REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 119 of 1996

KENYA CANNERS LIMITED …….....……..…….APPLICANT

AND

TITUS MUIRURI DOGE……..RESPONDENT

(Application for extension of time to file Notice and Record of appeal in an intended appeal from the judgment and decree High Court of Kenya at Nairobi (Shah, C.A) dated 28.10.1988

in

H.C.C.C NO.1832 OF 1980

****

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 31.03.04 by Githinji J.A who refused to extend time as sought by the applicant for filing a fresh notice of appeal and a record of appeal.

The matter appears to have a chequered history judging from the material placed at our disposal. We gather from the short affidavit in support thereof sworn by **Peter Le Pelley**, and an affidavit sworn in reply by **Lee Gacuiga Muthoga**, that a judgment was delivered by the superior court (**Shah, Commissioner of Assize**, as he then was) in favour of the respondent some 18 years ago on 28.10.88. The applicant preferred an appeal (Civil appeal No. 12/89) but it was struck out on 09.05.90 as it was incurably defective. An application was made for extension of time to file a fresh record of appeal (Civil appl. Nai. 64/90) and a 14 day extension was granted. The civil appeal was filed but was in turn struck out as it did not contain a certified copy of the decree. Undeterred by those setbacks, the applicant filed yet another application (Civil Application Nai. 200/95) seeking extension of time to file another record of appeal. The application was dismissed by Kwach JA on 05.03.96 who stated:

"**The judgment in question was given nearly 8 years ago. The applicant has been given every opportunity to file an appeal but has failed to do so because of an apparent inability on the part of**

its advocates to apply the rules correctly. Even this third time round, they have got them all wrong. The respondent cannot be expected to wait indefinitely while the advocates for the applicant are trying to make up their mind what the relevant rules means. They are entitled to do that but certainly not at the expense of the respondent."

The learned single Judge, Kwach J.A, also said that the applicant had not sought extension of time to file a fresh notice of appeal, the first one having gone with the striking out of the original appeal.

One would then have expected the dissatisfied applicant to have referred the dismissal of the application by the single Judge to the full court under ***rule 54***. But instead a notice of appeal was filed on 12.03.96. It is not clear what became of it. In addition another application was filed on 01.04.96 but a preliminary objection was taken by the respondent on the ground that it was *res judicata* since a similar application had been determined by a single judge of the court. The objection was however overruled by Lakha J.A on 02.05.97 thus paving way for the hearing of the application before Githinji J.A. For some reason, which is not apparent on the record, it was not heard until March 2004 - almost 8 years since it was filed! It is the dismissal of the application by Githinji J.A which is the subject matter of the reference before us.

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.

Learned counsel for the applicant Mr. Gitonga Murugara was obviously alive to those principles and he produced a list of authorities to augment his submissions, among them: Geoffrey Makana Asanyo and another v National Bank of Kenya Ltd **Civil Appl. Nai. 132 of 1999 (unreported)**, African Airlines International Ltd v Eastern & Southern African Trade & Development Bank (PTA Bank) **[2003] KLR 140**, Pothiwalla v Kidogo Basi Housing Co-operative Society Ltd & 31 others **[2003] KLR 733**, and Mwangi v Kenya Airways Ltd **[2003] KLR 486**.

In essence Mr. Murugara attacked the learned single Judge's decision on two fronts: firstly for dismissing the application on the basis that there was no material placed before him to assess whether the intended appeal was meritorious. On that issue, he submitted that it was not in the province of the single judge to decide whether an intended appeal was meritorious and this court said so in the **Geoffrey Asanyo Case** (supra). In the second place there was no principle of law requiring that such material be placed before the single Judge, and it was so stated in **Mwangi v Kenya Airways** (supra).

