IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Tunoi & Keiwua JJ A)

CIVIL APPLICATION NO NAI 162 OF 2002

THUITA MWANGI ……...……..APPLICANT

VERSUS

KENYA AIRWAYS LTD…….....…….. RESPONDENT

(Application for extension of time to file a fresh Notice of Appeal and

Record of Appeal in an intended appeal from the judgment and decree

of the High Court at Nairobi (Hayanga J) dated 29th September,

2000 in High Court Civil Case No 2570 of 1994)

JUDGMENT

We are dealing with a reference to the full Court under rule 54(1) of the Court's Rules, the Rules. The matter arises in this manner. On 29th September, 2000, Hayanga J delivered a judgment against Thuita Mwangi, the applicant herein. The applicant had sued Kenya Airways Ltd, the respondent, over what was alleged to be a loss incurred by the applicant as a consequence of a wrong booking made by the respondent when the applicant traveled using the respondent's air ticket to the United States of America. Following the dismissal of his suit by the High Court, the applicant lodged in this Court Civil Appeal No 105 of 2001; that appeal was so lodged in the Court on 28th May, 2002 but that appeal was, unfortunately for the applicant, struck out on 6th June, 2002, because the applicant had filed it out of time without leave.

The applicant then returned to this Court by way of a notice of motion under rules 4 and 42 of the Rules and the motion asked for an order to extend time for the applicant to enable him file a fresh notice of appeal and record of appeal against the judgment and decree of the Superior Court. The motion was lodged in the Court on 19th June, 2002. That was some thirteen days after the applicant's previous appeal had been struck out. As is the usual practice of the Court, the motion was heard by a single judge of the Court (Shah JA) on 23rd October, 2002 and in a reserved ruling delivered on 8th November, 2002 the learned single Judge refused to extend the time as sought by the applicant and dismissed the applicant's notice of motion with costs. The applicant now comes to the full Court pursuant to the provisions of rule 54(1) and under that rule an applicant such as this one who:-

"..... wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court .....".

may make an application such as the one now before us. Rule 2 of the Rules defines the Court as

"..... including any division thereof and a single Judge exercising any power vested in him sitting alone".

That is why this Court has repeatedly said before that a single judge sitting alone and acting under rule 4 is exercising the powers vested in him alone by that rule on behalf of the whole Court and the whole Court can only interfere with the exercise of those powers, which are entirely discretionary, for very specific reason(s). The circumstances under which the full Court would be entitled to interfere with the exercise of the discretionary power by the single judge are similar to those under which an appellate court would be entitled to interfere with the exercise of a discretion by a trial judge. Those circumstances were specified by the Court of Appeal for East Africa in *Mbogo & Another v Shah,* [1968] EA 93. That case is well known enough and we do not think it is necessary for us to set out the law on this aspect of the matter as therein stated. All we need to say is that before we could ever think of interfering with the exercise of a discretion by the single judge, and which discretion as we have already stated, is exercised on behalf of the whole Court, we would have to be positively satisfied that in coming to his decision, the single judge has taken into account some irrelevant factor, or that the has failed to take into account a relevant factor, or that he has not applied a correct principle to the issue before him or that taking into account all the circumstances of the case, his decision is plainly wrong.

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 v 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.

Again, as we have pointed out, we do not think the Court intended that the list of four items it set out in *Mutiso's case,* ante, was ever meant or intended to be exhaustive. It is also clear that the third issue for consideration, namely, the chances the appeal succeeding if the application is granted is merely stated as something for a "possible" consideration, not that it must be considered. This is understandable because the "the chances of an appeal succeeding" is normally dealt with by this Court under the rubric of "an arguable appeal" or "an appeal which is not frivolous" and the full Court normally considers that issue under rule

5(2)(b) of the rules when the question is whether or not there should be a stay of execution, an injunction and so on. The requirement for the consideration of whether an intended or proposed appeal has any chances of success appears to have its origins in the case of *Bhaichand Bhagwanji Shah v D Jamnadas & Co Ltd* [1959] EA 838 where Sir Owen Corrie, Ag JA is recorded as saying at pg. 840 Letter I to pg 841 at Letter A:

"..... It is thus essential in my view, that an applicant for an extension of time under r 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice. In the applicant's affidavit of September 19 last no indication whatever of the nature of the case is included and I hold that if that affidavit stood alone, not sufficient ground would have been shown for granting application.

In para. 3 of his supplementary affidavit of October 6, however, the applicant has given some indication of the nature of the case and of the ground upon which he desires to appeal and in my opinion that which he desires to appeal and in my opinion that statement is sufficient for the purpose".

As Mr Kiragu Kimani for the respondent and who relied on this case himself pointed out, correctly in our view, the case was decided under the then rule 9 which required that "sufficient cause" be shown before an extension of time could be obtained. There is no requirement for "sufficient cause" under the current rule 4. But even if that was still the position the present applicant stated in paragraph 2 of his supporting affidavit and we quote him:-

"2 That I instituted High Court Civil Case No 2570 of 1994 against the respondent so as to recover the loss that I incurred as a consequence by the respondent when

I traveled using its air ticket from Kenya to USA".

That was a sufficient statement of the nature of the applicant's case and as to why he was desirous of appealing the applicant annexed to his motion draft memorandum of appeal containing a total of eight grounds. Even if the case of *Shah, ante,* was still good authority under the present rule 4 the applicant would have satisfied the requirements set out therein. It must not be forgotten that even the recent case of *Mutiso* did not lay it down that the single judge is obliged to consider the issue of the chances of an appeal succeeding; the case only put that issue down as one for possible consideration. The learned single judge in this case refused to exercise his discretion in favour of the applicant and his principal reason(s) for doing so was that:

"Mr Oyatsi argued that the affidavit in support of the application as well as the grounds of the intended appeal do show that there is an arguable appeal. There is nothing in the affidavit to show what the intended appeal is all about save to say that the alleged loss was incurred by the applicant as a consequence of a wrong booking made by the respondent when he traveled using its air ticket from Kenya to USA. That does not help at all.

The draft memorandum of appeal, in the absence of pleadings and judgment, stands in vacuum. I do not see any good reason why the pleadings and judgment could not have been included in the application.

After all these cannot be said to be unavailable. These must have been in the struck out record of appeal".

As we understand the matter, the learned single judge wanted copies of the pleadings and the judgment so as to enable him weigh them against the grounds of appeal in the draft memorandum of appeal and thus come to a decision himself as to whether or not there was merit in the proposed appeal. Even if *Shah*'s case was still valid authority, that would be going far beyond what that case decided which was simply that:

"(iii) an applicant for an extension of time must support his application by a supplementary statement of the nature of the judgment and of his reasons for desiring to appeal from it to enable the Appellate Court determine whether refusal of the application would cause injustice".

The applicant stated the nature of his case in paragraph 2 of his supporting affidavit and his reasons for desiring to appeal were contained in his draft memorandum of appeal. With the greatest respect to the learned single judge, we think he applied the wrong principle of law in requiring that the pleadings and a copy of the judgment should have been attached to the application so as to enable him go through the

pleadings, weigh them against the judgment and thus determine the merits or otherwise of the proposed appeal. We think there is no such legal requirement and whether one calls it taking into account an irrelevant factor or applying a wrong principle, we are satisfied we are entitled to interfere with the exercise of an unfettered discretion by the learned single judge. We do so by allowing this reference and reversing the decision of the single judge and in its place make an order extending the time as sought in prayer number 1 of the notice of motion dated 17th June and lodged in court on 19th June, 2002. The Notice of Appeal must be filed and served upon the respondent's advocates within seven days of the date of this ruling. The record of appeal must be filed within seven days from the date on which the notice of appeal is lodged and must be served on the respondent's advocates within seven days from the date of its lodgment. The costs before the single judge and the costs of the reference shall be in the intended appeal.

Dated and delivered at Nairobi this 11th day of July, 2003

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

M.M.O. KEIWUA

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR