



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**Civil Appli. Nai 277 of 2006**

**JOSEPH MURIITHI NJIRU ..... APPLICANT**

**AND**

**TERESIA WANJA RAYMOND ..... RESPONDENT**

*(Application for extension of time to file a notice & record of appeal from the orders of the High Court of Kenya at Embu (Omwitsa, J) dated 15<sup>th</sup> February, 2001*

**In**

**H.C. C. C. No. 24 of 1999)**

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**RULING OF THE COURT**

The first objection taken to this reference from the decision of a single member of the Court is that it was lodged in Court out of time without leave and, therefore, is incompetent. Under **Rule 54 (1) (b)** of the Court's Rules a party who wishes to refer to the full Court a decision made by a single Judge of the Court has two options:-

- (i) such a party can informally inform the Judge, immediately the decision is given that he intends to refer the matter to the full Court; or
- (ii) if he does not adopt the first option, he must, within seven days of the decision to be referred to the full Court, write to the Deputy Registrar of the Court asking that the decision be referred to the full Court.

The decision the subject of the reference herein was made by the single Judge on 25<sup>th</sup> October, 2007. It appears from the record that the applicant Joseph Muriithi Njeru was present in Court when the decision was delivered. His advocate, Mr. Kariithi, appears to have been absent. No informal application to refer the matter to the full Court was made to the single Judge upon the delivery of the ruling. Mr. Kariithi then wrote to the Deputy Registrar of the Court on 29<sup>th</sup> October, 2007 asking that the decision of the single Judge be referred to the full Court. The letter, though dated 29<sup>th</sup> October, 2007, was only filed in the Court Registry at Nyeri on 2<sup>nd</sup> November, 2007. Mr. Muchira, for the respondent, contends that from 25<sup>th</sup> October, 2007 to 2<sup>nd</sup> November, 2007 was nine days, two days over the stipulated time set out in **rule 54 (1)(b)**. Mr. Kariithi contends it was seven days, excluding the first day when the order was made, i.e. excluding 25<sup>th</sup> October, 2007 and that is obviously right under **rule 3(a)** of the Court's Rules. So the seven days started to run on 26<sup>th</sup> October, 2007. According to our calculation seven days from 26<sup>th</sup> October, 2007 ended on 1<sup>st</sup> November, 2007 and unless that date (i.e. 1<sup>st</sup> November, 2007) was a public holiday or a Sunday, the reference would have been filed out of time by one day. We have

checked the calendar for the year 2007; 1<sup>st</sup> November was a Thursday and it was not a public holiday. So the reference was made one day out of time and it was so made without leave. It is, accordingly, incompetent and must be struck out.

But even on merit, the reference was bound to fail. The applicant conceded before the single Judge and before us as well that after his appeal was struck out he took another ninety days before lodging his application for extension of time.

The learned single Judge looked for any explanation for the delay and found none. He then went on to consider other issues such as the chances of the intended appeal succeeding, the prejudice to the respondent if the time was extended and so on, but in our view, having found that the delay of ninety days remained wholly unexplained, it was really not necessary to consider these other issues.

The learned single Judge, however, was exercising an unfettered discretion under **rule 4** of the Court's rules. He took into account relevant factors; he did not take into account any irrelevant factor and there is absolutely nothing on the record to show that he failed to appreciate any part of the evidence or law essential to his exercise of discretion. Mr. Kariithi did not point out to us any single thing from which we could conclude that the learned single Judge had improperly exercised his discretion. Even on the merits, the reference was bound to fail.

But as it is, the reference itself was incompetent, the same having been lodged in Court outside the prescribed period and without leave. We order that it be and is hereby struck out with the costs thereof to the respondent.

Dated and delivered at Nyeri this 23<sup>rd</sup> day of May, 2008

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**