The passage in the ruling of the learned single Judge which provoked the objections raised by Mr. Murugara was this:

"**The applicant should have placed before the Court relevant material such as a copy of the judgment intended to be appealed from, so that the Court could make its own assessment of all the surrounding circumstances including the importance of the intended appeal to the applicant."**

We have examined the two authorities upon which the submissions of Mr. Murugara are predicated and we cannot, with respect, find any substantial departure in principle in the approach adopted by the learned single Judge. The authority relied on by the single Judge to guide him in the exercise of his discretion clearly identifies as one of the factors for possible consideration in an application under ***rule 4***, the chances of the appeal succeeding. That is **Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Appl. No. Nai.** 255/97 (ur). Both in the ***Geoffrey Asayo Case*** and the ***Mwangi Case*** (supra), that factor was not discounted. What the court deprecated, and correctly so, was the peremptory finding by a single

judge that the intended appeal had nothing of substance or lacked merit. The simple reason is that it is for the full court to make that pronouncement with finality. As this Court stated in the **African Airlines International Ltd Case** (supra):

"**We wish to emphasise that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case. No doubt in some cases it may be material to have regard to the merits of the appeal; because it may be wrong, and indeed an unkindness to the appellant himself, to extend his time for appealing, after he has allowed the time to elapse, to enable him to pursue a hopeless appeal."**

In this case, we think the learned single Judge was merely looking for some material on which he could judicially consider that relevant factor but he found none in the supporting affidavit. His discretion could not therefore be exercised. In the two authorities relied on, there was some material on record for consideration. As correctly submitted by learned counsel for the respondent Mr. Mwangi, the short affidavit of Mr. Le Pelle was merely argumentative on an issue of law relating to the notice of appeal and nothing was said about the intended appeal. We do not fault the learned single Judge in the manner he exercised his discretion in relation to that issue.

The second frontal attack was in relation to the period of delay and the explanation for it. Mr. Murugara faulted the learned single Judge for thinking that the delay was 15 or 8 years and that there was no explanation for it. With respect, we think there is a misreading of the ruling on the part of counsel. The period of 15 years since the judgment was delivered by the superior court upto the filing of the application was factually correct, but it was considered in the context of responding to the applicant's submission that there was no prejudice to be suffered by the respondent. The learned single Judge stated:

"……**the respondent has some rights which have accrued through the passage of time without the filing of a proper appeal. He is likely to suffer great prejudice if the dispute is reopened over 15 years after the suit was determined by the superior court."**

The issue of inordinate delay was considered and upheld on the authority of **Ger vs Marmanent Forest Co-operative & Credit Society Ltd [1987] KLR 543** where the court stated that favourable exercise discretion may be declined where the advocate has made too many mistakes, as Kwach J.A had found in this particular case. In our view that was a judicial exercise of discretion and we do not intend to interfere.

The weakest link in this reference however, and in the application determined by the single Judge, is the manner in which the application found itself before a single Judge after a similar matter was determined by another single Judge of this Court. ***Rule 54 (1)(b)*** of our rules is very clear. It states:

"54. (1) Where under the proviso to section 5 of the Court of Appeal for East Africa Act, any person being dissatisfied with the decision of a single Judge –

(a) ……..

(b) in any civil matter wishes to have any order, direction or decision of a single Judge varied, discharged or reversed by the Court, he may apply therefor informally to the Judge at the time when the decision is given or by writing to the Registrar within seven days thereafter."

The ruling of Kwach J.A was before the learned single Judge and part of it is reproduced above. It clearly resulted in the dismissal of the applicant's application seeking extension of time under ***rule 4***, to file a record of appeal. Kwach J.A found that the delay in mounting a competent appeal was inordinate and there was no compliance with the rules. That decision was amenable to a reference under ***rule 54 (1) (b)***, but there was no reference. The filing of another application seeking similar indulgence was, to say the least an abuse of the court process. That another single Judge of this Court (Lakha JA) had a different view from Kwach JA does not avail the applicant. The learned single Judge, Githinji J.A had this to say on that issue:

"**In this case the applicant's advocates have made series of errors which has caused the previous appeals and applications to be struck out. Although Lakha JA rejected the preliminary objection raised against the application, my humble view, is that the Ruling of Kwach JA in Civil Application No. Nai. 200 of 1995 dated 5th March, 1996, finally determined that the delay was so inordinate that the Court could not extend time for filing an appeal. As a single Judge, I have no jurisdiction to vary that finding."**

We agree.

In the result we find no reason to interfere with the exercise of discretion by the learned single Judge and we dismiss the application with costs.

***Dated and delivered at Nairobi this 28th day of April,2006*.**

P.K. TUNOI

……..

JUDGE OF APPEAL

E.O. O'KUBASU

……

JUDGE OF APPEAL

P.N. WAKI

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR