



**Absa Bank Mauritius Limited v Pabari Investment Limited (Civil Appeal
(Application) E116 of 2021) [2025] KECA 2109 (KLR) (5 December 2025) (Ruling)**

Neutral citation: [2025] KECA 2109 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E116 OF 2021
AK MURGOR, JA
DECEMBER 5, 2025**

BETWEEN

ABSA BANK MAURITUS LIMITED APPLICANT

AND

PABARI INVESTMENT LIMITED RESPONDENT

(An application for extension of time to file a Record of appeal dated 16th December 2021 and a Supplementary Record of appeal dated 29th December 2021 out of time against the ruling of the High Court of Kenya (D. Chepkwony, J.) dated and delivered on 30th July, 2021 in Mombasa High Court Civil Case No. E001 of 2021)

RULING

1. In this application the Applicant, Absa Bank Mauritius Limited seeks leave to file an appeal out of time against a ruling of the High Court of Kenya in Mombasa delivered in favour of Pabari Investment Limited the Respondent, on 30th July 2021 where the court issued an injunction to restrain the Applicant from instituting or prosecuting any liquidation petition against the Respondent.
2. In the Notice of motion dated 30th July 2024 brought under Section 3A and 3B of the *Appellate Jurisdiction Act*, and Rule 4 and 42 (1) of the Court of Appeal Rules, 2022 the Applicant sought orders for; i) time to be extended for the Record of appeal and a Supplementary Record of appeal to be filed out of time; and ii) the Record of appeal dated 16th December 2021 and the Supplementary appeal dated 29th December 2021 to be deemed as properly filed.
3. The application is brought on grounds that by a ruling delivered on 30th July 2021, the High Court allowed the Respondent's Notice of motion dated 26th January 2021, and thereafter issued an injunction to restrain the Applicant from instituting or prosecuting any liquidation petition against the Respondent. The Applicant was aggrieved by the ruling and sought to file an appeal. On 30th July 2021, it requested for the typed proceedings and then lodged a Notice of appeal dated 11th August 2021.



4. The Applicant contended that on 17th September 2021, the Registry notified it that the proceedings were ready for collection, and they were supplied to the Applicant's advocates on 20th September 2021; that thereafter, the Applicant applied for a Certificate of delay which was issued to them on 27th October 2021; that according to the Applicant's counsel, after taking into account the period of 52 days taken by the Registry to prepare and supply the Applicant with the proceedings, it had 60 days from 12th August 2021, when the Notice of appeal was lodged, to file the Record of appeal; that in computing the date for filing the Record of appeal, it was contended that the Applicant's advocates erroneously computed the date for filing of the record, from the date of the Certificate of delay, rather than from the date the proceedings were ready for collection from the High Court registry; that as a result, the Applicant's Advocates erroneously filed the Record of appeal on 16th December 2021, instead of 20th November 2021 which was 26 days after the prescribed period had lapsed. It was asserted that the delay in filing the Record of appeal was unintentional and therefore excusable; that the Applicant's intended appeal is meritorious and no prejudice will be suffered by the Respondent if time for filing the Record was extended.
5. The motion was supported by an affidavit sworn on 29th November 2021 by George Ndungu, an advocate employed in the firm of Coulson Harney LLP, a firm of advocates acting for the Applicant.
6. In a replying affidavit sworn on 2nd July 2025, by Benson Musili the Group Head of Legal Affairs of the Respondent, it was deponed that, there was no disclosure from the Applicant as to the advocate responsible for erroneously computing the period for lodging the Record; that though the Applicant seeks to blame its advocates, the pleadings did not show that the delay was attributable to any particular counsel or counsels; and for this reason, no explanation had been provided for the delay. It was further deponed that the Applicant confirmed that it received the Certificate of delay on 27th October 2021 and by that time, it still had 23 days to file the appeal by 20th November 2021, but it chose to file the appeal much later.
7. It was also averred that the Applicant was served with a Notice of motion dated 20th December 2021 seeking to strike out the Record of appeal; that this application was filed on 30th December 2021 so as to pre-empt the Respondent's application to strike out the Record of appeal. It was also contended that it was now over four years since the injunction was granted, and that during this time, the suit in the High Court had proceeded to a hearing and was soon to be concluded; that in the circumstances, to try to sustain an appeal where the trial court proceedings were nearly concluded was an exercise in futility.
8. Both the Applicant and the Respondent filed written submissions and when the motion came up for hearing on a virtual platform, learned counsel Mr. Kuyo appeared for the Applicant while learned counsel Mr. Kongere appeared for the Respondent.
9. Counsel for the Applicant submitted that the delay of 26 days in filing the Record arose from a mistake of counsel; and that one George Ndungu, advocate had sworn an affidavit where he owned up to occasioning the error that led to the delay; that he had misunderstood the rules of this Court, particularly, on when time begins to run for filing of the Record of appeal; that as a result he had miscalculated when the Record of appeal should have been filed. It was further submitted that the lower court matter is ongoing and that the Respondent has been enjoying interim orders since the ruling was rendered.
10. For their part counsel for the Respondent reiterated that the delay in filing the Record of appeal had not been explained and therefore there was no basis on which this court could grant an order extending time.



11. Having considered the Notice of motion, the affidavits and the rival submissions of the parties, the issue that commends itself for determination is whether I should exercise my discretion to extend time for the filing and serving of the Record of appeal and the Supplementary Record of appeal, and to deem the Record as duly filed and served.
12. Under rule 4 of the Court of Appeal Rules this Court has jurisdiction to extend time in a matter such as this in the following terms:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or 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.”
13. This Court in the case of *Leo Sila Mutiso vs Hellen Wangari Mwangi* [1999] 2 EA 231 set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4 thus:

“...the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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.”
14. In the instant case, the ruling was delivered on 30th July 2021. The Notice of appeal was lodged on 11th August 2021. Thereafter, the Record of appeal was lodged on 16th December 2021. The Applicant concedes that the Record was lodged 26 days out of time, which delay in filing was as a result of the erroneous computation by its advocates. In other words, the Applicant has attributed the delay in filing the Record to a mistake on the part of its counsel or counsels. See *Kenya Cannery Limited vs Titus Muiruri Doge*, Civil Application No. Nai 64 of 1990 (unreported).
15. As to whether the mistake of counsel in erroneously computing time for filing the Record is plausible material on which this Court can rely to extend time, the pleadings disclose that, at all times the Applicant’s counsel, George Ndungu admitted that it was the advocates employed in the firm of Coulson Harney LLP who mistakenly computed the date for filing of the Record, as being from the date of the Certificate of delay, rather than from the date the proceedings were ready for collection from the High Court registry; and that this resulted in the delay in filing the Record of appeal. It was further deponed that the mistake was unintentional and therefore excusable by the Court. Notwithstanding counsel for the Respondent’s submissions that the Applicant has not identified the counsel responsible for the mistake, it is worthy of note that the affidavit in support is sworn by an advocate on behalf of the Applicant who has deponed that the Advocates employed by the firm of Coulson Harney LLP. Furthermore, the advocate has expressly admitted that the delay in filing the Record was squarely attributable to counsels employed by the firm.
16. In the case of *Lingam Enterprises Limited & 4 others vs Radio Africa Limited* [2015] KECA 975 (KLR) this Court cited the case of *Nura Awadh Bawazir vs Christopher Stephen Akilano Akiwumi & Another*, Civil Application Number Nairobi 256 of 2000; [2001] LLR 6820 (CAK), where Tunoi JA (as he then was) held that where the omission to lodge an appeal within the prescribed time falls entirely on the part of counsel who accepts full responsibility and the delay is otherwise satisfactorily explained, the Applicant should not be denied the chance to canvass the appeal.



17. In adopting the above rationale, given that there is no question that the Applicant's advocates have taken full responsibility for the delay on account of their error in computing the period for filing the Record, I find that they have sufficiently explained the delay of 26 days, which I do not consider to be inordinate. Consequently, on the basis of the material placed before the Court, I find the delay to have been adequately explained.
18. On the question of whether the intended appeal has a likelihood of success, though the Applicant indicated that it had filed a Memorandum of appeal, an interrogation of the motion does not disclose that it was attached. I am therefore unable to discern the likely success or otherwise of the intended appeal, save to observe that this notwithstanding, the Applicant has a right of appeal.
19. Having said that, regarding any prejudice to the Respondent, it is not lost on me that four years on, the Respondent continues to enjoy the injunctive orders issued by the trial court. As such, I do not see any prejudice that will be occasioned to it were time to be extended in filing the appeal, as, it will continue to enjoy those orders until such time as the appeal is determined by another bench of this Court, albeit dependant on the outcome of the appeal.
20. In view of, the Applicant having satisfied the requirements of rule 4, I exercise my discretion to extend time for filing the Record of Appeal.
21. As concerns the Supplementary Record of Appeal, rule 94 (3) of this Courts rules specifies:

“ An appellant may at any time lodge in the appropriate registry for copies of a supplementary record of appeal and as soon as practicable thereafter serve copies of it on every respondent who has complied with requirements of rule 81.”
22. According to the Applicant, a Supplementary Record of Appeal dated 29th December 2021 was also lodged in Court. In terms of rule 94 (3) what is left is for the Applicant to proceed and serve copies on the Respondent.
23. Consequently, the Notice of Motion dated 30th July 2024 succeeds the Record of appeal dated 16th December 2021 and the Supplementary Record of appeal dated 29th December 2021 be and are hereby deemed as properly filed. Costs in the Appeal.

It is so ordered.

DATED AND DELIVERED IN MOMBASA THIS 5TH DAY OF DECEMBER, 2025

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

