REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appli 332 of 2004

FAKIR MOHAMMED …………….........……………………………….. APPLICANT

AND

JOSEPH MUGAMBI

WILSON MWONGERA

HENRY STEPHANO KITHINJI …..........………......…………………. RESPONDENTS

(Application for extension of time to file the record of appeal out of time in an intended appeal from the judgment and decree of the High Court of Kenya at Meru (Kasanga Mulwa J) dated 2nd October, 2003

in

H.C.C.C. NO. 73 OF 1989)

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RULING OF THE COURT ON REFERENCE TO FULL COURT

In arguing before us the reference from the decision of a learned single member of the Court, Mr. Kioga, learned counsel for Joseph Mugambi, the 1st Respondent herein who also made the subject reference, correctly appreciated the principles on which the full Court normally acts in deciding on the issue of whether or not it should or should not interfere with the exercise of discretion by the single judge. The discretion given by ***Rule 4*** of the Court's Rules to a single member of the Court is wholly unfettered; part of the Rule states:

"The Court may, on such terms as it thinks just, by order extend the time limited by these Rules ………………………………………………………………………….

……………………………….".

The only limitation on the exercise of the discretion is the usual and inevitable one placed on the exercise of any discretion, namely that the exercise must be judicial, i.e. that the exercise must be based on reason and not caprice and so on. We cannot do better, on this point, than to quote from the ruling of WAKI, JA which is the subject of the reference before us. He sums it up in this manner:

"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 the 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 Application No. Nai. 255 of 1997 (ur), **Mwangi vs Kenya Airways Ltd** [2003] KLR 486, **Major Joseph Mwereri Igweta vs Murika M'Ethare & Attoney General,** Civil Application No. Nai. 8 of 2000 (ur) and **Murai vs Wainaina** (NO. 4) [1982] KLR 38".

Mr. Kioga did not find any fault with this recital by the learned single Judge of the possible issues which have to be taken into account by a judge considering an application under ***Rule 4***. For our part, we are satisfied the learned single Judge correctly stated the position concerning this aspect of the matter.

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. Mr. Kioga, in challenging the decision of the Judge told us that the Judge took into consideration and believed facts which he ought not to have taken into account. Our understanding of what Mr. Kioga meant by this was that when the judgment which it is proposed to appeal against was being delivered, Mr. Fraser of Hamilton, Harrison & Mathews, Advocates who represented and still represents the applicant was represented in court by a Mr. Mithega and that that being the position, the averment by Mr. Fraser in the supporting affidavit that he did not know about the judgment until 24th October, 2003 was not correct and the single Judge, therefore, ought not to have believed it. In dealing with the factual position as presented to him, the learned single Judge stated as follows:

"***In view of the uncontroverted facts stated in the supporting affidavit, I am not prepared to say that there was culpable delay on the part of the applicant or his counsel. I think the purported period of delay complained of by Mr. Kioga is the period between the filing of the suit in 1989 upto the time the notice of appeal was filed in July, 2004 which, on the face of it, is a long period. But there is nothing to show that the applicant had anything to do with such delay. Indeed the period cannot fall for consideration in this application since it must have been taken into account when the applicant applied for and was granted leave to file the notice of appeal out of time. The applicant thereafter explains the sequence of events leading to the filing of this application on 11.11.04, including a certificate of delay in obtaining the proceedings and judgment and I am satisfied with that explanation …………………………..".***

The learned single Judge was clearly of the view that the affidavit evidence placed before him by the applicant was uncontroverted. That was clearly correct because neither Mr. Kioga nor his client swore any affidavit in answer to that of Mr. Fraser. The learned single Judge accepted that evidence and all that Mr. Kioga told us during the reference was that the single Judge ought not to have believed that evidence. That is not the function of this Court in considering a reference. Even if the Court were to be convinced that the conclusion of a single judge may not necessarily be correct, that would not be a reason for the full Court to interfere with his conclusion, unless, as we have said, it can be shown that the conclusion is so unreasonable that no reasonable tribunal, properly considering that evidence and the applicable law, could ever come to such a conclusion. That was not Mr. Kioga's contention before us.

As we have said, he was merely complaining that the learned single Judge ought not to have believed Mr. Fraser. That cannot provide us with a basis for interfering with the single Judge's exercise of an unfettered discretion.

Next Mr. Kioga complained about the interpretation placed on ***Rule 82*** by the learned single Judge. We think that without making elaborate remarks on the matter, which may further complicate the situation, we unhesitantly agree that the Judge was right in following the decision of the full Court in ***DOLPHIN PALMS LTD VS AL-NASIBH TRADING CO. LTD***, *Civil Application No. Nai. 112 of 1999* (unreported) rather than the majority decision in ***KAMAU KIBUNJA VS NOORDIN CONSTRUCTION (K) LTD***, *Civil Application No. Nai. 172 of 1988* (unreported). As those two decisions are directly in conflict with each other, the learned single Judge was perfectly entitled to choose which of them to follow. We are satisfied he was right in following the ***Dolphin Palms Ltd*** case.

These were the two main grounds upon which Mr. Kioga asked us to reverse the decision of the single Judge. In our view, none of those contentions can justify our interference. That being our view of the matter, it follows that the reference must fail. We order that the reference be and is hereby dismissed with costs.

Dated and delivered at Nyeri this 12th day of May, 2006.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

……………………………

JUDGE OF APPEAL

W. S. DEVERELL

……………………………

JUDGE OF APPEAL

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

DEPUTY REGISTRAR