



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kwach, O’Kubasu & Githinji JJ A)

CIVIL APPLICATION NO NAI 247 OF 2002 (123/2002 UR)

PATELAPPLICANT

VERSUS

WAWERU & 2 OTHERS.....RESPONDENT

(Application for extension of time to lodge an application for leave

to appeal against the Ruling of the High Court at Nairobi

(Aganyanya J) dated 15th December 1998 in HCCC

No 1826 of 1987)

RULING

This is a reference to the court under rule 54 of the Rules of this Court from the decision of Bosire JA sitting as a single judge of this court delivered on 29th November 2002. The learned single judge exercised his discretion under rule 4 of this Court’s Rules by dismissing the applicant’s application for extension of time within which to seek leave to appeal against the decision of the superior court (Aganyanya J) given on 15th December, 1998.

In dismissing the applicant’s application the learned single judge expressed himself thus:-

“The applicant’s application for leave to appeal was struck out on 29th May, 2001. But this motion was not brought until 21st August, 2002. If the applicant was able to take out a motion for leave to lodge an appeal in January, 1998 it has not been explained satisfactorily why the applicant did not renew the application promptly. I am unable to accept that the delay in taking out this motion was due to mere oversight or a mistake on the part of the applicant’s counsel. Nor can the delay be attributable to the absence of the superior court record in view of what I stated earlier.

The applicant has clearly not placed sufficient material before me to enable me exercise my unfettered discretion under rule 4 of the Rules in his favour. In the result I dismiss the application with costs to the respondents assessed at Kshs 5,000/=.

When this matter came up for hearing before us Mr Goswami for the applicant submitted that the leaned

single judge failed to consider the correspondence attached to his supporting affidavit in which the delay was explained. But Mr Goswami went on to concede that he made an error in his supporting affidavit in which he did not give sufficient explanation for the delay.

This is a matter in which the learned single judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court.

All that the applicant was required to do was to place sufficient material before the learned single judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his discretion? In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No. NAI 251 of 1997 this Court stated:-

“It is now 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 decided 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”.

In this reference it has been shown that a delay of almost fifteen months was not explained to the satisfaction of the learned single judge. We asked Mr Goswami severally to explain to us the delay but he failed to do so.

The Rules of the Court must be complied with. As was said in *Ratman v Camarasamy* [1964] 3 All ER 933 by Lord Guest at p 935:-

“The rules of court must *prima facie*, be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

The above passage has been quoted with approval by this court in *Grindlays Bank International (K) Limited v George Barbour* Civil Application No NAI 257 of 1995 and *Trade Bank Limited (in Liquidation) v LZ Engineering Construction Limited and Another* – Civil Application No NAI 282 of 1998.

We have carefully considered the submissions of counsel appearing for both parties and having regard to what was before the learned single judge and bearing in mind that this is a reference from the exercise of a discretion by a single judge we have come to the conclusion that we discern no misdirection on the part of the learned single judge in the manner he exercised his unfettered discretion. The upshot of the foregoing is that this reference fails and is dismissed with costs.

Dated and delivered at Nairobi this 6th day of June, 2003

R.O. KWACH

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JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR