IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, KARANJA & MARAGA , JJ.A)

CIVIL APPLICATION NO. NAI. 280 OF 2003

BETWEEN

ANASTASIA NJERI KAMAU …… APPLICANT

AND

DAVID GITAU KAMAU …….. 1ST RESPONDENT

JOHN MBURU KAMAU …….. 2ND RESPONDENT

DORCAS MUMBI KAMAU …….. 3RD RESPONDENT

(Application for extension of time to file and serve a notice and record of appeal out of time from a ruling and order of the High Court of Kenya at Nairobi (Osiemo, J) dated 21st May, 2001

in

H.C.C. APPL. NO. NAI. 280 OF 2003)

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RULING OF THE COURT

This is a reference to the full court of the decision of a single judge of the Court (Deverell JA) given on 30th September, 2005 in the application dated 13th October, 2003 in which **Anastasia Njeri Kamau** the applicant, had applied for an order extending the time for filing the notice of appeal and record of appeal out of the time stipulated in the rules of court for doing so. The application which was expressed to be brought under **rule 4** of the Court of Appeal Rules, named **David Gitau Kamau**, **John Mburu Kamau** and **Dorcas Mumbi**, (*the 1st, 2nd and 3rd respondents, respe*ctively) as the respondents.

The decision against which the applicant intended to appeal was given by Osiemo J. on 21st May, 2001, in **Nairobi High Court Succession Cause No. 1579 of 1994**. The applicant and all the respondents were children of Kamau Mwangi, the deceased who died on 6th June 1987. A grant of letter of administration intestate was made to David Gitau Kamau (*1st respondent*) on 21st March 1995 and was confirmed on 19th April 1996. The deceased left an estate comprising of 27.67 acres of land. The applicant, a married daughter of the deceased as at the time of his death, was given 3.76 acres of the

land but she was not satisfied arguing that she was discriminated against because she was a daughter. She moved the High Court for an order revoking the grant on that account. It is that application which Osiemo J. handled. The learned Judge dismissed the application on the main ground that sufficient provision had been made for the benefit of the applicant and he saw no basis for interfering with the grant.

By the rules of this Court if the applicant was dissatisfied with that decision she had the right of appealing against it, and she would be obliged to file and serve a notice of appeal within 14 days of that decision (see **rule 74** – now **rule 75** of the Court of Appeal Rules). The applicant filed and served a notice of appeal within time but not the record of appeal. That is why she took out a motion under **rule 4**, above, seeking an extension of time within which to do so. The applicant filed the notice of appeal on 24th May 2001, and applied in time for copies of proceedings and ruling, and she was advised by the court, by its letter dated 1st November 2002 that copies of those proceedings and ruling were ready for collection. She did not, however, pay for them until 20th November, 2002. She collected the copies thereof on 22nd December, 2002, by which date the time for lodging a record of appeal had apparently expired. We say apparently, because by a Certificate of Delay dated 31st December, 2002, the period between 23rd May 2001 and 3rd December 2002, was certified by the High Court to have been required for the preparation and delivery of the copies of proceedings and ruling, and therefore excluded from computation by dint of the proviso to **rule 81** of the Court of Appeal Rules. So by 22nd December, 2002, the applicant would have been in time had she lodged her record of appeal. She did not, however, file any. She took out a motion under **rule 4** for extension of time within which to file and serve a fresh notice of appeal which motion was filed in court on 24th January 2003. She, however, withdrew the said motion on 12th September 2003, on the ground that it was defective and filed the current one on 13th October, 2003.

The jurisdiction of a single Judge under **rule 4** is discretionary. The single Judge exercises that power on behalf of the whole Court by virtue of **rule 53(1)** of the Court of Appeal Rules. The full court may only interfere with the exercise of that jurisdiction in clear cases. In **Thuita Mwangi v. Kenya Airways Limited** – **Civil Application No. 162 of 2002** this Court set circumstances when the full court will be entitled to interfere. The court rendered itself thus:-

"The circumstances under which the full court would be entitled to interfere with the exercise of the discretionary powers 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 vs. SHAH [1968] EA 93… All we need to say is that before we could ever think of interfering with the exercise of a discretion by a 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 this decision the single Judge has taken into account some irrelevant factor, or that he 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 cases, his decision is plainly wrong."

The principles to guide a Judge seised of an application under **rule 4** were aptly set out in the case of **Leo Sila Mutiso v. RoseHellen Wangari Mwangi** – **Civil Application No. Nai. 251 of 1997** (unreported). The court stated:

"Whilst the discretion under rule 4 of the Rules is, unfettered, it must, like all discretion, be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy. 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".

Deverell J.A. after setting out the background facts to the case considered the steps the applicant had taken with a view to mounting an appeal. We have done the same herein. He then stated that the delay the applicant was supposed to account for was between 22nd December, 2002 and 13th October, 2003, when she filed the application before us. In his view that delay was not fully accounted for and was inordinate. He was not satisfied with the reasons which were given for the delay nor are we. The applicant did not impress the learned single Judge, nor are we ourselves impressed that the applicant acted with any sense of urgency. She was indolent. And while it is clear the learned single Judge after considering the merits of the applicant's intended appeal thought it has some merit, it was his view that its success was borderline. He also considered the circumstances of the applicant at that time and appreciated that she was a lay person and gave allowance for that. The learned Judge then concluded his ruling thus:

"I have weighed in the balance all the above in the exercise of my unfettered discretion and have come to the conclusion that the application by the applicant for extension of time to file the notice of appeal and record of appeal should be dismissed with costs. It is so ordered."

In submissions made before us it was not shown what aspects the learned Judge may have taken into account which he ought not to have taken into account, or what aspects he omitted to take account of which he ought not to have done, or any error of principle, or that the decision he came to is otherwise plainly wrong. Mr. Kamonde for the applicant submitted before us that because the dispute concerns an interest in land and the parties are siblings, then the interests of justice demand that different considerations apply. We are unable to agree. The law on exercise of judicial discretion is clear and well settled, and any approach based on sympathy, whims, or other consideration other than the principles we set out earlier must be rejected.

In the result we are satisfied that there is no basis for interfering with the single Judge's exercise of judicial discretion. The delay in taking the essential step in mounting an appeal was inordinate and was not satisfactorily explained.

The reference fails and is dismissed with costs.

Dated and delivered at Nairobi this 20th day of April 2012.

S.E.O. BOSIRE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR