REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA PEAL AT KISUMU

CIVIL APPLI 360 OF 2004

WILLIAM AUDI ODODA ..... 1ST APPLICANT

PAUL WAORE ODODA ..... 2ND APPLICANT

AND

JOHN YIER .....1ST RESPONDENT

SIRERET FARMERS CO. LTD. ..... 2ND RESPONDENT

(An application for extension of time to serve a notice of appeal and the record of appeal

out of time in an appeal from a ruling and order of the High Court of Kenya at Kisumu

(Wambilyanga, J.) dated 28th May, 1998

in

H.C.C.C. NO. 66 OF 1978)

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RULING OF THE COURT

For the last 30 years or so, this matter has graced various court registries and court rooms and still refuses to go away. It is no wonder, therefore, that the respondents here passionately urged this Court to reject further overtures to prolong it in the interests of that hallowed principle that there must be an end to litigation. The applicants were equally passionate about the right to be heard on the merits of their appeal. Those opposing virtues were captured by Omolo JA in **Gichuki Kimira v Samuel Ngumu Kimotho & Another Civil Application NAI. 243/95 (UR)**, thus: -

"**.....I am aware that litigation ought to come to an end and that it is unfair that one case should hang over the heads of parties indefinitely. But that consideration must be weighed against the wider interests of justice, namely that where possible cases should be brought to a close after hearing on merits.....**"

Justice, of course, looks both ways. But it must be administered in accordance with the law, not on whim, caprice or sympathy. Is it time to lay the matter to rest?

The matter before us, this time round, is a reference arising from a decision of a single Judge of this honourable Court (Bosire J.A) made on 14th June, 2006 in which the learned single Judge rejected an

application for extension of time to serve a notice of appeal and record of appeal upon the 2nd respondent. As counsel for all parties properly appreciated, a reference is not an appeal and the full court would only interfere with the exercise of the wide discretion conferred on a single Judge, who acts on behalf of the full court, on settled principles. Learned counsel for the applicants Mr. Odunga cited **Fakir Mohammed v Joseph Mugambi & 2 others Civil Appl**. **NAI. 332/04** where this Court restated the principles as follows: -

"**To enable this Court to interfere with the decision of a single Judge it is now well established that an applicant must be in a position to show that in considering the issues set out herein, the single Judge failed to take into account a relevant matter which he was obliged to take into account, or that he took into account an irrelevant matter which he ought not to have taken into account, or that he applied a wrong principle of law, or that he misunderstood the evidence or the effect of the evidence on a particular aspect of the matter and thus reached a wrong conclusion, or, short of any of the foregoing factors, that the decision of the single Judge is plainly wrong, taking into account all the surrounding circumstances of the case."**

The principles applicable in applications for extension of time made under ***rule 4*** of this Court's rules are also well settled and we take them from the same authority:

"**The exercise of this Court's discretion under *Rule 4* has followed a well-beaten path since the stricture of "*sufficient reason*" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance----------are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (ur) and Murai v Wainaina (No 4) [1982] KLR 38.**

There are basically three reasons put forward by the applicants to persuade us that we must interfere with the discretion of the single Judge, as follows: -

"*a) That the learned single Judge erred in making a finding that there was no explanation for the delay when in fact there was one and therefore, the Judge omitted to consider a relevant factor;*

b) That irrelevant factors were considered in reaching the decision to reject the application.

c) That special circumstances relevant to the application were not considered."

We shall return to those issues shortly. First, a brief background to the reference:

The two applicants are the sons and the administrators of the estate of their late father, ***Fredrick Ododa Odundo*** ("the deceased") who died on 22nd January, 1995. The deceased was involved in litigation with ***John Yier***, (who died on 5th January, 1999), in **Kisumu High Court Civil Case No. 66/1978**. A consent judgment was recorded in that suit on 2nd September, 1981 that the deceased shall pay a sum of Shs.2 million to John Yier and a further consent was recorded on the manner of payment of that debt by instalments. The decretal sum, however, had not been fully paid before the deceased died in 1995. Upon his death, the applicants here stepped into his shoes as the Judgment Debtors and were registered as the owners of the deceased's properties including land parcel No. **Kericho/Chilchila/Kinyak/Block 2/201 (plot 201)** measuring approximately 210.8 Hectares (496.6 Acres), which was subdivided into two and given different plot numbers.

In 1994, John Yier took out execution proceedings as the decretal amount together with accrued

interest remained unpaid and had continued to escalate. Orders then appear to have been obtained in July 1997 for the public auctioning of three of the Judgment Debtor's properties but the applicants here applied for an injunction to stop it. The superior court (Wambilyanga J) summarized the application as follows: -

"**The present application is by notice of motion dated 20th March, 1998. It only seeks a temporary injunction to restrain the decree holder from selling by public auction the 3 pieces of land registered in the name of the judgment debtor. The grounds upon which the application is predicated are basically, that the respondent intends to sell the properties without having attached them, or that the notification of sale by auction was defective."**

That application was however dismissed in May 1998 and on 10th August, 1998, plot 201 was sold by public auction to the highest bidder, **M/S. Sireret Farmers Co. Ltd** (Sireret). The sale was made absolute by the court in October, 1998. So that, by the time the applicants filed **Civil Appeal No. 289/98** to challenge the dismissal of the injunction there was nothing to stop the sale and the property was sold and transferred to Sireret.

It is common ground that Sireret subsequently obtained court orders for eviction of the applicants from the property and that Sireret took possession thereof after the eviction. It is also common ground that the applicants subsequently retrieved from the court the funds (close to Shs.2million) which the auctioneer deposited in court after payment out to the decree holder. The applicants however still maintain that the sale, and possession of the land by Sireret was unlawful and that the retrieval of the sale proceeds did not amount to approval of the sale. They swear that they needed the money to settle urgent financial problems caused by Sireret's own actions.

In November, 2000, the applicants' **Civil Appeal NO. 289/98** was struck out as it was incurably defective since it omitted primary documents from the record. The application to strike out was made by the personal representatives of ***John Yier***, that is; ***Leonida Awuor Yier*** and ***Grace Mbuya Yier***, who had come on record by order of this Court made on 16th June, 2000 in the appeal. The applicants however returned to this Court and sought extension of time to file another appeal, still challenging the 1998 dismissal of their application for injunction, and their prayer was granted in March, 2002. **Civil Appeal No. 89/2002** was then filed in April, 2002.

Sireret was clearly a party directly affected by the appeal but the applicants did not serve them with the notice of appeal or the record when it was filed, as the rules of this Court require. On 24th March, 2004, the issue was raised by the personal representatives of John Yier who was still named as the respondent in the record although he, John Yier, had died 5 years earlier! Indeed those representatives sought extension of time to apply to strike out the appeal on the ground that they were not served but their application was rejected in June, 2004 by Githinji J.A on technicalities. The technicalities were that the supporting affidavit was not sworn by a party to the proceedings and that the application was filed beyond the period allowed under ***rule 80*** of this Court's rules. The applicants however, did not file the application seeking extension of time to serve the notice of appeal and record of appeal until 21st December, 2004. That was the application considered by Bosire J.A and, as stated earlier, rejected on 14th June, 2006, hence the reference before us.

We must now revert to the issues raised in this reference. The first complaint raised by Mr. Odunga is that the application was dismissed on the ground that there was no explanation for delay when in fact there was. On the other hand, learned counsel for the John Yier's estate, Mr. Mwamu, and Mr. Otieno David for Sireret, submitted that there was an explanation which was considered by the learned single Judge and was found wanting, hence the rejection of the application.

We have examined the ruling of the learned single Judge and we are satisfied that he appreciated the principles applicable in applications under ***rule 4*** which he set out. He further sought for an explanation of the delay and summmarised it from the supporting affidavits of William Audi Ododa and Lawrence Macharia Karanja, Advocate. We reproduce the explanation made in the two affidavits in the relevant

parts, *verbatim*:

(1) Affidavit of <u>William Audi Ododa</u>:

"11. That all these times Sireret Farmers Col Ltd was being represented by the Firm of Olago Aluoch & Co. Advocates and the issue of service of the notice of Appeal and the record of appeal had never arisen.

12. That for example in the year 2000 during the hearing of an application in Civil appeal No. 289 of 1998 (which was subsequently struck out) the court did order one Mr. K'Owino, an advocate in the firm of Olago Aluoch & Co. Advocates to serve Sireret Farmers Co. Ltd with a hearing notice. Annexed hereto and marked "WAOIIA" is a copy of the order. The said firm also did file an eviction suit against my self on behalf of Sireret Farmers Co. Ltd in Kisumu HCCC No. 90 of 1999 annexed hereto and marked "WAOIIB" a copy of the plaint in the said suit.

13. That since the firm of Olago Aluoch & Co. was acting for Sireret Farmers Co. Ltd in HCCC No. 90 of 1999 I am informed by Mr. Karanja which information I verily believe to be true that my advocates while serving the notice of appeal were of honest but mistaken believe (sic) that the firm of Olago Aluoch was acting for Sireret.

14. That consequently the said interested party (sic) interest have always been represented.

15. That in the midst of all these confusions and mix ups, it is through sheer inadvertence that the interested party was not served with the Notice of appeal and record of Appeal.

16. That when the appeal came for hearing on 24th March, 2004 the respondent brought in two applications – one seeking extension of time within which to lodge an application for striking out the notice of appeal and the record of appeal and the other seeking to strike out the notices and record of appeal for reasons that the same had not been served upon an interested party. The appeal could not proceed on the said date."

(2) The affidavit of <u>Lawrence Macharia Karanja</u>

"9. That it is within my knowledge that the interested party had all along been represented by the firm of Olago Aluoch & Co. Advocates.

10. That it is also within my knowledge that the honourable court had at one time made an order that one Mr.

K'Owino an advocate in the firm of Olago Aluoch & Co. Advocates do effect service of a hearing notice upon the interested party. Annexed hereto and marked "LMKII" is a copy of the order.

11. That there has all along been some confusion in respect of the interested party and it is on this basis that service of the Notice of appeal and the Record of Appeal was inadvertently not served upon it."

As correctly surmised by the learned single Judge, the explanation was that the failure to serve Sireret was due to the mistaken belief that M/S. Olago Aluoch & Co. Advocates were representing them and they only realised their mistake when two applications were served upon them in March 2004, one seeking extension of time for filing an application to strike out the appeal and another seeking an order that the notice of appeal and record of appeal be struck out. The learned single Judge was not impressed by that explanation and found that there was no basis for the assumption that Olago Aluoch & Co. Advocates would represent the appellants in the appeal. He did not however hold the confusion against the applicants, at any rate up to 24th March, 2004. It is from that date that the learned single Judge noted as follows: -

"**The first time Civil appeal NO. 89 of 2002 came for hearing was on 24th March, 2004. The court**

recorded Mr. L.M. Karanja as appearing for the appellants, and Mr. J.A Mwamu for the respondent. There was no note on the coram sheet to show Sireret Farmers Co. Ltd, was in the matter either substantively or as a party likely to be affected by the outcome of the appeal.

The next time the appeal came for a hearing was 7th June, 2004. there was an application before a single Judge under rule 4 of the Court of appeal Rules for an extension of time to enable John Yier apply for an order striking out the notice of appeal and memorandum of appeal in Civil appeal No. 89 of 2002. The reason given was that Sireret Farmers Co. Ltd, as a party likely to be affected by the appeal, had not been served with either a notice of appeal or the memorandum of appeal. The application was argued *inter partes*. By that application the applicants herein were made aware that they had not taken an essential step or essential steps in their appeal."

Paragraph 16 of the affidavit of William Audi Ododa (supra) also clearly states that it is on that day, 24th March, 2004, that the two applications for leave and striking out made it clear that Sireret ought to have been served as a party directly affected. The applicants could have taken action to rectify the situation soon after but did not. Instead when the appeal came up again for hearing on 7th June, 2004, the situation had not changed. Sireret had not been made party to the appeal. The learned single Judge does not appear to have held it against the applicants that they had done nothing between March and June, 2004 although they were already aware that Sireret was a necessary party to the appeal and did nothing about it. But the Judge stated this: -

"**This application was filed on 21st December, 2004, well over six months from the date the applicants became aware of their failure to serve Sireret Farmers Co. Ltd, as an interested party in the outcome of the appeal. The applicants contend that the delay in effecting service of the Notice of Appeal and Record of Appeal on that company was due to confusion on the issue of representation and other factors beyond their control. That may well be so, but <u>the applicants have not explained their delay in</u> <u>bringing this application</u>. As rightly pointed out by Mr. Otieno for Sireret Farmers Co. Ltd, the applicants did not serve Olago Aluoch & Co. Advocates with a Notice of Appeal and Record of Appeal or if they did they have not demonstrated that the did so."**
Emphasis added.

That was the passage, particularly the underlined portion, latched onto by Mr. Odunga in submitting that the learned single Judge stated that there was no explanation. With respect, the learned Judge was right in stating that there was no explanation for the delay occasioned between the time the applicants and their advocates became aware, whether in March or June, 2004, that M/S. Olago Aluoch & Co. Advocates were not representing Sireret and that Sireret ought to be made party to the appeal and served. As it is clear to us that there was consideration of the factor relating to delay and the explanation therefor or lack of it, it does not matter what contrary views we may have on the issue as that would be tantamount to substituting our discretion for that of the learned single Judge. We find no merit in the first complaint and we reject it.

The second complaint is that irrelevant factors were considered. Those were identified by Mr. Odunga as, firstly, the examination of the applicants conduct in collecting the proceeds of the public auction and, secondly, the expression of the view that the matter was overtaken by events.

On the first issue Mr. Odunga submitted that the collection of the proceeds did not compromise the applicants' right of appeal. In support of that proposition, he cited **<u>Kirinyaga County Council v. Kimmi Housing Co-op Ltd</u> Civil App. NAI. 123/2001 (ur)** which was a reference to the full court. In that case arrangements had been made by the applicants to settle the decretal sum and such settlement was found by the court to have taken care of the respondent's interest and did not affect the applicants' right of appeal. In Mr. Odunga's submission therefore, it mattered not that the applicants here shared in the proceeds of the disputed sale; they were still entitled to appeal.

For their part Mr. Mwamu and Mr. Otieno submitted that the ***Kirinyaga Case*** (supra) was distinguishable, since the decree holder in that case was entitled to the money in accordance with the decree. Settlement of the decree would not affect the right of appeal which could be in principle or on

matters of law. Here, the applicants were vehemently asserting that there was an illegal sale of the land and yet they went ahead to partake of those illegal proceeds. Furthermore, in making the application for extension of time before the learned single Judge, the applicants did not disclose that fact until the replying affidavit was filed by the 2nd respondent. In Mr. Mwamu's submission that was reprehensible conduct and it was a relevant factor to take into account.

We think for our part, as we stated above while setting out the principles applicable in applications under ***rule 4***, that there is no limit to the number of factors available for consideration, so long as they are relevant and will assist the Judge in the exercise of his discretion. The issue of the applicants' conduct was raised by the parties themselves and must surely have been intended to be considered. In that case, it cannot be said to have been an irrelevant issue. At all events, the learned Judge had already made a finding that there was inordinate and unexplained delay. The observation by the Judge that the judgment against the deceased was by consent and the deceased was allowed to liquidate the decretal sum by agreed instalments which he was unable to satisfy hence the forced sale of the land, was not wholly uncalled for. We do not propose to interfere with the decision on that ground either.

The second limb of the objection based on irrelevancies was in respect of the observation that the intended appeal may well have been overtaken by events. Once again, with respect, we do not think it was an irrelevant issue. A single Judge may, as one of the possible factors, consider whether the intended appeal was meritorious. The only caution is that he cannot pronounce himself with finality at that stage as such finding is in the province of the full court. But it is a relevant factor and the learned single Judge expressed himself thus:

"**The Notice of appeal dated 18th March, 2002 commenced the appellate process. In it the applicants declare that they are unhappy with the ruling delivered on 28th May, 1998 by Wambilyanga, J. in Kisumu High Court Civil Case No. 66 of 1978. In that ruling, as I stated earlier, the learned Judge of the superior court declined to grant an injunction to restrain the decree holder from selling by public auction the suit property. The sale later took place and the appeal may well have been overtaken by events. The applicants were evicted and although they complain that the eviction was wrongful, assuming they are right, orders in this appeal, even assuming it will succeed, will most unlikely (sic) not reverse the events."**

In our view the learned single Judge did not overstate his view on the merits of the appeal, which is an interlocutory one relating to refusal to grant an injunction.

Finally Mr. Odunga sought to persuade us that there were special circumstances which outweighed all others in this matter and therefore the justice of the matter tilted towards granting the application. He cited the attempt by the 1st respondent to seek extension of time to apply for the striking out of the appeal which was rejected by Githinji JA which, in his view, was not taken into account. That application, as stated earlier, was dismissed in June, 2004, and the learned single Judge did in fact consider it. It is not correct to say that he did not. No other special circumstances were raised before the learned single Judge which he failed to consider and none were raised before us. Perhaps the court seized of the main appeal may deal with such matters, if and when they are raised before it.

In sum, we find no sound basis for interfering with the unfettered discretion of the single Judge of this Court and we order that the reference be and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi. this 13th day of July, 2007.

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR