



Kiarie & 2 others v Administrator of the Estate of John Wallace Mathare (Deceased) & 2 others (Civil Application 4 of 2020) [2020] KESC 37 (KLR) (Civ) (4 August 2020) (Ruling)

Charles Karathe Kiarie & 2 others v Administrator of the Estate of John Wallace Mathare (Deceased) & 2 others [2020] eKLR

Neutral citation: [2020] KESC 37 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL**

CIVIL APPLICATION 4 OF 2020

**DK MARAGA, CJ, PM MWILU, DCJ & V-P, MK
IBRAHIM, NS NDUNGU & I LENAOLA, SCJJ**

AUGUST 4, 2020

BETWEEN

**CHARLES KARATHE KIARIE 1ST APPLICANT
THOMAS WANYOIKE WAINAINA 2ND APPLICANT
KALANG ENTERPRISES 3RD APPLICANT**

AND

**ADMINISTRATOR OF THE ESTATE OF JOHN WALLACE MATHARE
(DECEASED) 1ST RESPONDENT
ADMINISTRATOR OF THE ESTATE OF DENNIS WAWERU RIMUI
(DECEASED) 2ND RESPONDENT
ADMINISTRATOR OF THE ESTATE OF JOYCE WANJA
GITAU 3RD RESPONDENT**

Nature of a review against a decision of a single judge of the Supreme Court

A review of a single judge's decision isn't an appeal. Reviews were rare and only granted for clear errors or unreasonable delays that cause injustice. For such a review application to succeed, it must be shown that the judge acted whimsically or misdirected himself in the exercise of his or her discretion and as a result reached a manifestly wrong decision causing apparent injustice. That applicant's lengthy delays disqualified them from a successful review.

Reported by Kakai Toili



Jurisdiction – *jurisdiction of the Supreme Court – appellate and review jurisdiction - nature of a review against a decision of a single judge of the Supreme Court - what were the circumstances in which a decision of a single judge of the Supreme Court could be reviewed - whether the decision of a single judge of the Supreme Court could be appealed against.*

Brief facts

The applicant filed the instant application seeking a review of the ruling a single-judge of the court and for the court to reconsider the applicants' application made on June 12, 2018. The application made on June 12, 2018 sought among others orders for extension of time for filing a review application against the decision of the single judge disallowing extension of time for filing the reference on taxation against two rulings. The Deputy Registrar of the court had taxed the respondents' bill of costs at Kes. 2,052,770, aggrieved by that decision, the applicants applied for copies of the taxation proceedings and the Deputy Registrar's rulings.

The rulings were supplied on May 17, 2018 thus leading to the applicant's inability to file his reference on taxation within 7 days as required by rule 49 of the Supreme Court Rules. In dismissing the applicant's application to extend time to lodge references against the taxation ruling, the single judge of the court held that the 27 days delay explained by the applicant as time taken to prepare the application for extension of time was neither reasonable nor credible.

Issues

- i. What was the nature of a review against a decision of a single judge of the Supreme Court?
- ii. Whether the decision of a single judge of the Supreme Court could be appealed against.
- iii. What were the circumstances in which a decision of a single judge of the Supreme Court could be reviewed?

Held

1. A review of the decision of a single judge was not an appeal as there could be no appeal from the decision of a single judge of the court to the full court. To allow such an appeal would not only be an abuse of the court process but it would also lead to endless litigation and clog the system. A review was not meant to grant an applicant a second bite at the cherry; it was not a regurgitation of the matter that was before a single judge or limited bench. The focus of a review was the decision of the single judge and not the merits of the substantive application that was the subject of the decision under review.
2. As a review of a single judge's decision entailed interference with the exercise of the judge's discretion, such interference was permitted only in exceptional circumstances. Therefore, for such an application to succeed, the applicant had to satisfactorily demonstrate that in reaching his decision, the judge acted whimsically or misdirected himself in the exercise of his or her discretion and as a result reached a manifestly wrong decision causing an apparent injustice.
3. Considering the history of the instant matter which was filed in 1995, the applicant had not satisfactorily explained the two delays. Given the period of 7 days within which the references should have been filed, the 27 and 30 days respectively taken to prepare the two references were unreasonable.

Application dismissed; each party to bear its own costs of the application.

Citations

Statutes

None referred to

Advocates

None mentioned



RULING

A. Introduction

1. Before Court is a Notice of Motion dated 27th February, 2020 brought under Rules 21, 49(2) and 53 of the Supreme Court Rules, 2012; and Article 163 of the Constitution of Kenya, 2010 and supported by the affidavit Charles Karathe Kiarie sworn on 27th June 2020. It seeks to review the ruling a single-judge (S.C. Wanjala, SCJJ) made on 17th December, 2019 and to reconsider afresh the Applicants' application made on 12th of June 2018.
2. The application seeks orders:
 - a) That this Honourable Court be pleased to extend the time for filing a Review application against the decision of his Lordship S.C Wanjala, J. delivered on the 17th of December 2019, disallowing extension of time for filing the Reference on Taxation against the two rulings delivered herein on the 13th of April 2018 by Hon D Ole Keiuwa.
 - b) That if prayer (a) is allowed, this Honourable Court be pleased to vary and review the decision of his Lordship S.D Wanjala, J. delivered on the 17th of December 2019 disallowing extension of time for filing the References on taxation against the two rulings delivered herein on the 13th of April 2018 by Hon, D Ole Keiuwa.

B. Background

3. In his two decisions dated 13th April 2018, the Deputy Registrar of this Court taxed the Respondents' bill of costs at Kes. 2,052,770/=. Aggrieved by that decision and desiring to apply for a further reference to the full Court, on the 18th of April 2018, the Applicants applied for copies of the taxation proceedings and the Deputy Registrar's said rulings. The same were supplied on 17th May 2018 thus leading to the Applicant's inability to file his reference on taxation within 7 days as required by Rule 49 of the Supreme Court rules.
4. In his ruling dismissing the Applicant's application to extend time to lodge references against the taxation ruling, the single Judge of this Court (S.C. Wanjala, SCJ) held that "A copy of the Ruling and typed proceedings were availed to the Applicants on the 17th May 2018, and yet, it was not until the 12th of June 2018, that they filed the Application for extension of time. The Applicants contend that the 27 days delay is the time it took them to prepare the application for extension of time. Such an explanation, in my view, is neither reasonable nor credible." That is the decision that has provoked the present further reference before us.

C. Applicant's Submissions

5. In his written submissions dated 28th of February 2020 and filed on the 2nd of March 2020, the Applicants argue that the delay in filing the present Reference was occasioned by the Court Registry's failure to supply them with copies of the proceedings before the single Judge and his ruling. They applied on 17th December 2019 and were supplied with the same on 31st December 2020.
6. On the merits of the Reference, the Applicant submits that the single Judge erred in finding that the reason for the delay in filing the taxation reference was neither reasonable nor credible. He also erred in failing to appreciate that the Deputy Registrar misapprehended both the facts and the law on the taxation before him. And in dismissing the Reference, the judge in essence, allowed the same firm of advocates who represented the 1st and 2nd Respondents to charge twice on certain items like transport



to court and did not take into account the principle of reasonableness of costs which militated against the provisions of Article 48 of the Constitution.

7. In support of these submissions, the Applicants rely on this Court's decisions in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR on the Court's jurisdiction to extend time and *Hassan Nyanje Charo v Khatib Mwashetani and 3 others* [2014] eKLR in which it was held that a litigant should not be blamed for the laxity of the court process over which he or it has no control.
8. In conclusion, the Applicants urge that no prejudice will be suffered by the Respondents if this application is allowed. They therefore urge that this Reference be allowed.

D. The 1st and 2nd Respondents' Submissions

9. The 1st and 2nd Respondents (the Respondents) oppose the application. In their Preliminary Objection dated 10th June 2020 and filed on the 11th of June 2020, they argue that the Supreme Court has no jurisdiction to review a decision made by a single judge on an application seeking enlargement/extension of time; that the Reference is premised on the Supreme Court Rules 2012, which were revoked on the 14th of February 2020 and as such the same has no basis in law and cannot stand; and that Rule 49(2) of the Supreme Court Rules only applies in instances where a judge makes a determination on a reference (arising out of taxation) whereas the decision of the single Judge was on extension of time and not a reference.
10. On delay, the Respondents rely on this Court's decision in *County Executive of Kisumu v the County Government of Kisumu and 8 others*, Civil Application No 3 of 2016 [2017] eKLR that in an application for extension of time the whole period of delay should be declared and satisfactorily explained to the court, a fact they argue the Applicants have failed to do.
11. On the merits of the Reference, in their written submissions dated 10th June 2020 and filed on the 11th of June 2020, the Respondents argue that as a general rule, the Supreme Court has no jurisdiction to sit on an appeal over or to review its decisions save in the manner contemplated by Section 21(4) of the Supreme Court Act and in very exceptional circumstances to meet the ends of justice as stated by this Court in *Martin Wanderi & 106 Others v Engineers Registration Board & 5 Others, Egerton University & 43 Others* [2020] eKLR.
12. They argue that none of the exceptional circumstances therein stated have been cited by the Applicants nor do they exist in this matter. It is their submission that Section 21(4) of the Supreme Court Act that the Applicants rely on limits the intervention of the court to correcting any oversight or clerical error of computation or such other error apparent in the judgement, ruling or order. In the circumstances, they urge the Court to dismiss this Reference with costs to the 1st and 2nd Respondents.

E. Analysis

13. Two main issues arise for our determination in this matter. The first one is the delays in filing the two References in this Court. The first delay is between 17th May 2018 when the Applicants were supplied with copies and rulings of the Deputy Registrar and the 12th of June 2018 when they made the first Reference to the single judge, a total of 27 days. The second delay is from 31st January 2020 when the Applicants were supplied with copies of proceedings before and the ruling of the single Judge and 2nd March 2020 when they filed the present Reference before the full Court, a total of 30 days.
14. The second issue is whether interference with the decision of the single Judge in this matter is warranted.



15. A review of the decision of a single judge is not an appeal as there can be no appeal from the decision of a single judge of this Court to the full Court. To allow such an appeal will not only be an abuse of the court process but it will also lead to endless litigation and clog the system. As this Court stated in *Parliamentary Service Commission v. Wambora & Others*, [2018] eKLR, a review is also not meant to grant an applicant a second bite at the cherry; it is not a regurgitation of the matter that was before a single judge or limited bench. The focus of a review is the decision of the single judge and not the merits of the substantive application that was the subject of the decision under review.
16. As a review of a single judge's decision entails interference with the exercise of the judge's discretion, on the authority of the Court of Appeal for Eastern Africa in *Shah v. Mbogo & Another* [1967] EA 116, which jurisprudence was affirmed by this Court in *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR, such interference is permitted only in exceptional circumstances. What are those circumstances?
17. Therefore, for such an application to succeed, the applicant must satisfactorily demonstrate that in reaching his decision, the judge acted whimsically or misdirected himself in the exercise of his or her discretion and as a result reached a manifestly wrong decision causing apparent injustice.

F. Determination

18. We have considered the application as well as the grounds and the written submissions in support of and in opposition to it. On the first issue, the Applicants explain away the two delays as the time it took them to prepare the two applications for extension of time. As we have stated, it took them 27 days to prepare and file the first Reference and 30 days to prepare and file the second Reference.
19. Considering the history of this matter which was filed in 1995, through High Court Civil Case (now ELC) No 2325 of 1995, like the single Judge of this Court, we find that the Applicant has not satisfactorily explained the two delays. Given the period of 7 days within which such references should be filed, the 27 and 30 days respectively taken to prepare the two References is unreasonable.
20. Consequently, we dismiss this application with costs to the 1st and 2nd Respondents and make the following final orders:
 - (a) The Application dated 27th Feb 2020 is hereby dismissed.
 - (b) Each party shall bear its own costs of the application.
23. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2020.

D. K. MARAGA

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CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

P. M. MWILU

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DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

M. K. IBRAHIM

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JUSTICE OF THE SUPREME COURT



NJOKI NDUNGU

.....

JUSTICE OF THE SUPREME COURT

I. LENAOLA

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JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

