



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Application 77 of 2004

EDDY NDETO GITETU.....APPLICANT

AND

KENYA COMMERCIAL BANK LTD.....RESPONDENT

(An application for extension of time to file notice of appeal from a ruling of the

High Court of Kenya

Nairobi (Azangalala, J) dated 11thMarch, 2004

in

H.C.C.C NO. 2094 OF2000)

RULING OF THE COURT ON REFERENCE TO THE FULL COURT

This is a reference to the full Court from a decision of a single Judge of this Court made under rule 4 of this Court's Rules. The learned single Judge's ruling was made pursuant to an application for extension of time in which to file a notice of appeal against the ruling of the superior court (Azangalala Ag. J) dated 11th March 2004.

In dismissing the application for extension of time the learned Judge in his ruling delivered on 16th December, 2004 stated, inter alia:-

“The applicant has enumerated the grounds on which he will be appealing against the ruling in paragraph 18 of the supporting affidavit. Those grounds include the ground that the learned Judge confused the issue of liability with that of damages and should have determined the issue of liability first. The applicant should have annexed a copy of is (sic) counter claim to assist the court to understand fully the nature of the counter-claim.

Nevertheless, from the facts contained in the ruling of the superior court, it is apparent that applicant was claiming damages under a contract of employment for wrongful dismissal and although admittedly he had resigned from employment. To that extent the claim for damages for wrongful dismissal did not *ex facie* disclose a reasonable cause of action.

Secondly, the nature of the damages claimed for wrongful dismissal were in fact special damages which were not quantified and hence not awardable in law as the learned Judge correctly found

For the foregoing, I am not satisfied that the applicant has shown that the intended appeal is arguable and not frivolous.

The application was filed within 30 days from the date of the ruling. The applicant has explained the reasons for delay in filing the notice of appeal in time. If the applicant had satisfied the court that the intended appeal is not frivolous, which he has failed to do, I would not have considered the delay as inordinate or that the extension of time would be prejudicial to the respondent.

But for the reasons stated, I dismiss the application with costs to the respondent.”

The foregoing is what gave rise to this reference before the full Court. When the matter came up for hearing before us on 16th September 2009, Mr. Mutula Kilonzo Junior appeared for the applicant while Mr. R.O. Sagana appeared for the respondent.

In his submissions Mr. Kilonzo Junior submitted that the question that was before the learned single Judge was whether a notice could be filed out of time but the learned single Judge went into the merits of the intended appeal. It was Mr. Kilonzo’s contention that the learned single Judge went too far in his ruling as in so doing he denied the applicant the simple right of filing a notice of appeal. It was pointed out that, indeed, the learned single Judge was satisfied with the explanation given for the delay in filing notice of appeal. To buttress his submission Mr. Kilonzo relied on various authorities.

On his part Mr. Sagana supported the ruling of the learned single judge in that the intended appeal lacked merits. Mr Sagana supported his submissions by referring to various decisions of this Court in similar situations.

It is now settled law that in an application under rule 4 of this Court’s Rules a single Judge of this Court is exercising unfettered discretion but such discretion must be exercised upon proper principles of law. We have stated time without number that in exercising the unfettered discretion as granted by Rule 4 of the Court’s Rules a single member of the Court is doing so on behalf of the whole Court and the full bench of the Court would only be entitled to interfere with the exercise of the discretion if it be shown that in the process of exercising the discretion the single Judge has taken into account an irrelevant matter which he ought not to have taken into account or that he failed to take into account a relevant matter which he ought to have taken into account or that he misapprehended some aspect of the law applicable or that his decision was plainly wrong and could not have been arrived at by a reasonable tribunal properly directing itself to the evidence and the law applicable to it. A reference to the full Court is not an appeal and it is not enough to show that the full court would have come to a different result if it had been sitting in the place of the single Judge.

In **Pothiwalla v Kidogo Basi Housing Co-operative Society Ltd & 31 Others** [2005] KLR 733 this Court said:-

“..... it is now settled that an application of this nature (under rule 4 of this Court’s Rules) the Court is being asked to exercise its unfettered discretion and that for an applicant to succeed he must satisfy the Court that the delay was not inordinate and that the delay has been sufficiently explained. The other issue to be considered is whether the intended appeal is arguable. Lastly, the applicant has to show that no prejudice would be caused to the respondent if the application to extend time is allowed. This discretion, like any other judicial discretion must be exercised judicially.

In **Muchugi Kiragu v James Muchugi Kiragu & Another** – Civil App. NO. NAI 356 of 1996 this Court had the following to say as regards this Court’s discretion under rule 4:-

“Lastly we would like to observe that the discretion granted under rule 4 of the rules of this Court to extend the time for lodging an appeal, is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and

that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”

It is to be observed that the learned single Judge had the foregoing in mind as he dealt with the application before him. We also note that the learned single Judge was satisfied with the reason given for the delay. The learned single Judge, however, went on to dismiss the application on the ground that the intended appeal was frivolous. But in **Kenya Cannery Limited vs Titus Muiruri Doge – Civil Application No. NAI_64 of 1990** (unreported) it was stated:-

“This Court has held on many occasions that any litigant who wishes to be heard by this Court should not be prevented or penalized due to the mistake of his counsel.”

In the present reference we observed that the learned single Judge went too far as he dealt with the merits of the intended appeal and proceeded to declare the same frivolous. We agree with the applicant’s counsel that the learned single Judge went too far in his ruling.

Applying these principles to this case we are satisfied that this is one of those cases where, with the greatest respect, we have to interfere with the exercise of the discretion of the learned single Judge. We would therefore allow this reference, set aside the order of the single Judge and substitute therefor an order granting an extension of time as sought by the application. A notice of appeal shall be filed within seven (7) days from the date hereof. Costs of this reference and those of the application before the single Judge shall be in the appeal.

Dated and delivered at Nairobi this 16th day of October, 2009.

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR