



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLI 232 OF 2007 (UR 143/2007)

RAMESH SHAH.....APPLICANT

AND

KENBOX INDUSTRIES LTD.....RESPONDENT

*(An application for leave to serve notice and file record of appeal out of time from the ruling of the High court of Kenya at Nairobi (Ransley, J.) dated 27<sup>th</sup> September, 2004*

in

H.C.C.C. NO. 1107 OF 1990)

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**RULING ON REFERENCE TO FULL COURT**

**RAMESH SHAH**, the applicant in this reference, asked a learned single Judge of this Court (Bosire, J.A) to enlarge for him the time within which to serve a notice of appeal and a record of appeal from the decision of the High Court of Kenya at Nairobi (Ransley, J.) given on 27<sup>th</sup> September, 2004.

The genesis of the application before the learned single Judge may briefly be stated as follows. Judgment was entered on 10<sup>th</sup> June, 2003 against the applicant in an *ex parte* hearing. The applicant, as defendant in the suit, applied under **O IXB rule 8** of the Civil Procedure Rules for an order setting aside the judgment. Ransely J. heard the application and delivered his ruling on 27<sup>th</sup> September, 2004 dismissing that application. The applicant was aggrieved and he filed a notice of appeal pursuant to the provisions of **rule 74** of the Court of Appeal Rules. The said notice was timeously filed on 29<sup>th</sup> September, 2004, but was not served on time.

On 10<sup>th</sup> December, 2004, the applicant filed another Notice of Appeal against the same judgment which had been delivered on 10<sup>th</sup> June, 2003. This was about 17 months out of time. It is plain that the applicant was desirous of pursuing two separate appeals, one against the judgment and the other against the ruling declining to set aside that judgment and obviously because the notice of appeal against the judgment was filed out of time, it was mandatory for the applicant to seek extension of time in order for it to be regular. Also, because the notice of appeal against the ruling refusing to set aside judgment had not been served timeously, an order enlarging the time within which to serve it was essential. Consequently, the applicants filed two applications. The first one in time was **Civil Application No. NAI. 340 of 2004**,

and the second **Civil Application No. NAI. 341 of 2004.**

The record laid before us shows that both applications were listed on 17<sup>th</sup> June, 2005 before Deverell, J.A for hearing and he made the following order:

**“There being a consent by both parties to the proposed procedure I order that application NAI. 341/2004 be marked as withdrawn with costs of the application to be paid by the applicant in that application.**

**I further order that NAI. 340/2004 be heard on Thursday 23<sup>rd</sup> June, 2005 by Waki, J.A. at 9.00 a.m.”**

The record shows that for some reason Waki, J.A did not hear Civil Application NAI. 340 of 2004, but Deverell, J.A heard it and delivered his ruling on 12<sup>th</sup> September, 2005 allowing the application. The respondent herein who was also the respondent in that application was aggrieved and referred the Judge’s ruling to the full court which reversed his decision on 27<sup>th</sup> April, 2007. It is that decision which provoked the application before Bosire, J.A.

The applicant contended before the learned single Judge that his counsel did not advise him on the date of the hearing of the suit in the superior court and thus he was not to blame for the counsel’s omission. Mr. Wagara, who also represented him in this reference submitted before us that the applicant had satisfactorily explained his failure to take the necessary steps timeously and that the learned single Judge had failed to take into account the explanation given for the delay and had not in the circumstances exercised his discretion judicially.

On the other hand, Mr. Sarvia for the respondent vehemently opposed the reference terming it unmeritorious. He submitted that the learned single Judge in coming to his decision exercised his discretion judicially and cannot be faulted. Mr. Sarvia contended that the applications preferred before the learned single Judge was a gross abuse of judicial process.

The learned single Judge in dismissing the applicant’s notice of motion acquitted himself thus:

**“I need not cite them here, but the paramount factor to bear in mind is that delay in taking the essential steps has to be explained to the satisfaction of the court. It is after the court becomes satisfied on this that it may proceed to consider the other factors. It is not often that the court will aid a party who is dilatory for no apparent reason.**

**Regarding the question of delay, it was the applicant’s own decision to abandon Civil Application No. NAI. 341 of 2004, which was identical to this one. This application is clearly a revival of Civil Application No. NAI. 341 of 2004.**

**The applicant has not explained satisfactorily why he thought that a withdrawal of that application was the best course of action for him. If he believed Civil Application No. NAI. 340 of 2004 was sufficient for his purposes then this attempt to revive it can only be an abuse of the process of the court.**

**The applicant by bringing this applications is in effect approaching the courts by trial and error method and is litigating by instalments, both which are unacceptable and amount to abuse of the process of the court. It is quite clear to me that this application was brought to delay the conclusion of the dispute between the parties. Moreover, this Court dismissed Civil Application No. NAI. 340 of 2004 on 27<sup>th</sup> April, 2007. The applicant has not explained why it took him almost five months to bring this application. It is clear he is not serious in what he says he wants to do.”**

**Rule 54 (1) (b)** of the Court of Appeal Rules (“the Rules”) gives the full Court power to vary, discharge or reverse a decision made by a single Judge of this Court. However, in doing so, 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).**

In the reference before us, Mr. Wagara asked us to reverse the learned single Judge, apparently on the basis that the learned Judge did not exercise his discretion judicially and had concentrated on extraneous matters. Mr. Wagara asserted that the applicant had explained in detail the reasons as to the cause of the delay and therefore the learned Judge ought not to have ruled against the applications. With respect to Mr. Wagara, we cannot reverse the learned single Judge merely on the basis that he ought not to have ruled against the applicant. This cannot form the basis upon which the Court can interfere with the learned single Judge’s exercise of discretion. It has to be shown that in coming to his decision he 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. We are satisfied on perusing the record of the motion that on the material which was placed before the learned single Judge, we are totally unable to come to the conclusion that his decision was so unreasonable that no reasonable tribunal could have made it.

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 respondent. Those shall be our orders in the matter.

***Dated and delivered at Nairobi this 23rd day of October 2009.***

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**J.G. NYAMU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**