

**IN THE COURT OF  
APPEAL AT  
NAIROBI**

**(CORAM: W. KARANJA, ACHODE & JOEL NGUGI, JJ.A.)**

**CIVIL APPLICATION NO. E290 OF 2023**

**BETWEEN**

**BENEDETTA MUTUNGE MULLI.....APPLICANT**

**AND**

**ANNAH ITUMBI MULLI.....RESPONDENT**

*(Being a reference under rule 55 of the Court of Appeal Rules, 2010 from the Ruling of **(Gachoka, JA.)** dated 15<sup>th</sup> December 2023 in an application for extension of time to file the record of appeal out of time from the Judgment of the Environment and Land Court at Nairobi **(E.K. Wabwoto, J.)** dated 19<sup>th</sup> January 2023*

*in*

***ELC Case No. 205 of 2019)***

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**RULING OF THE COURT**

1. This is a reference to full Court, under **Rule 55** (now **Rule 57**) of this Court's **Rules** from the decision of a single Judge of this Court (Gachoka, JA.) dated 15<sup>th</sup> December 2023. The learned Judge considered an application by Benedetta Mutunge Mulli, the applicant, seeking extension of time to file and serve a record of appeal. The intended appeal arose from a judgment delivered by E. K. Wabwoto, J. on 19<sup>th</sup> January 2023 in Nairobi Environment and Land Court (ELC) **Case No. 205 of 2019**. The application seeking extension of time was brought under **Rule 4** of the

**Rules** of this Court.

2. In the said application, the applicant contended that she filed her Notice of Appeal in time, specifically on 23<sup>rd</sup> January 2023, shortly after delivery of the judgment and served the respondent on 28<sup>th</sup> January 2023. She further contended that she requested for typed proceedings on 19<sup>th</sup> January 2023 and that the same were ready for collection on 29<sup>th</sup> March 2023. Further, she contended that the certificate of delay was issued by the Deputy Registrar on 23<sup>rd</sup> June 2023 by which time the time stipulated by this Court's **Rules** for filing the record of appeal had lapsed.
3. The applicant attributed the delay in filing the record of appeal to the unavailability of the typed proceedings and certificate of delay. She also asserted that the intended appeal raised substantial grounds with high chances of success.
4. Opposing the application, Anna Itumbi Mulli, the respondent, contended that the delay in instituting the intended appeal is an afterthought intended to waste the court's time; that although the applicant received the typed proceedings on 29<sup>th</sup> March 2023 they only applied for a certificate of delay on 16<sup>th</sup> June 2023, three months later; and that the applicants are being untruthful when they allege and/or insinuate that it is the absence of the certificate of delay that occasioned the delay in filing the appeal; that the applicant has not given any reason why she did not apply for the

certificate of delay immediately after receiving the proceedings and that if this Court grants the applicant leave to file the appeal out of time, then the same should be conditional. She urged the Court to dismiss the application.

5. In his ruling, Gachoka, JA. reiterated that **Rule 4** granted the Court unfettered discretion to extend time for filing appeals. He considered the well-established principles outlined in precedents such as **Muringa Company Limited -vs- Archdiocese of Nairobi Registered Trustees [2020] eKLR, John Onger Mariaria & others -vs- Paul Matundura (Civil Application No Nai 301 of 2003)** (unreported), **Leo Sila Mutiso -vs- Helen Wangari Mwangi [1999] 2 EA P231** and **Andrew Kiplagat Chemaringo -vs- Paul Kipkorir Kibet [2018] eKLR** which require the Court to assess the length of the delay, the reason for the delay, the chances of success of the intended appeal, and the prejudice that may be occasioned to the respondent.
6. The learned Judge held that having looked at the letter dated 19<sup>th</sup> January 2023 addressed to the Deputy Registrar of the ELC, the same was not copied to the respondent and there was no

evidence of service on the respondent. The Judge held that in the absence of such evidence, it meant that the applicant had 60 days from 19<sup>th</sup>

January 2023 to file and serve the record of appeal, that is on or before 18<sup>th</sup> March 2023.

7. The learned Judge held that the applicant had not stated when she was notified that the proceedings were ready for collection but that the certificate of delay indicates that the applicant was notified on 29<sup>th</sup> March 2023 that the proceedings were ready for collection which fact the applicant does not dispute. The Judge found that the reason given for the delay in filing the record of appeal is the unavailability of the certified proceedings and the certificate of delay. The Judge held that the explanation given by the applicant was devoid of candidness.
8. The learned Judge observed that in the replying affidavit the respondent had annexed a letter dated 16<sup>th</sup> June 2023 by the applicant's counsel requesting for the certificate of delay. The Judge held that no explanation has been given for the 79 days delay in applying for the certificate of delay and that the applicant does not even disclose the date that it collected the proceedings. According to the learned Judge the reasons that the applicant has raised show a lame attempt to shift the delay to the court. The Judge held that it is clear that the proceedings were ready as early as 29<sup>th</sup> March 2023 and the applicant only applied for the certificate of delay on 16<sup>th</sup> June 2023 and it was availed to her on 23<sup>rd</sup> June 2023. The

Judge concluded that the delay in this matter cannot be attributed to the court and that the applicant has been indolent and has deliberately or inadvertently failed to explain the delay.

9. Ultimately, the Judge concluded that the application failed to meet the threshold for extension of time, noting that the delay was inordinate and the reasons offered were unsatisfactory. The application was therefore dismissed with costs to the respondent.
10. The refusal by the learned single Judge to exercise his discretion in favour of the applicant precipitated the filing of this reference.
11. At the hearing of this application Mr. Nzaku learned counsel appeared for the applicant, while the respondent was represented by Mr. Mutisya, learned counsel.
12. In the case of **Kenya Co-operative Creameries Ltd v Fims Ltd** [2006] eKLR, this Court held that:

***“In hearing matters brought under rule 4 of this Court’s Rules, the single Judge exercises unfettered discretionary powers which in law must be exercised upon reason and not capriciously. Once the single Judge has so exercised the same discretion, and made a decision on the matter, the full bench will be very slow in interfering with the same exercise of discretion by a single Judge unless it is demonstrated that the single Judge, in the exercise of the same discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the***

***exercise of his discretion and that as a result there has been misjustice (see the case of Mbogo v Shah [1968] EA 93 at page 96)."***

13. With regard to the application on which this reference is predicated, it is not in dispute that there was a delay in lodging the appeal. The applicant offered the following explanation for the delay: that being dissatisfied with the decision of the trial court, she filed a Notice of Appeal on 23<sup>rd</sup> January 2023 and requested for typed proceedings on 19<sup>th</sup> January 2023. The proceedings were ready for collection on 29<sup>th</sup> March 2023 and subsequently that a certificate of delay was issued on 23<sup>rd</sup> June 2023. That the delay in filing the record of appeal was not deliberate but was occasioned by the unavailability of the typed proceedings and certificate of delay.
14. The applicant contends that the above explanation was plausible and avers that she has an arguable appeal and urges that the Court exercises its discretion so as not to deny her a right to fair trial pursuant to **Article 50(1)** of the **Constitution**.
15. In considering the reasons for the delay, the learned Judge observed as follows:-

***“The above explanation preferred by the applicant is in my view devoid of candidness. This is because, and giving rise to my next question that arises, did the applicant give a plausible and satisfactory explanation for the delay? I do not think so. In the replying affidavit, the respondent has annexed a letter dated 16<sup>th</sup> June 2023 by the applicant’s counsel requesting the certificate of delay. No***

***explanation has been given for the 79 days  
delay in applying for the certificate of delay.  
The***

***applicant does not even disclose the date that it collected the proceedings. A close look at the reasons that the applicant has raised show a lame attempt to shift the delay to the court. It is clear that the proceedings were ready as early as 29<sup>th</sup> March 2023 and the applicant only applied for the certificate of delay on 16<sup>th</sup> June 2023 and it was availed to her on 23<sup>rd</sup> June 2023. The delay in this matter cannot be attributed to the court.”***

16. For determination in this reference is whether the single Judge properly exercised his discretion in concluding that the delay had not been adequately explained, in the sense that the typed proceedings were ready for collection on 29<sup>th</sup> March 2023 and why the applicant only applied for a certificate of delay on 16<sup>th</sup> June 2023 which was issued on 23<sup>rd</sup> June 2023. That the delay in lodging the appeal was inordinate and inexcusable and cannot be attributed to court.
17. We have anxiously considered the reference, particularly in view of the caution we must always administer that the single Judge in exercising his discretion under **Rule 4** does so on behalf of the full Court and, therefore, his decision ought not to be easily dislodged. As stated earlier, the full Court may only interfere when the applicant demonstrably shows that the principles stated above were not observed.
18. In our view, the applicant did not provide a plausible account for the delay. The delay arose from the advocate who does not

explain

the steps he took from 29<sup>th</sup> March 2023 when the proceedings were ready to be collected up until 16<sup>th</sup> June 2023 when he requested for a certificate of delay from court. It is notable that the certificate of delay was issued on 23<sup>rd</sup> June 2023 within a period of only six days from the date of request.

19. The single Judge considered the length of the delay (79 days) and found it to be inordinate and not adequately explained. The single Judge also considered the reasons given for the delay, specifically the argument that the delay was caused by the court in the issuance of the certificate of delay and found this explanation implausible. The applicant should have been candid, owned up to the delay and explained to the court why the certificate of delay was not applied for in March when the typed proceedings were made available to the applicant. Shifting the blame elsewhere and the lack of candour on the part of the applicant does not help her case at all. This Court finds no basis to fault the single Judge's assessment on this ground, especially considering that the court took a period of only six days to issue the certificate of delay once it was applied for by the applicant.
20. Applying the principles for interfering with a single Judge's discretion, this Court finds that the applicant has not demonstrated that the single Judge took into account any irrelevant factor; failed

to take into account any relevant factor; misapprehended any point of law or fact; or that his decision was plainly wrong. The single Judge considered the key factors under **Rule 4** and reached a decision based on his assessment of those factors. This Court should not interfere simply because it might have reached a different conclusion.

21. In the premises, the reference dated 19<sup>th</sup> December 2023, challenging the ruling of the Honourable Justice M. Gachoka, JA. delivered on 15<sup>th</sup> December 2023 is found to be devoid of merit and, is hereby dismissed with costs to the respondent. Orders accordingly.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of December, 2025.**

**W. KARANJA**

.....  
**JUDGE OF APPEAL**

**L. ACHODE**

.....  
**JUDGE OF**

**APPEAL JOEL**

**NGUGI**

.....  
**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR.**