



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

CIVIL APPLI 107 OF 2007

- 1. GODFREY KINUU MAINGI.....1ST APPLICANT
- 2. JUSTUS MURUNGI.....2ND APPLICANT
- 3. HARUN MBURUGU.....3RD APPLICANT
- 4. JOSEPH NTURIBI MWITHIMBU.....4TH APPLICANT
- 5. ANDREW GIKUNDA.....5TH APPLICANT

AND

- 1. NTHIMBIRI FARMERS CO-OP SOCIETY LTD.....1ST RESPONDENT
- 2. THE REGISTRAR OF CO-OP SOCIETIES.....2ND RESPONDENT

(Application for extension of time to serve notice of appeal out of time from the ruling of the

High Court of Kenya at Nairobi (Mohammed Ibrahim, J) dated 8th July 2005

in

H.C.MISC. APPL. NO. 633 OF 2004

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 to serve a notice of appeal out of time.

In allowing the application for extension of time the learned single Judge in his ruling delivered on 3rd April, 2008 stated inter alia:-

“In dealing with this application I have to bear in mind that I am called upon to exercise my discretion whether or not to grant the relief sought. In doing so, I am guided by the principles set out by this Court over a long period of time and that is that the discretion exercisable under Rule 4 of this Court’s Rules, is unfettered and that the main concern of the Court is to do justice between the parties. Nevertheless, the discretion has to be exercised judicially, that is on sound factual and legal basis.”

The learned Judge then stated the principles set out in this Court’s decisions in **LEO SILA MUTSO V ROSE HELLEN WANGARI MWANGI** - Civil Application NAI 255/97 (unreported) and concluded his ruling thus:-

“However, the most difficult aspect of this application is the delay between 3rd November, 2006 when the respondents’ counsel withdrew the application for striking out the notice of appeal and 16th May, 2007 being the time of making this present application. Was the delay inordinate and inexcusable as contended by Mr. Arithi? Could it, also, be asked of him why he never took any action to re-activate his application to strike out the notice of appeal? Was he sending signals to the applicants that he had no more quarrel over lateness in service? The delay, in my view, may appear inordinate but has been satisfactorily explained by Mr. Nyakundi that it was because of so many applications and suits between the parties which matters have been pending in various courts, some of which were in superior court during the last month of March, 2007. I accept the explanation. Further, I think the lack of activity on the part of Mr. Arithi could have made Mr. Nyakundi believe that the former did not place much seriousness on the validity of the notice of appeal.

I gather from submissions of counsel that the issues of law to be raised in the intended appeal are of great public importance and vexing enough to grant examination and legal interpretation by this Court. Moreover, it has not been shown to me how the respondents would be prejudiced if the application were to be granted.

I will in the circumstances exercise my discretion in favour of the applicants and make the following orders:-

- (a) That the time for serving the notice of appeal be extended.**
- (b) That the notice of appeal be served within 7 days from the date of this ruling.**
- (c) That the costs of this application shall be in the intended appeal”**

The foregoing is what has given rise to this reference before the full Court. The matter came up for hearing on 12th October, 2009 when Mr. Kiautha Arithi appeared for the applicant **NTHIMBIRI FARMERS CO-OP SOCIETY LTD** while Mr Gideon Mutai appeared for the **REGISTRAR OF CO-OPERATIVE SOCIETIES**

It was Mr. Arithi’s submission that the learned single Judge did not exercise his discretion properly in that the length of delay which in his view, was inordinate had not been sufficiently explained. It was further submitted that the reasons that the learned single Judge relied on were non-existent. For these reasons Mr. Arithi asked us to reverse the decision of the learned single Judge.

On his part Mr. Mutai associated himself with the submissions of Mr. Arithi.

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 claim 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-OPERTIVE 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. The learned single Judge was satisfied with the explanation given for the delay. The learned single Judge further noted that the issues to be raised in the intended appeal are of great public importance which deserve legal interpretation by this Court. Finally the learned single Judge noted that the respondents in that application would not be prejudiced if the application were to be granted.

In view of the foregoing, we decipher no error in the manner the learned single Judge dealt with the application for extension of time. He stated the correct principles and applied the same to the facts of the case before him. That being our view of the matter, this reference must fail. We accordingly order that it be and is hereby dismissed with costs to the respondents.

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

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR