



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI  
Civil Appli 247 of 2004

GEORGE GIKUBU MBUTHIA .....APPLICANT

AND

PETER NJERU MUGO ..... 1<sup>ST</sup> RESPONDENT

GEOFFREY KARIUKI MWENDA ..... 2<sup>ND</sup> RESPONDENT

HON. THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT

CONSOLIDATED BANK OF KENYA LTD. .... 4<sup>TH</sup> 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 Milimani Commercial Court (Ondeyo, J.) dated 24<sup>th</sup> June, 2004

in

H.C.C.C. NO. 1260 OF 2002)

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RULING OF THE COURT

The applicant herein was dissatisfied with the decision of a single Judge of this Honourable Court and now invokes the provisions of **rule 54 (1)(b)** of our rules in seeking to vary, discharge or reverse that decision. The decision was made on 18.02.05 by Deverell J.A who refused to extend the time as sought by the applicant for filing a fresh notice of appeal and record of appeal out of time. The intended appeal was against a ruling of the superior court (Ondeyo, J) made on 24.06.03 allowing an application to strike out the applicant's suit in that court.

It is common ground, and the learned single Judge so found, that the applicant applied for certified copies of the proceedings and the ruling but did not receive them until 12.01.04 despite several reminders made to the registrar between August, 2003 and December, 2003. A certificate of delay was issued accordingly with the result that the applicant had upto 12.03.04 to file the record of appeal. He did not. The next step he took after about 7 months was to file the application seeking extension of time on 02.10.04.

After citing the relevant principles governing the exercise of his discretion, the learned Judge found no persuasive explanation for that delay, which he found inordinate, in these words: -

“The applicant offered no convincing reason for that delay either in his affidavit in support of the application or in his oral submissions at the hearing of the application. The only attempt to give a reason was to suggest that during the nearly 7 months, he was trying to obtain a signed copy of the ruling of the superior court. The applicant appeared to think that the certified copy of the typed ruling ought to have the judge’s signature on it whereas in practice the signature is either in the Judge’s handwritten record or on the original typed ruling. No correspondence with the Registrar raising this issue was produced or indeed claimed to have taken place. The applicant did not produce any evidence from the proceedings for the day of delivery of the ruling appealed against to support the suggestion that the ruling was not signed. Nor was it explained how this issue resulted in any delay and, if so, how much delay.”

He also commented on the chances of the appeal succeeding and found them slim. Finally it was his view that it would be prejudicial to the respondents, if “ *this very long running piece of litigation.*” was reopened.

A reference to the full court is not an appeal although it is in the nature of one. In exercising the discretion under **Rule 4**, the single Judge was exercising the power on behalf of the full court and his discretion would not therefore be easily upset except on sound principles which this Court has stated many times before. These in substance, are that the single Judge took into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account; that he misapprehended or not properly appreciated some point of law or fact applicable to that issue; or that the decision, looked at in relation to the available evidence and the relevant law is plainly wrong. A breach of any or all of such principles would entitle the full court to interfere and the applicant must satisfy us that we ought to do so.

Although the applicant appeared in person, he was evidently fully conversant with these principles and he raised three issues: firstly that the learned single Judge erred in stating that there was no correspondence with the registrar raising the issue of a signed copy of the ruling. The applicant pointed out that there were no less than six letters by him to the registrar between August, 2003 and December, 2003 bespeaking a copy of the signed ruling. In ignoring that correspondence, he submitted, the learned Judge failed to consider a relevant factor.

With respect, we think the applicant totally misapprehended the single Judge’s reference to lack of correspondence. The correspondence made between August and December 2003 was considered when the certificate of delay was issued and the applicant suffered no penalty arising from that delay. On his own admission copies of the proceedings and ruling were supplied to him on 12.01.04. Between that date and October 2004 when the application before the single Judge was filed, there was no correspondence with the registrar and indeed the applicant readily admitted so at the hearing of this reference. That would have been the relevant correspondence explaining in part the delay of seven months which was found inordinate but the correspondence was lacking. As such the learned single Judge cannot be faulted on that issue.

The second issue raised by the applicant was the dismissal of his explanation for failure to file the intended appeal on the ground that there was no signed ruling to accompany the record. The copy of the ruling received from the registrar on 12.01.04 was unsigned and, in the applicant’s view, it was futile to use it for filing the record of appeal which would be subsequently declared incompetent. The learned single Judge considered such explanation and found it wanting since the absence of a signature on the proceedings and the ruling certified by the registrar to be correct were sufficient for filing the appeal. The applicant already had a certified order issued on 27.06.03 and he had filed a notice of appeal on 25.06.03. The issue as to whether the original typed or handwritten ruling was signed or not would only arise if there was a challenge made in that regard, but in this matter, there was no assertion, even by the applicant himself, that a signed ruling was not in existence in the original file. All the basic requirements under **rule 85 (1)** of the rules thus appeared to be available as at 12.01.04 but nothing happened until October 2004. We do not fault the learned single Judge in the manner he resolved that issue.

Finally the applicant criticised the single Judge for considering the chances of success of his intended appeal and holding erroneously that they were slim. The issue was raised by the applicant himself in his notice of motion before the single Judge and in arguments before him and he must have surely intended that it should be considered. At all events, this Court has said many times before, that the single Judge may, in exercising his discretion under rule 4 consider as one of the factors, the possible chances of the intended appeal succeeding. It was a relevant factor – see **Mwangi v Kenya Airways Ltd [2003] KLR 486** and **Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Appeal No. NAI. 255/97 (ur)**. Once again there is no reason to interfere with that approach.

In sum, the issues raised by the applicant were considered by the learned single Judge and, we think, properly so. In that event we have no reason to disturb the conclusions he reached in exercise of his unfettered discretion in the matter.

We dismiss the reference with costs.

*Dated and delivered at Nairobi this 17<sup>th</sup> day of March, 2006.*

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**