this Court should have deliberated on it and lastly that the learned single Judge erred in considering the question of prejudice which was not raised by the respondent. Mr. Anampiu, the learned counsel for the respondent on the other hand, was of the view that the learned Judge considered all the factors that are, in principle, required to be considered. According to him, the learned Judge considered length of delay, reasons for the delay and found that the delay was inordinate. He then considered merits of the intended appeal and prejudice and came to a sound ruling in Mr. Anampiu’s views. He thus asked us not to disturb the ruling of the single Judge.

We have considered the record before us, the submissions by the parties, the ruling of the learned single Judge and the law.

The learned single Judge heard the application under Rule 4 of this Court’s rules. He made that decision on behalf of the full Court but the full court has the power under Rule 54(1)(b) of the Rules to “*vary, discharge, or reverse*” the decision. We make haste to add that a reference is not an appeal. We are therefore not sitting on appeal upon the decision of a single Judge. The principles that guide the full court when hearing a matter pursuant to Rule 54(1)(b) are spelt out in several past decisions of this Court. One such decision is that in the case of Samuel Kinyua Mutugi vs. Eutyachus Muthuri Civil Application Number Nai. 334 of 2004 where this Court stated:

“In doing so however, the full court must be mindful that the single Judge was exercising a discretion which is in terms unfettered, though exercisable judicially, and it must be shown by the applicant that the single Judge took into account some irrelevant factor or that he has failed to take into account a relevant factor or that taking into account all the circumstances of the case, his decision is plainly wrong – see Mwangi vs Kenya Airways Ltd (2003) KLR 486 and Mbogo vs. Shah (1968) EA 93.”

Thus we are in law enjoined to consider whether the learned single Judge had in his ruling considered

the principles that the single Judge is, in law, required to consider and if we find he had done so, then it would not matter that he came to a conclusion which would have been different from ours, we would be bound to leave the ruling undisturbed. It is the applicant's duty to satisfy us that the learned single Judge has not exercised his discretionary powers properly. In a matter before us, which was brought pursuant to rule 4 of this Court's rules, the principles set out by this court upon which the judicial discretion under rule 4 may be exercised are as stated in the case of Mwangi vs. Kenya Airways Ltd (*supra*) where this court stated:-

“Over the years, the 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.”*

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

In short, the learned single Judge was not limited to the number of factors he could have considered.

We have carefully perused his ruling. He considered the period of the delay; he considered the reason of the delay which was that it was as a result of the advocate's mistake and came to a conclusion that in fact the ruling the applicant sought to appeal from was delivered in the presence of the appellant unlike the appellant stated in the affidavit before the learned single Judge. The learned Judge in considering and analyzing the allegation that the delay was caused by the mistake of the advocate in failing to follow the appellant's instructions to file the Notice of Appeal, found that that allegation was not proved to his satisfaction and that the delay had not been satisfactorily explained. He also considered the arguability of the intended appeal and concluded that there were no discernible valid grounds of appeal and the intended appeal *ex facie* appeared frivolous. We do not read any departure from the principles in the learned single Judge considering the question of prejudice even if the respondent did not raise it. The record was before him. It contained the facts of the case as well as the history of the case. From the records a court of law can make its own conclusions such as the single Judge made in this matter. Once a record is before a court of law, the court cannot be confined only to matters raised by the parties in their affidavits. The purpose of the record being before the court is to enable the court peruse it and make an informal decision guided by what the entire record contains. Nothing turns on the allegation that the learned single Judge considered prejudice which was not in the affidavit of the respondent.

In conclusion, we have, on our own considered the manner in which the single Judge exercised his discretionary jurisdiction and we have no reason to interfere with the result of that exercise of his discretion. In our view, he exercised it properly. That being our view of the matter, the reference has no merit. It is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 12<sup>th</sup> 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 of the original.

**DEPUTY REGISTRAR**