IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIV APPLI 170 OF 2004

KENYA CO-OPERATIVE CREAMERIES LTD …….....…….. APPLICANT

AND

FIMS LTD …….....……. RESPONDENT

(Application for extension of time to serve a Notice of Appeal and lodge the record of appeal out of time from the Ruling and order of the High Court of Kenya at Eldoret (Tunya, J) dated 4th April, 2002

in

H.C.C.C. NO. 101 OF 1998)

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RULING OF THE COURT

This is a reference to full court under **rule 54** of the Court of Appeal Rules, against the decision of a single Judge delivered at Nakuru on 18th October 2002 in an application by way of Notice of Motion dated 28th May 2002. In that application the applicant Kenya Co-operative Creameries Limited had sought three orders which were; extension of time for serving the Notice of Appeal from a ruling the superior court delivered on 4th April 2002 in High Court *Civil Case No. 101 of 1998*; extension of time for lodging the Memorandum and record of appeal from the ruling and order of the superior court at Eldoret delivered on 4th April 2002 and such further or other orders to meet the ends of justice as may be necessary be made. The grounds for the same application were five and we set them out here:

"**(i) The applicant failed to serve the Notice of Appeal within the prescribed period as it was not notified that the ruling from which it now desires to appeal would be delivered on April 4th 2002.**

(ii) The applicant first came to learn of the ruling and order from which it now desires to appeal from on April 16th 2002.

(iii) Given the fact that Counsel for the applicant has its chambers at Nairobi, it was not possible to have the Notice of Appeal filed at the Eldoret Court Registry within the two days period before the expiry of time to file the Notice of Appeal.

(iv) It would be in the interest of justice for time which to serve Notice of Appeal and lodging the

memorandum and record of appeal be extended to enable the applicant prosecute its intended appeal.

(v) The Respondent stands to suffer no prejudice should this application be granted".

There was an affidavit sworn by the learned counsel for the applicant which stated, *inter alia*, that the ruling that the applicant sought to appeal against arose from a preliminary point which was upheld by the learned Judge of the superior court (Justice Omondi Tunya) and which upholding resulted in the dismissal of the applicant's application which had sought stay of execution and review and setting aside of the orders dated 30th November 2001 which orders had directed the applicant to deliver vacant possession of L.R. No. 37/371 to the respondent. That preliminary objection was heard by the superior court on 6th February 2002 and the ruling reserved to February 13th 2002. It was not delivered on that date as the court file was apparently not available. The matter was mentioned on 18th February 2002 but again the court file was still missing and it was eventually delivered on 4th April 2002 in the absence of the applicant's counsel who had not been notified of that date of delivery of ruling. The applicant, according to that affidavit first came to know of the dismissal on 16th April 2002 when auctioneers descended upon it to evict it from the suit premises. As the counsel for the applicant had his chambers in Nairobi, and the matter was in Eldoret court, the two remaining days for filing the Notice of Appeal was too short for filing it. The application was opposed and the respondent filed replying affidavit in which it stated that the granting of the application would prejudice the respondent seriously as it would subject it to further litigation and further legal costs. They also stated that the applicant's counsel knew of the ruling date or should have known of it from his agents in Eldoret.

The Notice of Motion came up for hearing before a single Judge of this Court on 26th September 2002, who in a considered ruling delivered on 18th October 2002, dismissed the application on grounds that he did not believe what the applicant's counsel stated in her supporting affidavit that she was not aware of the date the ruling was delivered, but, he believed what Mr. Kimaru for the respondent stated in his replying affidavit that the agent of the applicant's advocates was aware of the date the ruling was delivered. Further, he found no excuse in the applicant's counsel's statement that two days that remained for them to file notice was too short because the learned Judge felt that with modern telecommunication system the applicant's counsel could have instructed an advocate's firm in Eldoret to file the notice of appeal and the same could have been filed in time and lastly he found in any event that the days taken to file the application which was 57 days was inordinate. It is as a result of that dismissal of the application on those three grounds that this reference before us was sought.

It is now trite law that a reference is not an appeal. It is normally sought because a single Judge of the Court hears single Judge matters on behalf of the full bench and so if a party feels aggrieved by the decision of a single Judge, the party is entitled in law to seek the decision of the full bench. That explains why at the hearing of a reference no further evidence can be adduced. In hearing matters brought under **rule 4** of this Court's Rules, the single Judge exercises unfettered discretionary powers which in law must be exercised upon reason and not capriciously. Once the single Judge has so exercised the same discretion, and made a decision on the matter, the full bench will be very slow in interfering with the same exercise of discretion by a single Judge unless it is demonstrated that the single Judge, in the exercise of the same discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice (see the case of **MBOGO VS. SHAH (1968) EA 93 at page 96)**. That principle was followed in the case of **SAMKEN LIMITED AND ANOTHER VS. MERCEDES SANCHEZ RAU TUSSEL AND ANOTHER** ***Civil Application No. Nai 21 of 1999***, and it was explained in that case that that principle in **MBOGO'S** case (supra), although was dealing with an appeal from the decision of a single Judge, it was non the less applicable to decision of a single Judge under **rule 54** of this Court's Rules as well.

The single Judge, in considering an application under **rule 4** of this Court's Rules, as we have stated, exercises unfettered discretion which, however, must be exercised upon reason. The principles that would guide him in the exercise of the same discretion are also now well settled. In the case of

MWANGI VS. KENYA AIRWAYS LTD (2003) KLR 486, this Court set out the principles to be as follows:

"**Over the years, the court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in LEO SILA MUTISO VS. ROSE HELLEN WANGARI MWANGI, Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus:**

'**It is now well settled that the decision whether or not to extend the 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'.**

These in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand the list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words "in general". Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way".

With the above in mind, we now turn to the matter before us. The learned single Judge, as we have stated above did not believe the applicant's counsel that he (counsel) did not know of the date of delivery of the ruling and preferred the respondent's counsel's version to that of the applicant. He also felt that the applicant had two days within which he could contact another advocate in Eldoret to file the notice of appeal for him in Eldoret even when he was in Nairobi.

We see nothing wrong with the learned single Judge's view on the facts that were deponed to in affidavits before him. Whether the applicant's counsel knew of the date of delivery or not was in dispute and the learned Judge chose to accept the version presented by the respondent's counsel. There were ample reasons to lead to that decision and we cannot fault him in the way he exercised his discretion on those facts. We have difficulties though, on his view that the applicant's advocates could have contacted an advocate in Eldoret to file Notice of Appeal for him and as he did not do so, the applicant could not benefit from the allegation that the two days that remained from the date he knew of the delivery of the ruling (if he indeed knew about the ruling only two days to the end of the period provided for filing the Notice of Appeal) was too short as he was based in Nairobi. It is true that a prudent and conscientious advocate would have done that but we do not share the view that a party to a suit should be punished on account that his advocate was not prudent and conscientious enough. That would be setting too high a standard. In our view, the advocate had to take instructions on the matter from his client before he could involve his client into extra costs by hiring another advocate to act on his behalf and that he chose to do everything himself is no reason for punishing his client. However, having said so, we also agree that the applicant, even after being late for 2 days to file the Notice of Appeal, delayed for another 57 days before filing this application and the record shows that even as matters stand now, there is no Notice of Appeal on record and yet we are being asked to extend time for serving Notice of Appeal. Perhaps the correct thing would have been for the applicant to file Notice of Appeal late as it was, and seek extra time to file it, seeking in the same application that the Notice of Appeal filed be deemed to have been filed within time allowed by the Rules of this Court. As matters stand, no Notice of Appeal is on record and thus the delay is now for 59 days i.e. from the date the applicant knew of the date of delivery of the ruling of the court to the date this application was filed. That delay has not been explained. Under those circumstances and considering the guidelines that the single Judge was enjoined to consider in his exercise of his unfettered discretion, we cannot say that he misdirected himself in any way, neither can we say that it is manifest from the case as a whole that the decision he arrived at was clearly wrong.

We have not considered the current legal status of the applicant and the effect of the same on the

entire application because we were shown a copy of the vesting order filed in the superior court and in any case that issue was not formally taken up before us.

The upshot of all the above is that we decline to interfere with the single Judge's decision. It will stand. The reference is dismissed. The respondent shall have costs of the reference. Orders according.

Dated and delivered at Eldoret this 13th day of October, 2006.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR