REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI

Civil Appli 265 of 2005

JAMES MWANGI MATHENGE (Suing as legal representative of the estate of)

MOSES KINYUA MWANGI – DCD …….……. APPLICANT

AND

CHARLES MWAI

THE HON. ATTORNEY GENERAL …….…… RESPONDENTS

(Application for leave to file and serve notice and record of appeal from the judgment

of the

High Court of Kenya at Nyeri (Khamoni, J.) dated 14th February, 2005

in

H.C.C.C. NO. 180 OF 2000)

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RULING OF THE COURT ON

REFERENCE TO THE FULL COURT

On *10th August 2005, James Mwangi Mathenge (suing as the legal representative of the Estate of Moses Kinyua Mwangi – the deceased)* had applied to a single Judge of this Court under *Rule 4* of the Court's Rules for an order that the time within which to file and serve a notice of appeal and a record of appeal be extended for him. That application was heard by a single Judge of the Court *(TUNOI, J.A.)* and was dismissed by the learned Judge by his Ruling dated and delivered on *3rd November, 2005*. The applicant has now referred the decision of the learned single Judge to a full bench of the Court and that is the subject of this ruling.

It is now accepted that in exercising his unfettered discretion conferred on him by *Rule 4*, a single member of the Court is really acting on behalf of the full Court and the full Court can only interfere with his exercise of discretion where it can be shown that in coming to his decision, the single Judge took into account an irrelevant factor which he ought not to have taken into account, or that he failed to take into

account a relevant factor which he ought to have taken into account, or that he applied a wrong principle of law, misapprehended the nature or hearing of the evidence placed before him and thus arrived at a wrong conclusion or, short of the foregoing factors, that his decision is plainly wrong, all factors and circumstances considered. We did not understand *Mr. Gathiga Mwangi* who vigorously argued the reference before us to challenge these accepted principles. Mr. Mwangi's first contention before us was that in coming to his decision, the learned single Judge failed to take into account a relevant factor and that factor was that while it was true that the cause of action arose in *1999,* the suit itself was filed in *2000,* was completed on *23rd September, 2002* and judgment delivered on *14th February, 2005*.

According to Mr. Mwangi, the learned single Judge did not take all these factors into account when he concluded that the case was very old. In his decision, the learned single Judge stated:-

"*The cause of action allegedly arose in 1999. There is on record a very elaborate judgment of the superior court. I doubt whether there will be a meritorious appeal if I grant extension of time within which to lodge it.*

Moreover, it would cause undue prejudice to the respondents if extension of time is granted to the applicant who has largely been guilty of laches."

We are unable to read from this passage that the learned single Judge was unaware of the fact that the case itself was filed in the superior court in *2000* or that the judgment, which he heard before him, was delivered only on *14th February, 2005*. Our understanding of the matter is that the learned single Judge was only taking into account the fact that the cause of action arose in *1999*; that was undoubtedly correct and in our view, the learned single Judge was entitled to take it into account. It is unreasonable for any one to argue that because the learned single Judge took into account the fact that the cause of action arose in 1999, he, of necessity, failed to take into account the fact that the case was completed on *23rd September, 2002* and that judgment was delivered only on *14th February, 2005*. In any case, the learned single Judge did not have before him the proceedings in the superior court to enable him to know when the proceedings were completed.

As to the complaint that the learned single Judge purported to determine the merits of the intended appeal, we can find no support for that contention. We have already set out the relevant passage from the Judge's ruling on that aspect of the matter. All the Judge said was that there was an elaborate judgment of the superior court and that he doubted whether there was a meritorious appeal from that judgment. From the authorities cited to us by Mr. Mwangi himself, among the matters a single Judge is required to consider is the possibility of success of the intended appeal – see, for example ***LUCY WAMBUI MAINA & TWO OTHERS VS. PETER SUNDRA MAINA, Civil Application No. NAI. 330 of 2004*** *(unreported)*.

To doubt the possibility of an appeal succeeding is not the same thing as determining the merits of the appeal. The learned single Judge was clearly entitled to take that factor into consideration. The learned single Judge was equally entitled to take into account the issue of prejudice to the other side. We on the full bench may well think that there would be no prejudice to the other side, but that alone would not justify our interfering with the single Judge's conclusion that there would be prejudice to the other side. It is to be remembered that the single Judge was exercising a discretion and we are not, on an application such as this, entitled to substitute our discretion for his. To interfere, it must be shown to us that the learned single Judge committed any or all of the matters we have already set out herein or that his conclusion is so unreasonable that no reasonable tribunal directing itself properly on law and facts could ever come to such conclusion.

The truth of the matter is that while taking all these factors into consideration, the learned Judge rejected the application basically on the ground that there was a delay of some three months which was not explained to his satisfaction. We cannot interfere with him on that conclusion. Accordingly, the reference by the applicant fails and we order that the said reference be and is hereby dismissed with costs to the two respondents. Those shall be our orders.

Dated and delivered at Nyeri this 19th day of May, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M.GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR