



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 248 of 2008 (UR 158/2008)

ESPOSITO FRANCO.....APPLICANT

AND

AMASON KINGI JEFFAH.....1ST RESPONDENT

AMINA KALE.....2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA.....3RD RESPONDENT

**(Application for extension of time within which to file an appeal from the ruling/order
of the High Court of Kenya at a Malindi (Ombija, J.) DATED 24TH April, 2008**

In

ELECTION PETITION NO. 1 OF 2008)

RULING OF THE COURT

Before us is a reference to the full court of the ruling of a single judge of the Court (O’Kubasu J.A) dated 14th November, 2008, in which the learned single judge allowed an application under **rule 4** of the Rules of this Court. In that application, Esposito Franco, the applicant, had applied for an extension of time within which to serve a notice of appeal, and also within which to file and serve a record of appeal.

The applicant’s election petition against the election of Amason Kingi Jeffah, the 1st respondent, as the member of parliament for Magarini Constituency was struck out on amongst other grounds that the petition was not served within the stipulated period under the National Assembly and Presidential Election Act, Cap 7 Laws of Kenya, and the rules made there under. He was aggrieved and file a notice of appeal declaring his intention to change the dismissal. He however, did not serve the notice of appeal upon all persons who were likely to be affected by the intended appeal, hence his application for extension of time.

In that application, apart from the 1st respondent, the applicant named Amina Kale (2nd respondent) and

Electoral Commission of Kenya (3rd respondent) as respondents. The 3rd respondent has since ceased to exist and has been replaced by the Interim Independent Electoral Commission. The 2nd and 3rd respondents joined the 1st respondent in challenging the learned single judge's decision. The three respondents contend that O'kubasu J.A, failed to exercise his discretion under **rule 4**, according to law ad thus arrived at a wrong decision.

It is now settled that a judge seised of an application under **rule 4** aforesaid, exercises judicial discretion. O'Kubasu J.A, was aware of this and cited an authority to substantiate this point. A court sitting on appeal, or handling a reference from a decision based on exercise of judicial discretion has no jurisdiction of interfering with such a decision unless as stated by the Court of Appeal for East Africa, in Mbogo and Another v. Shah 1968 EA 93, it is satisfied that the judge who made the decision misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice. It is also well settled that such a decision may be interfered with if the learned judge took into account irrelevant matter in coming to a decision or failed to take into account a relevant matter.

Mr. Weloba who with Mr. Munyithya appeared for the 1st respondent submitted before us that certain relevant material was not taken into account by the learned single judge and as a result he came to a wrong decision. Learned counsel also submitted that absence of prejudice per se is not a factor to consider before coming to a decision. In his view the court is obliged to first consider all relevant factors and if satisfied that the applicant has shown sufficient grounds for an extension, only then should the court consider the issue of prejudice. He was supported in that submission by Mr. Kithi who on his part submitted that the learned single judge of this Court proceeded as if the election petition against his client was still pending and for that reason he erred.

The background facts are short. In his application for extension of time Espito Franco, averred that the delay in serving the notice of appeal was a mistake on the part of his previous counsel. He also averred that the delay in lodging a record of appeal was because there was delay on the part of the trial court in furnishing him with the copies of proceedings. The learned single judge considered these two factors. He was alive to the fact that he was exercising judicial discretion as he reminded himself of that fact. He sent out, correctly, the matters the court should consider in an application under **rule 4**, as enunciated in the often cited case of Leo Sila Mutiso v. Rose Hellen Wanagari Mwangi, Civil Application No. NAI. 251 of 1997. He addressed his mind to the two reasons we have set out, above, which the applicant gave for his failure to take the necessary steps in his intended appeal timeously. He came to the conclusion that:

“In my view this is a proper case in which I should exercise my discretion in favour of the applicant since clearly the 1st respondent stands to suffer no prejudice as he will continue to be the member of parliament for Magarini Constituency even if this application is allowed”.

The learned single judge appears to have excused the applicant's delay in serving the notice of appeal, although he does not say so expressly. That conclusion is inevitable considering the approach he adopted. We eschew any attempt to substitute what we ourselves would have decided had we been the people seised of that application. The extent to which this court may interfere with the exercise of discretion by a single judge is circumscribed. We have no basis for saying that the decision under consideration is wrong. Nor can we pin-point any relevant factor the learned Judge may have failed to consider or a irrelevant factor he improperly took into account in coming to a decision. That being our view of the matter we come to the conclusion that this reference has no merit. It is dismissed with costs to the applicant, to be paid by the 1st respondent in the **rule 4** application.

As the parties herein are the same as in Civil Application 249 of 2008, and their respective council herein adopted submission herein in regard to that application this ruling applies to that application as well. Orders accordingly.

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

S.E.O BOSIRE

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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