



REPUBLIC OF KENYA



**Stephen (Suing as the legal Representative of the Estate of Stephen Munyao
Kini (Deceased)) v Gulf Stream Investment Limited (Civil Application
E007 of 2025) [2025] KECA 1583 (KLR) (3 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1583 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E007 OF 2025
GW NGENYE-MACHARIA, JA
OCTOBER 3, 2025**

BETWEEN

**ANNA KANINI STEPHEN APPLICANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF STEPHEN
MUNYAO KINI (DECEASED)**

AND

GULF STREAM INVESTMENT LIMITED RESPONDENT

(Being an application to extend and/or enlarge the timelines within which the applicant should file a Notice of Appeal and a Memorandum of Cross-Appeal against the Judgment of the Employment and Labour Relations Court of Kenya at Mombasa (Rika, J.) dated 13th December, 2019 in ELRC No. 940 of 2016)

RULING

1. By a Notice of Motion dated 5th February 2015 brought under Sections 27 and 28(1) and (2) of the [Limitation of Actions Act](#), Rules 4, 44 and 45 of the [Appellate Jurisdiction Act](#), Articles 22(1), 27(1), 48 and 50(1) of the [Constitution](#) and all other enabling provisions of the law, Anna Kanini Stephen (suing as the legal representative of the Estate of Stephen Munyao Kini (deceased) (the applicant), seeks the following orders:

“i That this Court be pleased to extend and/or enlarge the timelines within which the applicant should file a Notice of Appeal and a Memorandum of Cross- Appeal against the judgement of the Employment and Labour Relations Court Mombasa delivered on 13th December 2019;



- ii. That subsequent to grant of the above prayer, the Court to issue timelines within which the applicant should file the intended Notice of Appeal and Memorandum of Cross Appeal;
 - ii. Any other order this Court deems just to grant; and
 - ii. Costs be provided for.”
2. The application is supported by the applicant’s affidavit sworn on even date and a further affidavit sworn 21st February 2025. The applicant deposed that her deceased husband filed Mombasa ELRC Cause No. 950 of 2016, and judgement in its respect was delivered on 13th December 2019; that being aggrieved by the decision, Gulf Stream Investment Limited (the respondent) filed a Notice of Appeal dated 23rd January 2020 and subsequently an appeal, being Mombasa Court of Appeal No. E011 of 2020; that the applicant filed an application dated 29th February 2024 seeking to be substituted with the deceased; and that by an order of this Court (Gatembu, JA) dated 6th December 2024, the applicant was substituted with the deceased so as to enable her defend the appeal on behalf of the deceased.
3. The applicant further deposed that it was not possible to file the application seeking substitution earlier since the Court file in respect of the instant appeal was missing; that she was aggrieved with part of the superior court’s judgement; and that she was desirous of filing a memorandum of cross appeal so that it is considered on 18th March 2025 (albeit that this date is past) when directions on the hearing of the main appeal are given.
4. Opposing the appeal, the respondent filed a replying affidavit sworn by Jane Wairimu, the Human Resource Manager of its company sworn on 18th February 2025. It was deposed that the applicant obtained the grant of letters of administration ad litem on 16th February 2021, but that she filed an application for substitution 3 years and 13 days later; that the allegations that the Court file could not be traced are unsubstantiated as it was not demonstrated that the applicant made efforts to file the application before 29th February 2024; that the appeal has come up a number of times for case management between 6th November 2023 and 5th November 2024; that the applicant’s counsel actively participated in the case management, and even then, the applicant did not bother to file an application seeking similar orders as in the instant application; and that the application ought to be dismissed since it was filed after a long and inordinate delay, more so outside the statutory timelines.
5. In her further affidavit, the applicant contended that, from the Judiciary Case Tracking System (CTS) portal, the appeal had been dormant for the period between 23rd October 2020 to 5th November 2023 because the Court file could not be traced; that the Court file was traced on 29th January 2024, and that that is when she was able to file the application for substitution; that the applicant has never been served with the memorandum or record of appeal, and that, in any event, service ought to have been effected upon her on or after 6th December 2024 after she legally acquired the status of being a respondent in the appeal; that the motion, if allowed, will not prejudice the respondent in any way as it was equally aggrieved by the superior court’s judgment; and that failure to grant the application is tantamount to ousting the estate of the deceased from the seat of justice.
6. At the hearing of the application, learned counsel Mr. Opwapo appeared for the applicant while learned counsel Mr. Oyoo appeared for the respondent. The application was canvassed by way of written submissions with the respective counsel making oral highlights. Those of the applicant are dated 26th February 2025 while of the respondent are dated 13th March 2025.



7. On behalf of the applicant, it was submitted that the applicant deserves grant of orders of extension of time in line with the provisions of Article 50(1) of the Constitution on the right to fair hearing; that the intended memorandum of cross of appeal raises five (5) meritorious grounds of appeal which justifies the hearing of the applicant on merit; that the applicant has advanced reasonable grounds for the delay in filing the intended notice and memorandum of cross appeal since the Court file was only traced on 29th January 2024 when the applicant was called by her erstwhile counsel to sign an affidavit in support of the application for substitution; and that the reason for the delay was explained in the application for substitution, as a result of which that application was allowed.
8. It was further contended that the respondent would suffer no prejudice as it would have an opportunity to defend the cross appeal; that the instant application has not been brought with undue delay since rule 95 of this Court's Rules, 2022 provides that the notice of cross appeal ought to be filed not less than thirty (30) days before hearing of the appeal, which hearing is yet to be set down. Reference was made to the Supreme Court decision of Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission (2014) KESC 12 (KLR) for the principles that the Court should consider in granting orders of extension of time.
9. On behalf of the respondents, it was submitted that the allegations that the Court file has been missing has not been substantiated; that for this reason, the applicant has failed to demonstrate she is deserving the orders sought; that the appeal has come up for case management a number of times; that on all the occasions, the applicant was represented; and that, in any event, all the necessary pleadings were served upon counsel who represented the applicant as at the time of filing the application for substitution.
10. It was further submitted that the applicant obtained grant of letters of administration ad litem so as to enable her to defend the appeal on 16th February 2021; that she waited until 29th January 2024 to seek substitution and again until February 2025 to seek extension of time; that this amounted to litigation by instalments which prejudices the respondent; and that, therefore, the application ought to be dismissed with costs.
11. I have considered the application, the affidavits in support of, and in opposition to, the application, the respective written and oral submissions and the law. The sole issue that falls for determination is whether the applicant has satisfied the Court that she is entitled to extension and/or enlargement of time for filing a notice and memorandum of cross appeal.
12. At the onset, I should make it clear that it is not within the bounds of my jurisdiction as a single Judge to delve into the merits or demerits of the intended appeal as this is a preserve of a full bench. In Athuman Nusura Juma v Afwa Mohamed Ramadhan (2016) KECA 395 (KLR), M'noti JA rendered himself thus:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.
13. Rule 4 of the Court of Appeal Rules, 2022 confers upon this Court the jurisdiction to extend time as follows:

“The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a



reference in these Rules to any such time shall be construed as a reference to that time as extended.”

14. In as much as this Court’s discretion is wide and unfettered, the underlying principle is that in an application of this nature, the Court must exercise its discretion judiciously and not whimsically to the detriment of the other parties. Courts have settled on the guiding principles that should be considered in an application for exertion of time. These are: the length of the delay; the applicant should at the very least explain the reasons for the delay; the chances of the appeal succeeding; and lastly, the degree of prejudice which the respondent would suffer if the application was to be granted. It is also trite that each case should be considered under its own circumstances. These principles were restated in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Appeal No. 255 of 1997 and further in the decision of *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* (2013) KECA 199 (KLR) where Otieno-Odek. JA held that:

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance...”

15. The applicant wishes to file both a notice and memorandum of cross appeal against the decision in Mombasa ELRC Cause No. 950 of 2016 delivered on 13th December 2019. According to the applicant, she did not file both pleadings timeously because the Court file went missing and it only resurfaced on 29th January 2024; and that it was at this point that her erstwhile advocate was able to file the application for substitution of the deceased with her (the applicant).
16. The respondent on the other hand asserts that the application has been filed with inordinate delay; that it was not true that the Court file was missing since the appeal had severally come up for case management between 6th November 2023 and 5th November 2024 on which instances the applicant was represented by a counsel.
17. From the annextures to the applicant’s affidavits, it is evident that the grant of letters of administration ad litem was issued to her on 16th February 2021. The CTS extract ‘AKS - 6c’ shows that the appeal was registered on 23rd October 2020, and thereafter, it was slated for mention on several occasions between 6th November 2023 and 5th November 2024, but it was adjourned severally. It is on record that one of reasons for adjournment of the proceedings of 6th November 2023 to 13th November 2023 was so that the applicant’s counsel would confirm whether substitution of the deceased had been effected. In view therefore, it can safely be concluded that the Court file was not missing and that it only resurfaced on 29th January 2024 as claimed by the applicant.
18. Even after the order granting the substitution was issued on 6th December 2024, the applicant only moved this Court two (2) months later while seeking to file a notice and memorandum of cross appeal. In my considered view, the systemic delays by the applicant in moving the Court at the various instances, has not been sufficiently explained. It is also worthwhile to note that the reasons for the delay being proffered are contradictory; basically, that the Court file was missing while at the same time she (the applicant) participated in case management. Whereas a party has a right to be heard, that right must be balanced against the principle that he who seeks equity must come to court with clean hands as equity must ensure that no prejudice is occasioned to other parties.



- 19. Consequently, the inaction of the applicant for three (3) years of failing to move the Court, between the time when the grant of letters of administration ad litem was issued on 16th February 2021 to 29th February 2024 when the application for substitution was filed, is an inordinate delay which militate against grant of the orders sought.
- 20. There is also the assertion by the applicant that her counsel wrote letters to the Deputy Registrar requesting that the Court file be reconstructed. The Court of Appeal Rules, 2022 do not make provision for reconstruction of a Court file. To my mind, I believe that the reasons that no rule is provided in this regard is because this being an appellate court, all or almost all the necessary pleadings and documents which find their way to this Court for purposes of compiling a record of appeal, are from the courts below. Therefore, any request for reconstruction of a Court file, should be made before the courts below. In any case, the contention by the applicant that she wrote letters to the Deputy Registrar requesting the reconstruction of the Court file, is not supported by any evidence.
- 21. Further, the assertion by the applicant that her explanation as to the delay in seeking redress was accepted by the Single Judge who determined the substitution application, is further from the truth. I say so because that application was not heard on merit, but was consented to by both parties. To my mind, I cannot fathom why the applicant did not seek enlargement of time to file the notice and memorandum of cross appeal in the same substitution application since both prayers are within the domain of a single Judge. For this lapse, I arrive at the conclusion that this application is filed as an afterthought.
- 22. In view of the foregoing, I arrive at the inescapable conclusion that the Notice of Motion dated 5th February 2015 is devoid of merit. The same is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF OCTOBER, 2025.

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

