



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT MOMBASA**

**Civil Appeal (Appli) 330 of 2003**

**BETWEEN**

**HUSAMUDDIN GULAMHUSSEIN POTHIWALLA .....APPLICANT/APPELLANT**

**AND**

**ADMINISTRATOR, TRUSTEE AND EXECUTOR OF**

**THE ESTATE OF GULAMHUSSEIN EBRAHIM POTHIWALLA**

**AND**

**KIDOGO BASI HOUSING CORPORATIVE**

**SOCIETY LIMITED AND 31 OTHERS .....RESPONDENTS**

*(An application for leave to substitute the appellant in place of the deceased and for extension of time within which to file the application in an appeal from the judgment and decree of the High Court of Kenya at Mombasa Ang'awa, J.) dated 8<sup>th</sup> December, 1997*

**in**

**H.C.C.C. NO. 112 OF 1995)**

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**RULING OF THE COURT**

This is a reference from the ruling of Waki J.A sitting as a single Judge of the Court delivered on 21<sup>st</sup> day of July, 2006 in which he allowed extension of time and substitution of the applicants in place of the deceased *Husamddin Gulamhussein Pothiwalla*. The respondents Kidogo Basi Housing Corporation Society Limited and 31 others being dissatisfied by the ruling of the learned single Judge have, through their counsel Mr. Jiwaji, brought this reference in which Mr. Jiwaji made passionate appeal to us to interfere with the exercise of discretion by the learned single Judge. The reference was argued with considerable force by Mr. Jiwaji who started his submissions by pointing out that the firm of Kilonzo & Co. Advocates came on record before the death of the original appellant who passed away on 1<sup>st</sup> April, 2005. It was Mr. Jiwaji's contention that the new firm of advocates did not act with speed and that when

they eventually filed the application for extension of time and substitution they cited the wrong provisions of the rules. Mr. Jiwaji referred and relied on the order of this Court made on 28<sup>th</sup> July, 2005. That order stated as follows: -

**“The matter is adjourned in order to allow Ms. Kilonzo to file application for substitution of the appellant which application must be filed within sixty (60) days from today and the same be heard on priority basis.”**

It was Mr. Jiwaji’s submission that since the Court had used the word “must” then there was no room for extension of time for the substitution of the appellant. Mr. Jiwaji went as far as submitting that when the Court used the word “must” then **rule 4** of the Rules of this Court was ousted.

In conclusion Mr. Jiwaji submitted that the application before the single Judge was stated to have been brought under rules **51(2)** and **83 (1) and (2)** of the Rules of this Court but when he came before the single Judge he was confronted with an application under **rules 4** and **96** of this Court’s Rules. In view of this it was Mr. Jiwaji’s contention that the learned single Judge misunderstood the law when he proceeded to hear an application which was not properly before him.

To counter the foregoing submissions Ms. Kilonzo the learned counsel for the appellant stated that the errors complained of arose from the mistakes of counsel and that the learned single Judge addressed himself to those defects which he found not fatal and then proceeded to apply the correct principles. It was Ms. Kilonzo’s submission that the defects were mere irregularities which did not go to the jurisdiction of the court.

Having heard what has been urged before us we must on the outset say that the application which was before the learned single Judge sought two substantive orders; that is to say: -

**“1. THAT Hussein Husamudin Pothiwalla and Khuzeima Husamuddin Pothiwalla be granted leave to be substituted as the Applicants in place of the deceased Husamuddin Gulamhussein Pothiwalla in this suit.**

**2. THAT this Honourable Court be pleased to extend the time within which this Application ought to have been filed.”**

The provisions of the law upon which that application was brought were, however, not correctly stated in that the application was stated to have been brought pursuant to **rules 51(2)** and **83(1) and (2)** of this Court’s Rules. The learned single Judge appreciated this error and dealt with it in his ruling as follows: -

**“The provisions of the law upon which the application is based are however carelessly invoked or not invoked at all and that formed one of the two prongs of the objection raised by learned counsel for the respondents Mr. Jiwaji. The rules cited as the basis for seeking the first prayer are rules 51(2) and 83(1) and (2) but it was readily conceded by Ms. Kilonzo for the applicant that they are not relevant. They relate, respectively, to substitution of deceased parties in applications and in intended appeals. It is common ground that the main appeal was filed on 29<sup>th</sup> December, 2003, and has since come up for hearing severally but has been adjourned on account of interlocutory applications. In the intervening period the appellant died on 1<sup>st</sup> April, 2005. The application for substitution in such event may only lie under rule 96(1) of this Court’s Rules. The second prayer may only be made under rule 4 of the rules but there is no mention of it except at the hearing of the application when Ms. Kilonzo apologized for the oversight.**

**It is obviously a serious matter for advocates to submit records before this Court which are slovenly drawn. But, in my view, it is not in the interests of justice that a party be punished for such errors of counsel which do not go to the substance of the matter when appropriate orders as to costs may be made to address such transgression. The orders sought in this application are clear and the rules under which they can be sought or granted are also clear. I will deal with the substance of the application those defects notwithstanding.”**

Having so stated the learned single Judge then embarked on the task of dealing with the application on its merits. The learned single Judge considered the length of the delay and the reasons given for the said delay and applying the well known principles in such applications came to the conclusion that the applicants were entitled to the reliefs sought. In concluding his ruling the learned single Judge stated: -

**“The factors are not exhaustive and I have exercised my mind on the period of delay which is 4 ½ months. It would be inordinate if there was no explanation for it but I am satisfied with the explanation put forward by the applicants. I would excuse it particularly considering that this is a land matter and the applicants have since inception of the dispute given no reason to show that they were not interested in pursuing it to its conclusion. I am also satisfied that there would be no prejudice to the respondents who continue to stay in occupation of the land without disturbance from the applicants.**

**Accordingly the time for filing the application is hereby extended with the result that the application now before me was timeously filed. Prayer 1 of the application seeks “leave”, as correctly pointed out by Mr. Jiwaji but there are no provisions under the rules for seeking leave. It is a superfluous word and I ignore it. I grant the order with the effect that the deceased appellant be and is hereby henceforth substituted with Hussein Husamdin Pothiwala, and Khuzeima Husamdin Pothiwala, the joint administrators/executors of his estate, as the appellants in the appeal.**

**The costs of this application shall be borne by the applicants in any event.”**

This being a reference from the ruling of a single Judge, the issue is whether having regard to strong submission by Mr. Jiwaji, this Court would be entitled to interfere with the exercise of discretion by the learned single Judge. In dealing with the application before him what were the matters to be taken into account? As it has been stated many times by this Court for an applicant to succeed it must be shown to the satisfaction of the Court that the delay was not inordinate, the delay has been sufficiently explained, the intended appeal is arguable and lastly that no prejudice would be caused to the respondent if the application to extend time is allowed. – see **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi – Civil application No. NAI 251 of 1997 (Unreported)**.

For this Court to interfere with the discretion of a single Judge it must be shown that the single Judge acted on matters which he should not have acted or he failed to take into consideration matters which he should have taken into consideration and in doing so he arrived at a wrong conclusion or that he was plainly wrong in his decision.

In the present reference we have considered what was before the learned single Judge and the manner in which he handled the matter. We have endeavored to reproduce portions of his ruling in a bid to show how he approached the matter. Despite spirited submissions by Mr. Jiwaji, we do not find anything in those submissions to show that the learned single Judge was plainly wrong in the manner he decided the application. The learned single Judge carefully considered the procedural errors and proceeded to apply the correct principles in dealing with such matters. He was exercising his unfettered discretion under **rule 4** of this Court’s Rules.

In **African Airlines International Ltd v. Eastern & Southern Africa Trade & Development Bank [2003] KLR 140 at p. 143** this Court stated.

**“Since the grant of the extension is discretionary, this Court would not normally interfere with the exercise of that discretion. The circumstances in which this Court will disturb the exercise of a discretion of a trial Judge were stated by the Court of Appeal for East Africa in the case of Mbogo v. Shah [1968] EA 93 which has been applied on numerous occasions by this Court. In his judgment in that case, Sir Clement de Lestang VP said at page 94:-**

**“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself**

**or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”**

Applying these principles to the present case we are satisfied that the learned single Judge cannot be faulted in the manner he exercised his discretion. We do not consider that the use of the word must in the order of the Court made on 28<sup>th</sup> July, 2005 is, in the context of that order such as to render the time limit imposed in the Court order to be outside the phrase “*time limited by.....any decision of the Court .....*” in **Rule 4**. We are of the view that sufficient material was placed before him to warrant the conclusion he reached.

For the foregoing reasons, we decline to interfere with the discretion of the learned single Judge. Consequently, this reference is dismissed with costs.

***Dated and delivered at Mombasa this 19<sup>th</sup> day of January, 2007.***

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**W.S. DEVERELL**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**