

**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, JA (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. E035 OF

2024 BETWEEN

JENNIFER OTIENO.....APPLICANT

AND

**DEVELOPING AFRIKA LIMITED1ST RESPONDENT
NANDI OWUOR YUSTO 2ND
RESPONDENT**

*(Being an application for extension of
time to file Record of Appeal out of
time)*

RULING

[1] This ruling is in respect of the applicant's Notice of motion dated 7th February, 2024, brought under **Rule 4** of the Court of Appeal Rules, seeking enlargement of time to enable her file the Record of Appeal out of time.

[2] The applicant lodged her Notice of Appeal on **15th November 2023** within time. She subsequently requested certified copies of proceedings and judgment via a letter dated **28th November 2023**. The proceedings and judgment were ready for collection on 2nd February 2024, after expiry of the prescribed period for the filing of the record of appeal according to the rules of this court. The applicant has since been issued with a Certificate of Delay

evidencing that the delay was not her fault.

[3] Opposing the application, the respondents through a replying affidavit sworn by one **Oscar Mori**, on his own behalf and on behalf of the second respondent. However, the affidavit deposes on matters, adduction of additional evidence in this court. To that extent the depositions are therefore, irrelevant for purposes of this application.

[4] In my view, this application only raises a single issue for determination:

“Whether I should exercise my discretion under Rule 4 of the Court of Appeal Rules, to enlarge time for filing the Record of Appeal.”

[5] Rule 4 of the Court of Appeal Rules, vests this Court with wide and unfettered discretion to extend time where the interests of justice so require. While the Rule itself does not set out explicit factors to guide the Court in exercising this discretion, jurisprudence from this court and of course, the Supreme Court have over the years developed principles applicable in such applications. In **Joseph Kinyua & 2**

Others v Robert Kimathi Mati [2020] KECA 426 (KLR) 331, the Court affirmed that extension of time is a discretionary remedy, and that in considering whether to grant such relief, the Court generally evaluates:

- (i) the length of the delay;
- (ii) the reasons for the delay;
- (iii) possibly the arguable chances of the appeal

succeeding if time is extended; and
(iv) *the level of prejudice*, if any, that the respondent stands to suffer should the extension be granted.

[6] The applicant's advocates, in their supporting affidavit sworn on **7th February 2024**, have deposed that the applicant was dissatisfied with the entire judgment delivered on **2nd November 2023**. Acting diligently and within the statutory period, the applicant lodged a Notice of Appeal on **15th November 2023**, well within the 14 days prescribed by law. Following the lodging of the Notice of Appeal, the applicant wrote to the Deputy Registrar of the trial court on **28th November 2023** bespeaking certified copies of the judgment and proceedings.

[7] Thereafter, the applicant made several visits to the trial court to follow up on the status of the requested proceedings. It was not until **2nd February 2024** that the Registry notified the applicant that the certified copies were ready for collection.

[8] By that time, the statutory period within which the applicant ought to have filed the appeal had already expired. It is obvious therefore that the delay occurred through no fault of the applicant, who acted promptly and diligently once the necessary documents were availed to her.

[9] The delay in filing the appeal was therefore entirely occasioned by the late availability of the typed proceedings, a factor completely beyond the control of the applicant. The Certificate of Delay unequivocally confirms that the applicant could not comply with the

statutory timelines despite diligent follow-up. The applicant thereafter

acted expeditiously and without any indolence once the necessary documents were availed to her.

[10] I note that the applicant's intended appeal raises substantive issues warranting this Court's interrogation such as whether: the trial court failed to properly evaluate the evidence and submissions placed before it, resulting in findings that do not reflect the totality of the record; critical issues concerning the ownership and root of title to **KISUMU/NYALENDA "B"/1568** were overlooked, while the burden of proof was improperly shifted to the Appellant, contrary to established evidentiary principles.

[11] Obviously, these are not minor technicalities but fundamental legal and factual issues capable of affecting the outcome of the appeal.

[12] In the case of **Kenya Tea Growers Association v Kenya Planters**

& Agricultural Workers Union [2012] eKLR, it was stated that the existence of even a single arguable ground is sufficient to warrant the exercise of this Court's discretion in favour of granting leave. In the present application, the applicant has demonstrated arguable grounds in my view. The intended appeal is therefore not frivolous.

[13] The respondents actively participated in the trial and are fully aware of the issues in dispute. They will therefore suffer no

prejudice if this Court grants an extension of time, as they will still have the opportunity to respond during the hearing of the appeal.

[14] Conversely, refusing application would unjustly lock out the applicant and deny her the right to exhaust the appellate process, contrary to **Articles 50(1)** and **Article 159(2)(d)** of the Constitution which directs courts to administer justice without undue regard to technicalities.

[15] In **Richard Ncharpi Leiyagu v IEBC & 2 Others [2013] KECA 282 (KLR)**, this court stated that the right to be heard is a cornerstone of justice and should not be taken away lightly, and that procedural deficiencies must not be used to defeat a party's right to ventilate their cases on merit. Accordingly, the balance of justice strongly favours granting the orders sought so that the intended appeal may be considered and determined on its merits.

[16] In the ultimate, time for filing the Record of Appeal is hereby enlarged; the record of appeal already filed shall be deemed as duly filed and served upon payment of the requisite fees. Costs of this application shall be in the appeal.

Dated and delivered at Kisumu this 17th day of November, 2025.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed
DEPUTY REGISTRAR