REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: OMOLO, TUNOI & GITHINJI, JJ.A.)
CIVIL APPEAL (APPLI) 86 OF 2003

BETWEEN

PURSHOTTAM RAMJI KOTECHA

BHAGWANJI NARCHIDAS KOTECHA …...… APPLICANTS/APPELLANTS

AND

SANJAY NARANDAS PAU

SIMEON KIPTUM ARAP CHOGE ……..…….. RESPONDENTS

(Appeal from the judgment and decree of the High Court of Kenya at Kisumu (Tanui J) dated 26th February, 2003
in
H.C.C.C. NO. 449 OF 2001)
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RULING OF THE COURT ON REFERENCE TO FULL COURT

On 28th May, 2004 a single Judge of the Court, O'Kubasu, JA. allowed the notice of motion of Purshotam Ramji Kotecha and Bhangwanji Narshidas Kotecha, which motion had asked the learned single Judge for an order that:

"The period for filing and serving a Notice of Appeal and Record of Appeal against the judgment/decree of the superior court (Honourable B. K. Tanui) given on 26th of February, 2003 in HCCC NO 449/2001 (Kisumu) be extended so that the Notice of appeal filed herein and dated 26th February, 2003 and 28th April, 2003, respectively, are deemed to have been properly filed and served".

The learned single Judge fully heard the motion and finally held that:

"The upshot of the foregoing is that the application is allowed so that the Notice of Appeal and the Record of Appeal filed herein and dated 26th February, 2003 and 28th April, 2003, respectively are deemed to have been properly filed and served. Costs of the application assessed at Shs.5,000/= to be awarded to the respondent, which should be paid within thirty days from the date of this ruling. Those shall be the orders of the Court".

The respondents Narandas Ranchodas Pau and Simeon Kiptum Arap Choge were dissatisfied with the orders given by the learned single Judge and they now come before the full Court pursuant to ***Rule 54 (1) (b)*** of the Rules of the Court. And as ***Rule 54 (2)*** of the Rules provides:

"At the hearing by the Court of an application previously decided by a single judge no additional evidence shall be adduced".

That rule means that the full Court, when hearing a reference from a decision of its (i.e. Court's single member), must confine itself only to the material that was made available to the single member.

Again, both Mr. Ragot for the referees and Mr. Letangule for the respondents to the reference are agreed that a reference under ***Rule 54 (1)*** is not like an appeal and in dealing with the reference the full Court is not really concerned with the merits or demerits of the decision of the single Judge. ***Rule 4*** under which such applications are made gives a single member of the Court an unfettered discretion subject only to the interests of the justice of a particular case. Usually the full Court would only interfere with the exercise of discretion by the single Judge if it be shown that in coming to his decision the single Judge:

"… misdirected himself in some matter and as a result 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 discretion and that as a result there has been misjustice" – see MBOGO AND ANOTHER VS SHAH [1968] 93.

The misdirection can take the nature of the single Judge failing to take into account a relevant matter, or his taking into account an irrelevant matter, or his misapprehending the evidence or the law, or, to use the words of ***SIR CHARLES NEWBOLD in MBOGO & ANOTHER V SHAH***, supra, *"if 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 a misjustice"*. In dealing with the decision of a single Judge, it is irrelevant that the members of the full Court would have reached a decision contrary to that of the single Judge. The discretion under ***Rule 4*** is exercisable by the single Judge and the full Court is not entitled to substitute its discretion for that of the single Judge.

What were the complaints raised by Mr. Ragot on behalf of the referees? First, it was alleged that the learned single Judge was only given conclusions in the supporting affidavit but that the facts on which the conclusions were based were not disclosed to him. It was, therefore, submitted that there was insufficient material upon which the single Judge could have exercised his discretion. Whether or not the supporting affidavit contained only conclusions the learned single Judge clearly considered them for he says in his ruling:

"…… Although there was a delay of only a few days there is an explanation based on the fact that there developed differences in the firm of advocates which had been handling the applicants' matters. The fact that there were differences in the law firm has not been denied. In my view that explanation is acceptable. It is to be noted that the applicants indicated their desire to appeal right from the date the judgment of the superior court was delivered. If there was any delay it cannot be said that the applicants were deliberately causing the delay. From the material before the court the applicants have demonstrated their desire to appeal".

What Mr. Ragot was telling us was that it was not shown how the differences in the law firm caused the delay in filing in time the notice and the record of appeal. He contended that the learned single Judge did not consider certain portions of their replying affidavit which challenged the averments in the supporting affidavit. We think these are not valid grounds upon which we can interfere with the exercise of discretion by the learned single judge. As we have seen the Judge took into account the period of delay and the explanation offered for it. He accepted the explanation and we do not ourselves think that the explanation offered for the delay was so unreasonable that no reasonable tribunal properly directing itself as to the law and the relevant circumstances of the case, could have accepted it. Put another way, we are not satisfied that in accepting the explanation offered for the delay the learned single Judge was plainly wrong and thus caused an injustice.

We think the same observations must apply to Mr. Ragot's other complaints like the issue of succession causing further delay of one year and so on. The learned single Judge clearly dealt with such issues and having done so, he was satisfied that they were satisfactorily explained. We do not think we would be justified in interfering with him even if we ourselves would have reached a contrary conclusion. Taking

all the relevant circumstances into account, we have not been shown that the learned single Judge, in coming to his decision, took into account any irrelevant matter, or that he failed to take into account a relevant matter, or that he misapprehended the law or facts relating to the issues before him or that it is manifest from his decision as a whole that he was plainly wrong and thus caused an injustice. The learned single Judge clearly committed no such error. That being our view of the matter, our decision must be and is that there is no merit in the reference before us and we accordingly order that it be and is hereby dismissed with costs to the respondents.

Dated and delivered at Kisumu this 24th day of June, 2005.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR