REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civ Appli 297 of 2004

KENYA PORTS AUTHORITY ….....……
APPLICANT

AND

SILAS OBENGELE ….....…….
RESPONDENT

(*An Application for extension of time to file and serve a Notice of Appeal, letter for copies of Proceedings and Judgment and Memorandum of Appeal in an Appeal from Judgment and Decree of the High Court of Kenya at Mombasa (Khaminwa, J) dated 24th October, 2003*

In

H.C.C.C. No. 654 of 1995)

****

RULING OF THE COURT

Silas Obengele is dissatisfied with the Ruling dated 21st December, 2004 made by a single member of this Court pursuant to the exercise of his unfettered discretion under ***Rule 4*** of the Court's Rules. Due to his dissatisfaction with the said Ruling Obengele has made a reference to the Court pursuant to ***Rule 54(1) (b)*** of the Rules. That rule provides as follows:-

"***Rule 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) in any criminal matter wishes to have his application determined by the Court; or

(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."

Of course there is now no Court of Appeal for East Africa Act; that Act must have ceased to apply when the Appellate Jurisdiction Act, ***Chapter 9*** of the Laws of Kenya came into force on 28th October, 1977. But ***section 5*** of the latter Act which gives the Rules Committee created under ***section 81*** of the Civil Procedure Act, ***Chapter 21*** Laws of Kenya, power to make rules of practice and procedure of the Court of Appeal still provides at ***section 5 (2) (h)*** that the Rules Committee may make rules –

"***for providing for a reference from a decision of a single Judge to the Court."***

Though in a reference under ***Rule 54 (1) (b)***, the Court may vary, discharge or reverse the decision of a single Judge, the Court has, time and time again, laid it down that in exercising the discretion conferred by ***Rule 4***, a single Judge is acting on behalf of the Court for in ***Rule 52 (1)*** there is a proviso that:-

"***Provided that any such application [i.e. an application to be heard by a single Judge] may be adjourned by the Judge for determination by the Court."***

So that even if an application is one which can be heard and determined by a single Judge, there is nothing which would prevent the single Judge from adjourning such application and referring it to the full Court. That, in our understanding, is the basis of the insistence by the Court that in exercising the discretion conferred by ***Rule 4***, the single Judge does so on behalf of the Court and the Court is not entitled to interfere with the exercise of the discretion except on certain well settled principles. In **JOSEPH KAMAU MUSA & OTHERS VS. ERERI COMPANY LTD & OTHERS**, Civil Application No. NAI 361 of 2001 (unreported), the Court stated as follows at pages 3 – 4:-

"***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 LTD, 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 facts and the law as they are known the decision is plainly wrong.' "***

In asking us to interfere with the single Judge's exercise of discretion, Mr. Orao-Obura, learned counsel for Obengele, strenuously pressed upon us two issues. The first issue dealt with the question of whether the learned single Judge had exceeded the jurisdiction conferred on him by going into minute details as to the chances of the proposed appeal being successful.

We must admit that this issue has given us some cause for worry with the ruling of the learned single Judge. The learned Judge went into details regarding the claim in the High Court and basing himself on the case of **KENYA PORTS AUTHORITY VS. EDWARD OTIENO**, Civil Appeal No. 120 of 1997 (unreported) which the learned Judge thought was based on a claim similar to that of Obengele and which had been decided in favour of the Kenya Ports Authority, the very same intended appellant herein, the Judge concluded that aspect of the matter as follows:-

"***The facts in Edward Otieno's case are similar. The employer (Kenya Ports Authority) is the same. The decision in the Court of Appeal in Edward Otieno's case is dated 19th September, 1997 while the decision of the superior court in this case is dated 24th October, 2003. So decision in Edward Otieno's case is prior to the decision in the case, the subject of this application. It is apparent from the judgment of the superior court that the respondent was awarded large sums of money which he had not apparently earned by rendering services to the employer – applicant. In the circumstances I am satisfied that the intended appeal has merit."***

We respectfully agree that one of the factors a single Judge considering an application under ***Rule 4*** is entitled to take into account when exercising his discretion is the possibility of the intended appeal succeeding. The Court put the matter in this way in the case of **LEO SILA MUTISO VS. ROSE HELLEN WANGARI MWANGI**, Civil Application No. NAI. 255 of 1997 (unreported):-

It is now well settled that the decision whether or not to extend time for appealing is essentially

discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: "first the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and fourthly, the degree of prejudice to the respondent if the application is granted."

It is to be noted that the third requirement is only an area for possible consideration by a single Judge. That requirement cannot, therefore, be made the central core or axis for allowing or refusing an extension. In this Court's recent ruling in **JOSEPH KAMAU MUSA & OTHERS VS. ERERI CO. LTD**. to which we have already referred, the Court allowed the reference from the learned single Judge and quoting from **AFRICAN AIRLINES INTERNATIONAL LTD VS. EASTERN SOURTHERN AFRICA TRADE & DEVELOPMENT BANK (PTA BANK) 2003 KLR 140**, the Court stated thus:-

"***We wish to emphasize 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 lapse, to enable him to pursue a hopeless appeal."***

The Court then continued:-

"***This is why the single Judge is entitled to examine whether there was any material on record which may be judicially considered. The process of analysis of such material, however, and the pronouncement with finality that the intended appeal has no substance, lacked merit or was frivolous, remains within the province of the full court ……"***

In **GEOFFREY MAKANA ASANYO VS. NATIONAL BANK OF KENYA LTD**., Civil Application No. NAI. 132/99 (UR), it was specifically held that:-

"…….***it is clear to us that a learned single Judge has no power to reject an application on the basis that it lacked merit or substance."***

In the reference before us, the learned single Judge did not reject the application for extension of time; he allowed it on the ground that the intended appeal, in his view, had merit. While we are of the view that it is inadvisable for a single Judge to go into a detailed consideration of the merits of the intended appeal, we do not think it would be right for us to equate the refusal of an application on the ground that the intended appeal has no merit, or is frivolous, with the position where the application for extension of time is allowed on the basis that the intended appeal has merit. After all a single Judge is entitled to consider the possible success of the intended appeal and if he allows an extension of time on that basis he cannot be said to have exceeded the limits of his discretion under ***Rule 4***. Rejecting an application for extension of time because the intended appeal lacks merit, however, is a different proposition for such a conclusion clearly usurps the jurisdiction of the full Court. Accordingly, we are unable to accept Mr. Orao-Obura's contention that we should interfere with the learned single Judge's exercise of discretion because the Judge exceeded his jurisdiction under ***Rule 4***. The Judge did not do so and we reject that contention.

Mr. Orao-Obura next attacked the single Judge's decision on the ground that there were periods of inordinate delay which were not explained by the intending appellant and since there was, over-all, an inordinate delay which remained unexplained, the learned Judge was not entitled to exercise his discretion in the manner he did. We agree that it is now settled that whenever there is delay, even for one day, there must be some explanation for it as otherwise an extension may not be granted.

However, on this aspect of the matter, we think we need not go into details, except to say that there was material before the learned single Judge from which he could and did conclude that the delay or periods of delay, even if it was inordinate, had been explained to his satisfaction. Having set out the respective arguments of each side, the learned single Judge concluded as follows:-

"***The Notice of Appeal was filed in time thereby indicating that the applicant intended to appeal***

against the decision of the superior court. A firm of advocates M/s Kanyi J & Co advocates was appointed promptly on 27th October, 2003 after the applicant's previous counsel Mr. Dulu was appointed a Judge . The firm of M/s KANYI J & Co. advocates did not make the application for extension of time to file a fresh Notice of Appeal promptly. It is also true that after the application was dismissed on 30th July, 2004, the applicants were not informed of the decision of the court by their advocates until 30th September, 2004. Thereafter the applicant's current advocates had to seek leave from the court to represent the applicant. I am satisfied that the delay that applicant is accused of was caused by the applicant's former advocates."

It is clear to us from this page that the learned single Judge had in mind all the relevant factors when he considered the issue of delay and whether the delay had been explained. He was satisfied with the reason(s) offered to explain the delay. It may well be that if all or any of us had been sitting in the single Judge's place, we could have come to a different conclusion on the issue of whether the delay was inordinate and whether it had been explained. But that is neither here nor there. It is to be remembered that the single Judge was exercising an unfettered discretion and it would be wrong for the full Court to disagree with him merely because the full Court thinks he reached wrong conclusions on the material placed before him. That would be tantamount to the full Court substituting its discretion for that of the single Judge. We are not allowed to do that and we repeat that a reference under ***Rule 54***, though it be in the nature of an appeal, is really not, strictly speaking, an appeal. Hence, the principles which the Court has developed in dealing with a reference from the decision of a single Judge. We reject the contention that the learned single Judge did not exercise his discretion correctly in coming to the conclusion that there was no inordinate delay and that the delay that was there was explained.

Lastly, we agree with the learned single Judge that the application which he was called upon to determine did not amount to an abuse of the process of the Court. It is true that an earlier application for extension of time had been made and dismissed by another single Judge of the Court. But the reason for the dismissal of the earlier application was that as at the date of hearing and determination of the application, there was a notice of appeal in existence and there was no basis for extending time for the applicant to file another notice. A reference to the full Court was made from that decision but before the full Court could hear the reference, the notice of appeal was struck out and the reference was withdrawn. In those circumstances, the learned single Judge was entitled to come to the conclusion that the matter before him was not *res judicata* and did not amount to an abuse of the process of the court. We agree.

In the circumstances, we have come to the conclusion that the reference must fail. We order that it be and is hereby dismissed. The costs of the reference shall be costs in the appeal. These shall be our orders.

Dated and delivered at Nairobi this 22nd day of September, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

……..

JUDGE OF APPEAL

P.N. WAKI

…….

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.