



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: OMOLO, TUNOI & O’KUBASU JJ A)

CIVIL APPLICATION NO 51 OF 2001

BETWEEN

ABRAHAM TENOI KIMALA.....APPLICANT

AND

JOB KIPSANG SUTERRESPONDENT

RULING OF THE COURT

This is a reference from the ruling of a learned single judge of this Court delivered on 25th September, 2001, whereby, in exercise of his powers under rule 4 of our rules, he refused to grant the applicant extension of time within which to file a notice of appeal in an intended appeal by the applicant.

The application canvassed before the learned single judge had been necessitated by the fact that the applicant’s appeal had been struck out by this Court on 21st February, 2001 on the ground that it was lodged one day out of time.

In the exercise of his discretion to enlarge time on such terms as may seem just to him, the learned single judge disallowed the application. He expressed himself thus:-

“Reliance is placed on RKL5 and RKL 6 - the 2 letters. I have read them. Nothing therein supports the view that the file was lost. The ground on which the application is based is not substantiated. The application fails and is dismissed with costs.”

The foregoing constitutes the background leading to this reference. Mr Kimatta, counsel for the applicant, has argued that the learned single judge improperly exercised his discretion by rejecting the applicant’s application despite the fact that the court file and the entire exhibits went missing immediately after the delivery of the judgment the subject of the intended appeal. The loss of the court file was a matter beyond the applicant’s control and, moreover, the delay occasioned therefrom was merely a day.

Mr Kimatta also argued that the learned single judge only dealt with matters which preceded the striking out of the appeal and not what steps the applicant took thereafter to perfect his appeal. Nakuru Civil Appeal No 156 of 1999 was struck out on 21st February, 2001 for being out of time. The applicant lodged this application a week later on 28th February, 2001. Mr Kimatta contended that the applicant was not guilty of unreasonable delay in bringing the application and has shown keen interest to have the matter in issue decided by this Court. He averred that the learned single judge gravely erred in shutting out the applicant from the corridors of justice by dismissing his application.

It is trite that this Court will not disturb the decision of a judge in the exercise of his discretion except where he has 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 he was clearly wrong in the exercise of his discretion and that as a result there has been injustice.

With great respect to the learned single judge, we conclude without any hesitation, after taking into consideration all the facts of the matter before us, that the learned single judge did not consider all the facts post the striking out of the appeal. This was a misdirection which resulted in his improper exercise of his discretion the consequence of which is an injustice on the applicant.

In the result we allow the reference. The applicant is granted leave to file his notice of appeal out of time. This should be lodged within 7 days hereof and the record of appeal shall be filed within 21 days thereafter. The costs occasioned by this reference shall be in the intended appeal in any event.

Dated and delivered at Nakuru this 20th day of September 20, 2002

r.s.c Omolo

R.S.C OMOLO

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JUDGE OF APPEAL

P.K TUNOI

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JUDGE OF APPEAL

E.O O’KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR