



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 361 of 2001**

JOSEPH KAMAU MUSA1ST APPLICANT
 JAMES KARIUKI MUCHIRI2ND APPLICANT
 DAVID MUCHIRI 3RD APPLICANT
 RUIGU NJIRIRI 4TH APPLICANT
 JOSEPH NJEHU BORO & 29 OTHERS5TH APPLICANT

AND

ERERI COMPANY LTD. 1ST RESPONDENT
 GIKONYO NDIRANGU 2ND RESPONDENT
 RUIGU KABUCHO 3RD RESPONDENT
 DR. GEORGE KAMAU GIKANGA 4TH RESPONDENT

(Application for leave to file Notice of Appeal & Record of Appeal out of time from the Judgment of the High Court of Kenya at Nairobi (Mbito, J) dated 19th November, 1997

In H.C.C.C. No. 3746 of 1988 consolidated with H.C.C.C. No. 3200 of 1990)

RULING OF THE COURT ON REFERENCE TO FULL COURT

By their notice of motion dated 16th October, 2001 and lodged in this Court on 18th October, 2001 and which was brought under **Rule 4** of the Court of Appeal Rules, Joseph Kamau Musa and thirty-three other named persons applied to a single Judge of the Court for an order:

“(a) That the time within which the applicants will lodge notice of appeal and record of appeal from the Judgment of M/s (sic) Justice Mbito dated 19/11/97 delivered in HCC (sic) No. 3746/88 as consolidated with HCC (sic) No. 3200/90 be enlarged by a further 30 days.”

That motion was heard by Bosire, J.A on 25th July , 2002 and by his Ruling dated and delivered on 29th July, 2002, the learned Judge refused to exercise in favour of the applicants the unfettered discretion conferred on him by **Rule 4** and dismissed the applicant’s motion with costs. This is a reference to the

full Court from that refusal. Mr. S.M. W. Kinuthia who has always fought gallantly on behalf of the applicants wrote to the Deputy Registrar of the Court on 30th July, 2002, one day after the ruling by the single Judge, asking that the matter be referred to the full bench. We are appalled that the reference is coming up for hearing before the full bench some four years after Mr. Kinuthia's letter of 30th July, 2002. Mr. Ochieng Oduol, learned counsel for the respondents, asked us to refuse to interfere with the decision of the learned single Judge on the ground that the delay in hearing the reference is inordinate and that there ought to be an end to litigation. We agree that there in fact ought to be an end to litigation, but in the circumstances of the matter before us, there is absolutely no material before us from which we can conclude that the applicants are in any way to blame for the delay of some four years. So we cannot act on the issue of delay in hearing the reference to the detriment of the applicants; nothing shows that they are responsible for that delay.

Are there grounds upon which we can interfere with the learned single Judge's exercise of discretion? **OCEAN FREIGHT SHIPPING COMPANY LTD. VS OAKDALE COMMODITIES LIMITED**, Civil Application no. NAI 198 of 1995 (92/95 UR) (unreported) is one of the cases showing the circumstances under which the full Court will interfere with the exercise of discretion by a single Judge. There, the Court stated thus:-

“This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor or took into account an irrelevant one or that on the facts and the law as they are known the decision is plainly wrong.”

In the matter now before us, the learned single Judge refused to grant the extension sought only on one ground and he put it thus:-

“.....The applicants brought this motion promptly. The applicants have not all sworn affidavit to support the motion. The affidavit in support has been sworn by one Joseph Kamau Musa alone and nowhere in that affidavit, sworn on 16th October, 2001, has he said he had authority of the other applicants to depose to the matters therein. As it is now I have no material from other named applicants to grant them any extension of time. At best as only Joseph Kamau Musa has placed material before me only him can, if at all, be granted an extension of time within which to lodge a notice of appeal and a record of appeal. Having come to that conclusion, it would be futile to grant an extension to him only when in the application he purports to swear on behalf of himself and others.”

It is true that in his affidavit in support of the motion to enlarge time Joseph Kamau Musa did not specifically swear that he was authorized by the other applicants to swear the affidavit on their behalf, but he said and we quote him:-

“That I am the first applicant in this application with instructions to make this affidavit on behalf of the others.”

Our understanding of that averment is that the first applicant was saying he had instructions from the other applicants to swear the affidavit on their behalf. If the first applicant had instructions to swear on behalf of the other applicants then clearly he had authority to swear on behalf of the others for how else could they instruct him and yet at the same time not authorize him to act on their behalf. We think the learned single Judge misapprehended this fact, which was in any case, not challenged by the respondents.

But even more to the point it appears to us that the attention of the learned single Judge was not drawn to **Rule 43(1)** of the Court's rules. That Rule provides:-

“Every formal application to the court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts.”

The motion before the learned single Judge was supported by one affidavit sworn by Joseph Kamau Musa. We are unable to read in the rule any requirement that where there are more than one applicant each one of them must swear a separate affidavit. The affidavit provided for in the rule need not even be sworn by the applicant; it can be sworn by any person having knowledge of the facts. Joseph Kamau Musa, apart from being one of the applicants, had knowledge of the facts he deposed to. Once again, we think the learned single Judge failed to take into account a relevant factor, namely **Rule 43(1)** of the Court's rules. Mr. Oduol referred us to **Order 1 r 12** of the Civil Procedure Rules which provides that a person authorised by any number of others named as plaintiffs or defendants to represent them in a civil suit shall obtain written authority signed by such persons and the authority shall be filed in the case. With respect we think that provision has no relevance to the matter before us in view of **Rule 43(1)** cited above which governs proceedings before this Court.

It must by now be clear from our analysis of the matter that we are for allowing this reference. We do so and make the following orders:-

1. The applicants shall file and serve their notice of appeal within seven (7) days of the date of this ruling.
2. The applicants shall file and serve their record of appeal within fourteen (14) days from the date they lodge their notice of appeal in court.
3. If the applicants should fail to comply with the first two orders or any of them or fail to comply with them or any of them within the stated times, then in the event of such failure, the reference which we have allowed shall automatically stand dismissed with the costs thereof to the respondents.
4. The costs of the reference shall be costs in the proposed appeal.

These shall be our orders in the reference.

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

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

W.S.DEVERELL

.....

JUDGE OF APPEAL

certify that this is a

true copy of the original.

DEPUTY REGISTRAR.