



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA APPEAL**  
**AT NAIROBI**  
**CIVIL APPLI 163 OF 2005**

1. **BEATRICE WAMBUI KIGONDU**
2. **JANE WAIRIMU MUGURO**
3. **EDITH NYAKIEGA**
4. **JOHN KAMAU**

5. **ISAAC WAMBUGU..... APPLICANTS**

**AND**

**BEATRICE MUTHONI THUMBI ..... RESPONDENT**

**(Application for extension of time to file and serve notice and record of appeal out of time in an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Githinji, J) dated 3<sup>rd</sup> July 2002 in H.C. Succession Cause No. 780 of 1992)**

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**RULING OF THE COURT**

This is a reference from the decision of a single Judge of this Court on a notice of motion dated 15<sup>th</sup> June 2005 brought under **rule 4** of the Court of Appeal Rules (**the Rules**) in which the applicants, **Beatrice Wambui Kigondu, Jane Wairimu Muguro, Edith Nyakiega, John Kamau and Isaac Wambugu**, sought an order to extend time to file and serve notice of appeal and record of appeal out of time.

The respondent, **Beatrice Muthoni Thumbi**, was the successful party in Nairobi High Court Probate and Administration Cause No. 780 of 1992 in which the superior court (Githinji J.) (as he then was) delivered a judgment on 3<sup>rd</sup> July, 2002. The applicants felt aggrieved by that judgment and filed a notice of appeal against it on 9<sup>th</sup> July 2002. They requested in time for copies of proceedings and judgment. The proceedings were supplied and the applicants lodged Civil Appeal Number 295 of 2002 in this Court. That appeal came up for hearing on 8<sup>th</sup> February, 2005 when the record of appeal was struck out as the order on record and confirmation of the grant appealed from had errors. Thereafter, the applicants filed this notice of motion on 16<sup>th</sup> June 2005, over four months from the date the appeal was struck out. The notice of motion was placed before a single Judge of this Court who, after hearing it fully, in a ruling

dated and delivered on 9<sup>th</sup> December 2005 dismissed it with costs stating, *inter alia*, as follows:

**“My final decision is reached after having weighed up all of the above factors in the exercise of my discretion under rule 4 of the Rules, which, I am very aware, although unfettered, must not be exercised capriciously, but, on the contrary, must be exercised judicially.**

**My decision is that the application for extension should be dismissed with costs and I hereby so order.”**

The applicants were not satisfied with that ruling, hence this reference before us.

Mr. Njanja, the learned counsel for the applicants, submitted that the learned single Judge did not give reasons for his refusal to grant the extension sought and that even after the learned single Judge had appreciated that the intended appeal was arguable, he still dismissed the application without giving reasons as to why the applicants, with an arguable appeal, should not be allowed extension of time to argue the appeal. He further stated that the Judge appeared to have based his decision on the fact that the applicants’ counsel made certain mistakes that made it difficult to comply with the time requirement and contended that a mistake or a blunder of an advocate should not deny a party the right to be heard. Further, he maintained that delays such as were there in filing the application were not inordinate and though he conceded that the Judge considered the delay, he felt that the same delay was not inordinate and the Judge should not have based his decision to dismiss the application on account of such non inordinate delay. Lastly, he submitted that the learned Judge should have considered that the subject matter of the intended appeal was land, which is a sensitive matter in the country and on that score, the extension sought should have been granted. He referred us to a number of authorities to buttress his submissions.

Mr. Machira, the learned counsel for the respondent, in opposing the application submitted that the learned single Judge properly exercised his unfettered discretion under **rule 4** of the Rules and in doing so, he considered all matters that were before him and found that there was an unexplained delay and rightly dismissed the application. His contention was that in a reference, the full Court cannot substitute its own decision for that of a single Judge’s discretionary decision if the single Judge considered all relevant matters.

A single Judge hearing a matter under **rule 4** of the Rules is exercising powers vested on him alone on behalf of the whole Court by virtue of **rule 52(1)** of the Rules. The full Court can only interfere with the exercise of those powers, which are entirely discretionary, for very specific reasons. In the case of **Thuita Mwangi vs. Kenya Airways Limited – Civil Application No. Nai. 162 of 2002**, this Court stated the circumstances under which the full Court would be entitled to interfere with the exercise of the discretionary powers by a single Judge. It stated:

“The circumstances under which the full Court would be entitled to interfere with the exercise of the discretionary powers by the single Judge are similar to those under which an appellate Court would be entitled to interfere with the exercise of a discretion by a trial Judge. Those circumstances were specified by the Court of appeal for East Africa in **MBOGO & ANOTHER VS. SHAH** (1968) EA 93. .... All we need to say is that before we could ever think of interfering with the exercise of a discretion by a single Judge, and which discretion as we have already stated, is exercised on behalf of the whole Court, we would have to be positively satisfied that in coming to this decision, the single Judge has taken into account some irrelevant factor, or that he has failed to taken into account a relevant factor, or that he has not applied a correct principle to the issue before him or that taking into account all the circumstances of the case, his decision is plainly wrong.”

Those are the principles that would guide us in deciding this matter before us. Before we consider whether the learned single Judge considered irrelevant matters or did not consider relevant matters or whether he did not apply the correct principles in deciding the case, we need to set out what the law required of him as he was considering the application, which as we have stated, was under **rule 4**. In other words, what were the guiding principles the Judge needed to consider in deciding the application

which was for extension of time to file and serve a notice of appeal and record of appeal. The law as to the principles that the single Judge needs to consider in the exercise of his discretion when considering an application under **rule 4** of the Rules is now well settled. In the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. Nai. 251 of 1997 (unreported)** delivered on 5<sup>th</sup> November, 1999, this Court stated, *inter alia*, as follows:

“Whilst the discretion under rule 4 of the Rules is unfettered, it must, like all discretion, be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy. It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are first, the length of the delay; secondly, the reason for the delay, thirdly, (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

We have carefully perused the application that was before the learned single Judge, the affidavit in support, the record and the submissions that were before the single Judge as well as the decision by the learned single Judge with the above legal principles in mind as well as the principles upon which we can interfere with the single Judge’s exercise of his unfettered discretion. The applicant did not demonstrate any instances of the single Judge considering irrelevant matters or failing to consider any relevant matters. It was not demonstrated in what way the single Judge exercised his discretion outside the principles for the exercise of his unfettered discretion some of which we have stated above. It was not suggested that when all is considered, his decision was plainly wrong. We have equally not seen any reason on which the single Judge’s exercise of discretion can be interfered with. The single Judge found that there was delay and he specifically pointed out those instances of the delay. He found that some of the delays were occasioned by the mistakes of the appellants’ advocates and considered whether the appellants should suffer from those mistakes. He in fact stated the delay periods that were unexplained and did consider the same periods of delay inordinate. That was in the exercise of his discretion. He considered the arguability of the intended appeal and appreciated that it could be arguable but that was not the only consideration before him on the entire application. He considered that the intended appeal was on a land matter and stated:

“I am aware that the fact that the underlying dispute relates to succession to family land which is always a sensitive issue. This however does not mean that in every dispute involving such land extension of time must always be granted.”

Lastly, he also considered the question of prejudice and weighed all the evidence that was before him and the submissions of the learned counsel. As we have stated, we can only interfere with a single Judge’s unfettered discretion in very specific circumstances which we have stated above. Those circumstances do not obtain in this application.

That being our view of the matter, this reference cannot succeed. It is dismissed with costs to the respondent. Order accordingly.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of March, 2007.**

S.E.O BOSIRE

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**