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

CIV APPLI 75 OF 2006

KERESCENT MASINDE ……..……. APPLICANT

AND

CONCEPTA NAMAEMBA MASINDE …… 1ST RESPONDENT

CHARLES MASINDE MILEMO ……...…… 2ND RESPONDENT

(An application for extension of time within which to file and serve a notice of appeal as well as file and serve the record of appeal out of time from the judgment of the High Court of Kenya at Kakamega (Kariuki J) dated 11th March, 2005

in

H.C.C.A. NO. 49 OF 1992)

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RULING ON REFERENCE TO FULL COURT

Kerescent Masinde went before a single member of this Court under ***Rule 4*** of the Rules asking for extension of time to file the notice of appeal and the record of appeal outside the time allowed by the rules. The judgment Masinde wanted to appeal against was delivered by the High Court at Kakamega (Kariuki J) on *11th March, 2005*. It appears that at the conclusion of the hearing of the appeal in the superior court, the Judge had reserved judgment to a specified date but on that date judgment was not delivered and the parties were informed that judgment would be delivered upon notice to them. Masinde and his two opponents ***Concepta Namaemba Masinde***, the *first respondent*, and her son ***Charles Masinde Milimo***, the *second respondent*, were represented by counsel. Masinde contended before the single Judge that he did not know of the delivery of judgment until *27th January, 2006* when he went to check with the Court at Kakamega. Though the learned single Judge of the Court was not quite satisfied with the explanation for the delay between *11th March, 2005* and *27th January, 2006*, yet the Judge did not rule against the applicant on that aspect of the delay for he said:

"……. ***Although I am not completely satisfied with that explanation, as the applicant also had a duty to check with his advocates as often as possible to know the date his judgment would be delivered (sic). He showed no interest and he too cannot escape blame for the delay upto 27th January, 2006. However, I would be prepared to give him the benefit of doubt as far as that part of the delay is concerned. …..……."***.

So the learned single Judge, though not quite satisfied with the explanation given for the delay amounting

to almost one year, he nevertheless accepted that explanation. But the learned single Judge ruled against the applicant on the delay between *27th January, 2006* when he discovered that judgment had been delivered and *10th March, 2006* when his motion for extension of time was filed. On that aspect of the matter, even Mr. Wanyonyi who argued the reference before us, conceded that no explanation had been offered, either in the appellant's supporting affidavit or anywhere else. On this aspect, the learned single Judge stated:

"…….. ***However that is not the end. On 27th January, 2006 the applicant knew that judgment had been delivered against him. What did he do? Nothing. What explanation does he offer of that delay between 27th January, 2006, when he knew about the judgment against him and 10th March, 2006 – a period of about 42 days. His affidavit is completely silent on the same. He has not even made an attempt to explain that delay".***

All that Mr. Wanyonyi pressed upon us was that the delay of ***42 days*** was not inordinate and that the learned single judge was wrong in concluding that that delay was inordinate. That, with respect to Mr. Wanyonyi, is not the basis on which the full Court deals with a reference from the exercise of a discretion by a single Judge. It may well be that if the three of us had been sitting in the place of the single Judge, we might have concluded that the delay was not inordinate. But that cannot entitle us, on a reference such as this, to interfere with the learned Judge's exercise of discretion. We are not entitled to substitute his exercise of discretion with ours and for us to interfere, it must be shown to us that in coming to his decision, the learned single Judge took into account an irrelevant factor or that he failed to take into account a relevant factor or that he applied a wrong principle of law, or that he misapprehended the evidence and the law applicable to it and thus came to a wrong conclusion or that the decision of the single Judge is so plainly wrong that no reasonable judge could have arrived at it – see for example ***SAMUEL KINYUA MUTUGI VS. EUTYCHUS MUTHUI, Civil Application No. Nai. 334 of 2004*** (unreported) which was one of the cases cited to us by Mr. Wanyonyi.

In the end, Mr. Wanyonyi concentrated his fire-power on the issue that when he came to considering the question of the probability of the intended appeal succeeding, the learned single Judge wrongly held that no draft memorandum of appeal was placed before him while there was in fact such a document in the record before the single Judge. Mr. Wanyonyi contended that in failing to consider or in failing to notice that there was in fact a draft memorandum of appeal, the learned single Judge failed to take into account a relevant factor and that entitles the full Court to interfere with his exercise of discretion.

That argument, at its face value, looks attractive but it ignores the fact that the learned single Judge had found as a fact that there was an unexplained delay of some 42 days and the Court has held, times without number, that whenever there is a delay of whatever length, some explanation must be proferred for the same, otherwise there would be no material before the single Judge upon which he can exercise his discretion in favour of the party seeking an extension of time. It would not sound quite right for a party seeking an extension of time to come and tell the single Judge:-

"***Though I have delayed for six months and I have no explanation for that delay, yet I have a very good appeal and because the chances of my appeal succeeding are very high, you must extend the time for me."***

We are, of course, not saying that whenever there is a delay which is not explained, then it is irrelevant considering the chances of the appeal succeeding. That is always a matter for possible consideration in all cases. But it would be wrong to elevate that requirement above all others and hold that where there is probability of the appeal succeeding, all other considerations must be subordinated to it. All these things have to be considered and weighed one against the other and in the reference before us, the learned single Judge was satisfied that the unexplained delay of ***some 42 days*** was inordinate and because of that delay, he chose not to exercise his discretion in favour of the applicant. We have no business in interfering with that exercise of discretion. Mr. Shitsama, for the respondents, supported the decision of the single Judge.

That being the view which we take of the matter, the reference before us fails and we order that it be and is hereby dismissed with costs.

Dated and delivered at Kisumu this 1st day of December, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

……..

JUDGE OF APPEAL

P.N. WAKI

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR