



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, J. MOHAMMED & KANTAI, J.J.A)

CIVIL APPLICATION NO. 180 OF 2020

BETWEEN

KENYA HUMAN RIGHTS COMMISSION.....APPLICANT

AND

NUBIAN RIGHTS FORUM.....1ST RESPONDENT

KENYA NATIONAL HUMAN RIGHTS COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INTERIOR AND NATIONAL

CO-ORDINATION OF NATIONAL GOVERNMENT.....4TH RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND NATIONAL

CO-ORDINATION OF NATIONAL GOVERNMENT.....5TH RESPONDENT

THE DIRECTOR OF NATIONAL REGISTRATION.....6TH RESPONDENT

CABINET SECRETARY, MINISTRY OF INFORMATION AND

COMMUNICATION TECHNOLOGY.....7TH RESPONDENT

HON. SPEAKER, NATIONAL ASSEMBLY.....8TH RESPONDENT

KENYA LAW REFORM COMMISSION.....9TH RESPONDENT

CHILD WELFARE SOCIETY.....10TH RESPONDENT

AJIBIKA WELFARE SOCIETY.....11TH RESPONDENT

MUSLIMS FOR HUMAN RIGHTS INITIATIVE.....12TH RESPONDENT

HAKE CENTRE.....	13 TH RESPONDENT
LAW SOCIETY OF KENYA.....	14 TH RESPONDENT
INFORM ACTION.....	15 TH RESPONDENT
BUNGE LA MWANANCHI.....	16 TH RESPONDENT
EXTERNAL POLICY GROUP.....	17 TH RESPONDENT
TERROR VICTIMS SUPPORT INITIATIVE.....	18 TH RESPONDENT

(An application for extension of time to file an appeal out of time in an intended appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (W. Korir, P. Nyamweya & M. Ngugi, JJ.) dated 30th January 2020 in Consolidated Constitutional Petitions No. 56, 58 & 59 of 2019)

RULING OF THE COURT

1. This is a reference to the Court under Rule 55(1)(b) of the Court of Appeal Rules of the ruling delivered by the **Hon. Lady Justice W. Karanja** on 6th November 2020 allowing an application dated 29th June 2020 by Kenya Human Rights Commission, under Rule 4 of the Court of Appeal Rules, for extension of time for the filing of the appeal against a judgment of the High Court given on 30th January 2020.

2. In that judgment, the High Court declared as unconstitutional, null and void: Section 6 of the Kenya Information and Communication Act as amended by Statute Law (Miscellaneous Amendment) Act, Act No. 18 of 2018; Section 24 of the Public Finance Management Act introducing subsection 2A therein made by Statute Law (Miscellaneous Amendment) Act, Act No. 18 of 2018; the collection of DNA and GPS coordinates for purposes of identification; and Sections 5(1)(g) and (ha) of the Registration of Persons Act whilst at the same time giving liberty to the respondents to proceed with the implementation of the National Integrated Identity Management System (NIIMS), or the Huduma Number, as it is popularly known.

3. It is urged, in support of the reference, that the learned single Judge of this Court misdirected herself in allowing the application in that she failed to consider relevant factors set out in the affidavits and in the submissions in opposition to the request for extension of time.

4. The basis upon which the applicant sought extension of time was set out in a supporting affidavit that was sworn by Jackson Awele Onyango in which it was deposed that following the delivery of the judgment by the High Court on 30th January 2020, the applicant filed and served a notice of appeal within the prescribed period; that at the same time a request was made for copies of the proceedings and the judgment but that whilst the letter bespeaking proceedings indicated on the face of it that it was to be served on the respondents, it was not in fact served; that it was in the course of preparation of the record of appeal after the proceedings were received from the court, which record of appeal was filed on 29th June 2020, that omission was noted whereupon the application for extension of time dated 29th June 2020 was also made.

5. The application was opposed on grounds that there was delay of 77 days in lodging the record of appeal; that the reasons given for the delay were not convincing and the advocate for the applicant did not satisfactorily explain why the omission to serve the letter bespeaking proceedings was not detected earlier; that extension of time would be prejudicial given the immense benefits on NIIMS; and that public interest favored the refusal of the application.

6. The factors for consideration by a single Judge when dealing with an application for extension of time under Rule 4 of the Court Rules were stated in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. Nai 255 of 1997 where this Court expressed:

“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”.

7. In Njuguna vs. Magichu & 73 others [2003] KLR 507, Waki, JA stated that:

“The discretion exercisable under Rule 4 of this Court’s Rules is unfettered. The main concern of the court is to do justice between the parties. Nevertheless, the discretion has to be exercised judicially, that is on sound factual and legal basis.”

8. Although unfettered, that discretion which is exercised by the single Judge on behalf of the Court must, however, be exercised judicially. We can only interfere with the decision of the single Judge if it is shown that in the process of exercising the discretion, the single Judge took into account irrelevant matters or failed to take into account relevant factors or that the single Judge misapprehended some aspect of the applicable law or his decision was plainly wrong and could not have been arrived at by the Court properly directing itself to the evidence presented to it and the applicable law.

9. Moreover, in a reference such as this, the Court is not sitting on appeal from the decision of the single Judge, and it is not a consideration that the full Court would have come to a different result if it had been sitting in place of the single Judge. In Donald O. Raballa vs. Judicial Service Commission & Another [2018] eKLR this Court pronounced itself on the circumstances in which the exercise of discretion under Rule 4 of the Court Rules can be interfered with as follows:

“The applicant ... now comes before us on a reference under Rule 55 (1) (b) of the Rules of this Court... The reference is, of course, not an appeal and we may only interfere with the exercise of the wide discretion bestowed on a single Judge under Rule 4 of the rules on the basis of sound principles. These in substance are that the single Judge took into account an irrelevant factor which he ought not to have taken into account or that he failed to take into account a relevant factor which he ought to have taken into account; that he misapprehended or not properly appreciated some point of law or fact applicable to the issues at hand; or that the decision on the available evidence and law is plainly wrong. The onus of the demonstrating the breach of any or all such principles is on the applicant.”

10. See also Thuita Mwangi vs. Kenya Airways Limited – Civil Application No. 162 of 2002; and Hezekiah Michoki vs. Elizaphan Onyancha Ombongi [2015] eKLR

11. Keeping those principles in mind, is this a proper case for us to interfere with the decision of the single Judge" Having identified that the main issue before her related to the failure by the applicant to serve the letter bespeaking proceedings, the single Judge noted that it was not disputed that the notice of appeal was filed and served within the prescribed period; and that the letter

bespeaking proceedings was also made within the time prescribed under Rule 82(1).

12. The single Judge considered whether there was placed before her good reasons to justify exercise of discretion. She considered whether the delay in serving the letter was inordinate and the explanation given and concluded it was excusable. The single Judge alluded to chances of appeal succeeding and expressed that it is not a frivolous appeal. She also considered the question of prejudice and the question of public interest before allowing the application. The learned single Judge was clearly alive to the factors stated in *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* (above). We are unable to discern that the learned single Judge either misapprehended the applicable law or failed to consider a relevant factor or considered an irrelevant factor.

13. In our view, the learned single Judge properly exercised her judicial discretion, and we have no reason to interfere with her decision. Like the learned single Judge, we too make no orders as to costs of the reference which is hereby dismissed.

Dated and delivered at Nairobi this 9th day of July, 2021.

S. GATEMBU KAIRU, (FCI Arb)

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

Deputy Registrar

