



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAKURU
Civil Application 37 of 2008**

JOSEPH D. HALAKE.....APPLICANT

AND

YUNIS MALIK.....RESPONDENT

(An application for extension of time to file notice of appeal from the judgment of the High Court of Kenya at Nakuru (Kimaru, J) dated 18th October, 2007

in

H.C.C.C. NO. 230 OF 2004

RULING ON REFERENCE TO FULL COURT

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 the 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).

Joseph D. Halake, the applicant herein, asked a learned single Judge of this Court to enlarge for him the time within which to file a notice of appeal from the decision of the High Court of Kenya at

Nakuru made on 18th October 2005. The motion which was brought under **rule 4** of the Rules was lodged in the Court on 29th February, 2008, some four months after the decision which the applicant intended to appeal against. The reasons given for not preferring an appeal within the time prescribed by the rules were first, that judgment was delivered in the absence of the applicant's counsel; second, that there was communication breakdown between counsel and the applicant; and thirdly, the applicant was unable to instruct counsel due to the rampant insecurity in many parts of the country in January, 2008.

Bosire, J.A, as a learned single Judge heard the motion and by his ruling dated 3rd October 2008, dismissed the motion. Among the reasons given by the learned single Judge for dismissing the motion were, and we quote him:-

“The decision against which an appeal is intended was delivered on 18th October, 2007. The applicant says he was unaware of it until end of December, 2007. If that be so, one would have expected that the applicant would take urgent steps to file the notice of appeal with promptitude. However, no action was taken in that regard until over a month later. That delay is not by any standard short.”

And also:-

“This application was not filed until 29th February, 2008, well over 14 days since Mr. Kagucia was made aware of the judgment against which an appeal is intended. In an application like the one before me, the conduct of the applicant since the date of the decision he intends to challenge on appeal is relevant in the determination of the issue whether or not the delay is or may be regarded as inordinate.”

In the reference before us, Mr. Kagucia 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 Kagucia asserted that his affidavit explained in detail the reasons as to the cause of the delay and therefore the learned Judge ought not to have ruled against the applicant. Mr Kimatta learned counsel for the respondent vehemently opposed the reference terming it unmeritorious.

With respect to Mr. Kagucia, we cannot reverse the learned single Judge 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 respondent. Those shall be our orders in the matter.

Dated and delivered at Nakuru this 6th day of November 2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR