REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CRIMINAL APPLI 1 OF 2008 (NYR 1/2008)

ALBERT MAGU MUSA.....APPLICANT

AND

THE REPUBLIC.....RESPONDENT

(Application for extension of time to file Notice of Appeal out of time from an order of the

High Court of Kenya at Nyeri (Ang'awa, J.) dated 14th September, 1993

in

H.C.CR.A. NO. 112 OF 1993)

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RULING OF THE COURT ON REFERENCE TO FULL COURT

This is a reference to the full court from the Ruling and decision of a single Judge of this Court delivered on 16th May, 2008 in which the learned single Judge, after hearing Notice of Motion dated 11th December, 2007 and filed on 11th January, 2008, seeking leave to be granted to the applicant to lodge a Notice of Appeal against the decision of the superior court made on 14th September, 1993 in **Nyeri High Court Criminal Appeal No. 112** of **1993** out of time, dismissed the same application with costs to the respondent. The application was made under ***Rule 4*** of this Court's Rules and this reference was brought pursuant to ***Rule 54 (1) (a)*** of the Rules.

The brief facts giving rise to the application that was before the learned single Judge were that on 16th April, 1993, the applicant was convicted in Kerugoya Senior Resident Magistrates Court **Criminal Case No. 890** of **1991** on three counts, namely obtaining land registration by false pretences contrary to ***section 320*** of the Penal Code, uttering a false document contrary to ***section 353*** of the Penal Code and forgery contrary to ***section 349*** of the Penal Code. He was sentenced to serve 2 years in jail on the first count, 8 months on count 2 and 10 months in respect of count 3. The jail terms were to run concurrently. He lodged an appeal with the superior court vide **H.C.CR. Appeal No. 112** of **1993**. That appeal was filed on his behalf by his then firm of advocates M/S. Nyawira Gitonga & Company, Advocates which firm of advocates had also represented him at his trial in the subordinate court. That appeal was filed on 29th April, 1993. On 14th September, 1993, the superior court summarily rejected that appeal under ***section 352 (2)*** of the Criminal Procedure Code. Neither the appellant nor his advocates on his behalf,

challenged that decision of the superior court until 11th January, 2008 when, as we have stated, the applicant filed Notice of Motion, the subject of this reference in court.

After full hearing of that application, the learned single Judge, in a lengthy ruling dismissing the application appreciated that as the application that was before him was premised on ***Rule 4*** of this Courts Rules, he had unfettered discretion in deciding the case. He further appreciated and set out the guidelines for the exercise of such discretion as are clearly spelt out in the well known cases of **Mutiso v. Mwangi, Civil Application No. Nai. 255 of 1997** (ur), **Mwangi vs. Kenya Airways Ltd (2003) KLR 486**, **Major Joseph Mwereri Igweta vs. Murika M' Ethare & Attorney General**, **Civil Application No. Nai. 8 of 2000 (ur)** and **Murai vs. Wainaina (No. 4) [1982] KLR 38**. Having done so, he analysed the affidavits that were in the record and considered the submissions made by both Mr. Maari, the learned counsel for the applicant and Mr. Orinda, the learned Senior Principal State Counsel and found that on the facts laid before him, the delay of 15 years was not properly explained and was inordinate. He also did not believe the applicant and his advocate when they stated that the applicant knew nothing about the dismissal of the applicant's appeal until September, 2007; Relying on a letter dated 6th October, 2004 from Complaints Commission, the learned single Judge formed the opinion that the applicant must have known about the dismissal of the appeal much earlier than September, 2007. On that basis, he felt that the applicant was seeking an equitable remedy yet he was not approaching the court with clean hands in that he was not candid with the court as to when he knew that his appeal had been dismissed. It is on those grounds that the learned Judge felt that the question of merit of the intended appeal even if it were to be considered, could not overide those other factors and hence dismissed the application.

Before us, Mr. Maari, in urging the reference submitted that the learned Judge in finding that the delay period to be explained was for 15 years, considered matters that he should not have considered as the delay period was less than 15 years and had been adequately explained. He contended that the learned Judge was so much taken up with considering that the delay period was 15 years that he disregarded the consideration of the merits of the intended appeal. He further submitted that the learned Judge failed to consider all factors he should have considered such as that the intended appeal had good chances of success. Lastly, Mr. Maari submitted that the learned Judge considered the question of prejudice which was not properly before him. Mr. Orinda, on the other hand was of the view that the learned single Judge's decision was based on well trodden legal path as all aspects of the matter including the history of the matter that was before him were all considered and nothing extraneous was considered while at the same time nothing worth considering was not considered.

We have anxiously considered the reference. We have considered the rival submissions that were made before us by the two learned counsel and the law. It is trite law that a reference is not an appeal and as a full court, it is not our duty to substitute our decision for that of a single judge on the basis that we do not agree with the decision or that we may nevertheless have reached a different conclusion on the matters that were before the learned single Judge. Our duty is not to interfere with the exercise of the discretion of a single judge of the court who incidentally acts as an agent of the full court, unless we are satisfied that he considered matters that he should not have considered or that he failed to consider matters he should have considered, and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the learned single judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice. In the case of **MBOGO V. SHAH (1968) EA 96**, Sir Charles Newbold, P. stated:-

"**We come now to the second matter which arises from this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial Judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong at the exercise of his discretion and that as a result there has been misjustice."**

In the reference before us, it was not in dispute that the learned single judge in hearing application which was brought under ***rule 4*** of this Courts rules, was exercising unfettered discretionary jurisdiction. He was aware of this aspect and incorporated it in his ruling. He was also aware that in doing so he had to have reasons upon which to exercise that discretion and that it was not to be exercised upon his own whims nor capriciously. He was aware of the requirements of guidelines for the exercise of that discretion which are that the applicant seeking orders under ***Rule 4*** of this Court's rules had to state the period of delay, the reasons for that delay or put another way, give explanation for the delay; that he had to consider if possible, the merits of the intended appeal and whether the respondent in such an application would suffer prejudice if the application is granted.

In our perusal of the ruling, we note that the learned Judge set out the affidavit sworn by the applicant that set out the delay period and the explanation for the delay. He certainly did not consider the entire 15 years as a whole period of delay without explanation. He for instance stated at page 5 of the ruling:

"**It will also be apparent that between October 2003 and September, 2007, a period of 4 years, he never bothered to visit the court registry to find out the position regarding his appeal**."

The four years was the period after the appellant left prison and thus the learned Judge did not consider as delay period, the period the applicant was in jail. Further the main part of his ruling clearly indicated that the question of the merit of the appeal was in his mind, but he felt that on the facts before him the alleged merit of the intended appeal could not override other factors. That was in exercise of his discretion and the court cannot fault him on that. As to the question of prejudice, the learned Judge in his comments was responding to Mr. Maari's submissions and he was entitled to do so as that was a matter canvassed before him by Mr. Maari representing a party before him.

All in all, having considered the entire matter, we find no reason to fault the learned single Judge's exercise of his discretion which we find he exercised properly. This reference cannot succeed. It is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 30th day of October, 2009.

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR