



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT KISUMU**  
**(CORAM: OMOLO, O'KUBASU & WAKI, J.J.A.)**  
**CIVIL APPLICATION NO. NAI. 20 OF 2004**  
**BETWEEN**

**PENINAH MONGINA ..... 1ST APPLICANT**

**ALPHONSE NYAGIRO ..... 2ND APPLICANT**

**AND**

**WALTER MASESE MAKORI ..... 1ST RESPONDENT**

**RACHAEL KEMUNTO KAMANDA..... 2ND RESPONDENT**

**(Appeal from a decision of the High Court of Kenya at**

**Kisii (Justice Wambilyangah) dated 24th July, 2002**

**in**

**H.C.SUCCESSION CAUSE NO. 174 OF 2000)**

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**RULING OF THE COURT**

This is a reference from the decision of a single Judge (Tunoi, J.A.) delivered at Kisumu on *14th June, 2004* in which he dismissed the applicant's application for extension of time for filing and serving the Notice of Appeal, the Memorandum of Appeal and the Record of Appeal. That application for extension was, of course, brought under *rule 4* of the Court of Appeal Rules (the Rules).

When this reference came up for hearing before us on *17th June, 2005*, Mr. Odunga, for the applicant, reminded us of the principles to be applied. He pointed out that the learned single Judge did not take into account relevant matters or took into account irrelevant matters. It was Mr. Odunga's contention that paragraphs 7, 8 and 9 of the applicant's supporting affidavit contained what he considered sufficient explanation for the delay.

As regards the delay attributed to the applicant's counsel, it was Mr. Odunga's submission that mistake of counsel should not be visited on the applicant.

Apart from complaining about great costs incurred in this matter, the 2nd respondent, who appeared in person, did not have anything to say by way of opposition to this reference.

From the record, it would appear that the applicants herein, **Peninah Mongira** (1st Applicant) and **Alphonse Nyagiro** (2nd Applicant) filed a notice of motion under rule 4 of the Rules seeking an order "*that the time limited for filing and service of the notice of appeal, Memorandum of Appeal and record of*

*appeal be extended.*” What can be deciphered as the grounds in support of that application were:-

***“that the applicant’s appeal is not frivolous there has not been inordinate delay and the applicant (sic) has plausible reason for the delay”.***

There were two supporting affidavits, one sworn by **Peninah Mongira**, the first applicant, and the second, sworn by **George Vincent Odunga**.

The learned single Judge considered what was urged before him and in his ruling stated inter alia:-

***“The ruling the subject matter of the intended appeal was delivered on 24th July, 2002 in Kisii H.C. Succession Cause No. 174 of 2000 by Wambilyangah, J. It is the applicants’ case that they were not informed of the outcome of the application until 12th August, 2002 when they went to inquire about it from their advocates. In short, the applicants would seem to aver that failure to appeal within the prescribed time was occasioned by the mistake of their counsel.***

***Even if this is so, the new counsel Mr. Odunga, did not save the situation and was also guilty of laches. He was guilty of inordinate delay. It was not necessary for him to have the order certified before lodging an application to extend time to lodge Notice of Appeal out of time, as he says. However, assuming that the order was certified on 17th November, 2003, Mr. Odunga has not given a satisfactory explanation as to why he did not lodge this application until 15th January, 2004.***

***In my view the matter now before me has been characterized by grave and inordinate delays, which have not been explained to my satisfaction.***

***I realize that the dispute concerns succession but the rules of the Court, if not observed may cause injustice instead. The 2nd respondent states that the Public Trustee has progressed quite a lot in distributing the estate. Any further delay is injurious to her house.***

***What is surprising is that the applicants do not seem to want to challenge the ruling of 13th June, 2002, which is the most crucial decision as far as the dispute is concerned, but, are only at issue with refusal to review it.”***

From the foregoing, the learned single Judge sets out his reasons for dismissing the application to extend time. It has been stated time and again that in an application under *rule 4* of the Rules, a single Judge of this Court is called upon to exercise his discretion which discretion although unfettered must be exercised judicially. On numerous occasions this Court has had time to comment and elaborate on the issue of judicial discretion and the nature of that discretion exercised by a single Judge under *rule 4* of the Rules. In **MWANGI V. KENYA AIRWAYS LTD** [2003] KLR 486 at p. 487- 488 this Court stated:-

***“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 this 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 anyway.”***

What comes out clearly from the foregoing is that under rule 4 of this Court’s Rules, the learned single Judge was exercising his unfettered discretion. In a reference to the full court before we can interfere with that discretion, we must be satisfied that the learned single Judge misdirected himself in some matter and as a result arrived at a wrong decision or, that the learned single Judge misapprehended the law or failed to take into account some relevant matter. In MBOGO AND ANOTHER VS. SHAH [1968] E.A. 93 at P. 95 Sir Charles Newbold P put it thus:-

***..... a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his 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 has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.....”***

In his submission, Mr. Odunga argued that the learned single Judge took into account irrelevant matters. We were, however, not told what these irrelevant matters were. In our view, the learned Judge considered the length of the delay, the explanation offered for that delay, the chances of success of the intended appeal and the prejudice to the respondents. In his view, the learned Judge was satisfied that the delay was inordinate, and that the explanation given was unacceptable, and finally that allowing the application for extension would greatly prejudice the respondents. The learned single Judge in his ruling observed that the 2nd respondent had indicated that the Public Trustee had progressed quite a lot in distributing the estate, and that any further delay would be injurious to her house. That was the position as at 14th June, 2004 when the application for extension of time was argued before the learned single Judge. It is slightly over a year now and we do not know how far the Public Trustee has gone in distributing the estate. Perhaps, the process has been completed.

Mr. Odunga brought in the issue of a mistake of counsel not being visited on his client. The decision of this Court in KENYA CANNERS LTD VS. TITUS MUIRURI DOGE – Civil Application No. NAI. 64 of 1990 (unreported) came to our mind in which it was stated:-

***“This Court has held on many occasions that any litigant who wishes to be heard by this Court should not be prevented or penalised due to the mistake of his counsel”.***

In the above cited authority, the mistake of the counsel related to failing to interpret the rules properly. In this reference, there was no question of the applicants’ counsel failing to interpret the rules but rather the advocate(s) being indolent. On this issue of mistakes of counsel we would refer to what **Lord Denning** said in **“The Due Process of Law”** (1980) Lord Butterwoths at p. 93:-

***“Whenever a solicitor by his inexcusable delay, deprives a client of his cause of action, his client can claim damages against him as for instance when a solicitor does not issue a writ in time, or serve it in time or does not renew it properly. We have seen, I regret to say, several such cases lately. Not a few are legally aided. In all of them the solicitors have I believe been quick to compensate the suffering client; or at least their insurers have. So the wrong done by this delay has been remedied as much as can be. I hope this will always be done”.***

Perhaps, the foregoing, if applied to the Kenyan situation may be a consolation or offer some sense of comfort to the applicants and others in similar circumstances.

We have said enough in this matter. The learned single Judge, as we have already point out, was exercising his discretion under rule 4 of the Rules when he dismissed the application. We have considered the submissions of Mr. Odunga, but in our view, he has failed to show us any fault in the manner the learned single Judge exercised his discretion. On our part, we have carefully considered the matter but in the end come to the conclusion that we have no reason why we should interfere with the learned single

Judge's exercise of his discretion.

For the foregoing reasons, we order that this reference be and is hereby dismissed with costs.

***DATED and DELIVERED at KISUMU this 15th day of July, 2005.***

**R.S.C. OMOLO**

.....

**JUDGE OF APPEAL**

**E.O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**P.N. WAKI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**