



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OMOLO, WAKI, J.J.A & DEVERELL, AG. J.A)

CIVIL APPLICATION NO. NAI. 317 OF 2004 (UR 165/04)

MOMBASA DEVELOPMENT LIMITED APPLICANT

AND

1. JIMBA CREDIT CORPORATION LTD.)

2. CONSOLIDATED BANK OF KENYA LTD.)RESPONDENTS

RULING ON REFERENCE TO FULL COURT

What is before us is a reference made to the full Court by **M/S Mombasa Development Ltd** ., who are the respondents in the main appeal (hereinafter “the applicant”). It is a reference from the decision of a single Judge of this Court (Githinji, J.A) made on 20th December, 2004 dismissing an application by the applicant under **rule 4** of the Court of Appeal Rules (the Rules) seeking extension of time to file and serve a notice of motion dated 05.07.04. That notice of motion sought an order to strike out the appeal for reasons specified therein. The appeal itself was filed on 21.05.04 and the record was served on the applicant’s advocates on 24.05.04. If any application was to be filed seeking to strike out the appeal, then under the proviso to **rule 80** which is mandatory in language and intent, it ought to have been filed on or before 23.06.04. But no application was filed until 08.07.04. That was some 16 days or so out of time and it was obviously an incompetent application unless it was regularized. But the applicant did not apparently realize that when he set it down for hearing on 21.01.05. Some five months or so after the filing of the application, i.e. 08.12.04, he took out the notice of motion as stated above seeking extension of time to validate the application but the learned single Judge rejected his efforts, hence the reference.

Although such a reference is not an appeal, it is in the nature of one. By dint of **rule 54(1)** of the Rules, a dissatisfied party may seek to have the decision of a single Judge varied, discharged or reversed by the full Court. To succeed, however, the applicant must show that “the single Judge took into account an irrelevant matter; or that he failed to take into account a relevant matter, or he misapprehended the law applicable to the case, or that he misapprehended the facts of the case and hence misapplied the law to them or that his decision, taking into account all the circumstances of the case, is plainly wrong”. Those guidelines have been restated many times in this Court, for example, in **The Standard Ltd. & 2 others vs. Wilson K. Kalya & Another - Civil Application No. Nai. 306 of 2002 (unreported)** .

The first challenge mounted by Mr. Omollo, learned counsel for the applicant, is that the learned single Judge erred in stating that there was no explanation for the delay of 16 days. The affidavit in support of

the application, he pointed out, showed that there was another advocate who was initially acting for the applicant who filed the appeal. He notified the applicant of that fact on 02.06.04 but on 05.07.04 he ceased to act for them.

The applicant then filed the application on 08.07.04. Mr. Omollo drew our attention to the principles applicable in the exercise of this Court's discretion under **rule 4** and cited **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. Nai. 255 of 1997 (unreported)** where this Court stated as follows:

“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.”

Mr. Omollo submitted on that authority that the learned single Judge said nothing about any prejudice being caused to the respondent if the application was granted which omission was a relevant factor for consideration.

The second issue raised by Mr. Omollo was that the learned single Judge failed to appreciate the explanation offered for the delay of 5 months in filing the application for extension of time. The applicant's Managing Director, Joseph Mbugua Gichanga, swore that he was ignorant of the provisions of **rule 80** of the Rules since he is not a lawyer.

That, he submitted, should have been accepted as sufficient explanation, the same way this Court did in **Kirinyaga County Council vs. Kimmi Housing Co-op. Ltd. – Civil Application No. Nai. 123 of 2001 (unreported)** where it was stated:

“We must pause here and draw attention to the fact that this Council's Clerk is not a qualified lawyer to know certain basic things and make periodic checks and supervise the applicant's lawyers who had been engaged to appeal but did not do it. In our judgment there was nothing the Clerk would in the circumstances have done to ensure that the Council's previous advocates acted on its instructions to lodge a notice of appeal or appeal.”

Mr. Mabeya, learned counsel for the respondents, saw no departure by the learned single Judge from the relevant principles applicable in the exercise of his discretion under **rule 4** and asked us to reject the reference. He distinguished the **Kirinyaga case** since there were special circumstances in that case.

For our part, we say this: The learned single Judge was alive to the nature of his duty under **rule 4** and he spelt it out. We are not persuaded that he misapprehended the law on the exercise of discretion. He considered the totality of the delay of 5 months and 16 days between the two applications together with the explanation given therefor and found it unreasonable.

Delay being a relevant factor for consideration and the learned Judge having taken it into account and rejected the applicant's explanation on it, it would be wrong for us to simply substitute our discretion for his. He said **“ignorance of the existence of the proviso is not a good explanation ”** and again we find no reason to fault the Judge on that.

Ordinarily, litigants cannot be preferentially treated and are presumed to know the law and procedure unless there are special circumstances for making exceptions in any particular case. The **Kirinyaga case** cited to us had its peculiar circumstances and is distinguishable from this case. There, the County Council Clerk surrendered all files to the advocates and relied on them for advice and action. The errors and omissions complained of were committed by the advocates. Here the applicant took the files away from the advocates and advised himself on the law. He has himself to blame for the errors and omissions which he cannot otherwise explain.

Rule 80 , under which the application was brought was most relevant and that too was considered, the learned Judge stating:

“Moreover, it seems to me that the purpose of the proviso to rule 80 was to ensure, for the interest of justice, that an application to strike out an appeal or a notice of appeal is brought very early in the appeal and not belatedly when the appeal is about to be heard. In the circumstances, it would be against the spirit of the proviso if I were to allow the application at this time.”

As correctly submitted by Mr. Mabeya, the necessary implication in that statement is that the respondents are entitled to assume that the appeal filed was proper in all respects unless it is challenged under the relevant provisions of the law, and a delayed application is logically prejudicial to them.

We find no substance in the submission that the factor of prejudice was not considered. We are also unable to say, after taking into account all the circumstances of the case, that the learned single Judge was plainly wrong.

In the event, this reference fails and is accordingly dismissed with costs.

Dated and delivered at Mombasa this 28 th day of January, 2005.

R.S.C OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR