



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**Civil Appli 183 of 2008 (UR 117/2008)**

**JAMES ROBERT KARANJA MUIGAI ..... APPLICANT**

**AND**

**JOSEPH MWANGI KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**SIMON CHEGE KARANJA ..... 2<sup>ND</sup> RESPONDENT**

**SAMUEL MUGO KARANJA ..... 3<sup>RD</sup> RESPONDENT**

**DANIEL MBUGUA KARANJA ..... 4<sup>TH</sup> RESPONDENT**

**JANE MUTHONI MBUGUA ..... 5<sup>TH</sup> RESPONDENT**

**ESTHER WARINGA MUGO ..... 6<sup>TH</sup> RESPONDENT**

***(An application for extension of time to file notice of appeal and record of appeal***

***in an intended appeal from the ruling of the High Court of Kenya at Nairobi (Kubo, J) dated 4<sup>th</sup> March, 2005***

**In**

**H.C.C.C. No. 125 of 2002)**

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**RULING ON REFERENCE TO FULL COURT**

Though **rule 54 (1) (b)** gives the full Court power to vary, discharge or reverse a decision made by a single Judge of the Court, the principles which the Court applies when dealing with references under that rule are now well settled. For example, in deciding the issue of whether or not to enlarge time for an applicant under **rule 4**, a single Judge is exercising an unfettered discretion and it is accepted that such discretion is being exercised on behalf of the full Court. So, to interfere with the exercise of a discretion by a single Judge who has done so on behalf of the Court, the full Court must be satisfied that in coming to his decision the single Judge took into account what he ought not to have taken into account or failed to take into account what he ought to have taken into account or that he misapprehended some aspect of the law or that he failed to appreciate the weight and bearing of the evidence and thus reached a wrong decision in law, or that the decision itself is so plainly wrong that no reasonable tribunal could have come to it, taking into account all the circumstances of the particular case – see for example, LEO SILA MUTISO VS. ROSE HELLEN WANGARI MWANGI, Civil Application No. NAI. 255 of 1997 (unreported); MWANGI VS. KENYA AIRWAYS LTD. [2003] KLR 486 and HENRY MUKORA MWANGI VS. CHARLES GICHINA MWANGI, Civil Application No. NAI 26 of 2004 (unreported).

James Robert Karanja Muigai, the applicant herein, asked a single member of this Court to enlarge for him the time within which to file a notice of appeal and a record of appeal from the decision of the superior court made on 4<sup>th</sup> March, 2005. The motion for the enlargement of time was made under **rule 4**, and was lodged in the Court on 18<sup>th</sup> July, 2008, some three years after the decision which the applicant intended to appeal against. Githinji, J.A, as a single Judge heard the motion and by his ruling dated and delivered on 13<sup>th</sup> November, 2008, dismissed the motion. Among the reasons given by the learned single Judge for dismissing the motion were, and we quote him:-

***“--- the present application was filed on 18<sup>th</sup> July, 2008 – over 3 years since the ruling of the superior court. The applicant himself did not file any affidavit to explain the reasons for the delay. The supporting affidavit is instead sworn by his new advocate, who came on the record with leave of the superior court on 20<sup>th</sup> December, 2007. All what the applicant’s advocate deposes regarding the delay is that the applicant’s former advocates applied for copies of proceedings and ruling on 26<sup>th</sup> May, 2005 and that the mistake of the applicant’s advocates should not be visited on the applicant. Apart from the fact that the applicant’s advocate now on record has no knowledge of the matter, which happened before he was allowed to take over the applicant’s case, there is absolutely no explanation for the inordinate delay before and after he took over the case. This application was filed 7 months after Mr. Seneti was allowed to represent the applicant. The applicant has not annexed a copy of the letter bespeaking the proceedings and the ruling nor claimed that the court’s registry did not supply a copy of the proceedings and ruling in time. It seems to me the applicant had not initially intended to file an appeal and that the decision to lodge an appeal is an afterthought.”***

In the reference before us, Mr. Seneti simply asked us to reverse the single Judge, apparently on the basis that the Judge ought not to have ruled against the applicant. Mr. Seneti asserted that his affidavit explained in detail the reason(s) as to the cause of the delay. With respect to Mr. Seneti, that cannot form the basis upon which the Court can interfere with the single Judge’s exercise of discretion. Mr. Seneti did not say that in coming to his decision the Judge took into consideration any irrelevant matter or that he failed to take into account a relevant matter, or that the Judge misapprehended the law or the evidence before him. Mr. Seneti made no such complaint before us and on the material which was placed before the learned single Judge, we are totally unable to come to the conclusion that the decision of the single Judge was so unreasonable that no reasonable tribunal could have made it. In any case, Mr. Seneti did not make any such claim before us. As we have already said the complaint of the applicant as put before us by Mr. Seneti appears to us to be that the learned single Judge ought to have accepted the applicant’s case. There was no such obligation upon the Judge. In our respectful view, the learned single Judge correctly exercised his discretion on the basis of the material placed before him. That being the view we take of the matter, this reference fails and we order that it be and is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Those shall be our orders in the matter.

Dated and delivered at Nairobi this 10<sup>th</sup> day of July, 2009.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**