



REPUBLIC OF KENYA



**Southern Credit Banking Corporation v Hussein Dairy Limited (Civil Application E227 of 2025) [2025] KECA 2123 (KLR) (5 December 2025) (Ruling)**

Neutral citation: [2025] KECA 2123 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E227 OF 2025  
F SICHALE, JA  
DECEMBER 5, 2025**

**BETWEEN**

**SOUTHERN CREDIT BANKING CORPORATION ..... APPLICANT**

**AND**

**HUSSEIN DAIRY LIMITED ..... RESPONDENT**

*(Being an Application for Extension of Time to file and serve Notice of Appeal against the Ruling of the High Court of Kenya (Mabeya J), dated 17th March 2025 in Nairobi High Court Commercial & Tax Division Case No. 252 of 2008)*

**RULING**

1. Southern Credit Banking Corporation (“the applicant” herein) has vide a motion on notice application dated 8<sup>th</sup> April 2025, brought pursuant to the provisions of Rule 4, 42, 57 & 121 of the Court of Appeal Rules 2022, invoked the jurisdiction of this Court sitting as a Single Judge seeking the following orders;
  - “i. Spent.
  - ii. That time for filing and service of the Notice of Appeal be extended and the Notice of Appeal dated 2<sup>nd</sup> April 2025, be deemed as filed within time request.
  - iii. That costs of this application be provided for.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Brian Kilonzo the Managing Director of the applicant who deposed inter alia that the impugned ruling was delivered on 17<sup>th</sup> March 2025 and inadvertently, their counsel did not attend court on the date of delivery and only came to know of the same long after delivery.



3. He further deposed that on 2<sup>nd</sup> April 2025, they received communication from their counsel disclosing that they had now received a copy of the ruling from counsel for the respondent and immediately instructed counsel to file a Notice of Appeal which was filed on 3<sup>rd</sup> April 2025.
4. That, further the delay in complying with the law was due to human error on the part of their counsel which was regretted. He thus deposed that the delay of filing the Notice of Appeal by 3 days was excusable.
5. The motion was opposed vide a replying affidavit sworn on 9<sup>th</sup> May 2025, by Mahmood Kassin Miyanji, a director of the respondent who deposed inter alia that the applicant had not demonstrated sufficient basis for this Court to exercise its discretion in its favour and that the application was filed after an inordinate delay being 20 days after the impugned ruling.
6. He further deposed that the reasons in delaying to file the Notice of Appeal were not genuine as the notice for the ruling was duly served upon the parties on 12<sup>th</sup> March 2025, by the court assistant via email.
7. It was submitted for the applicant that the delay in filing the Notice of Appeal was not unreasonable as the same was lodged as soon as the applicant learnt that the ruling had been delivered and approximately 3 days after the lapse of the 14 days and that the rules do not set out the number of days that would be considered inordinate and that as such, the Court should determine this matter based on the facts. For this proposition, reliance was placed on case of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR.
8. Turning to reasons for the delay, it was submitted that the same was due to human error by the applicant's advocates who failed to diarize the Ruling date, which error should not be visited upon the applicant.
9. On the other hand, it was submitted for the respondent that the applicant having already filed and served the Notice of Appeal it should not ask this Court that the same be "deemed" to have been filed, as that amounts to pre-empting the outcome of this Court, hence improper in law.
10. It was further submitted that the applicant had not demonstrated sufficient basis for this Court to exercise its discretion in its favour as the application was filed after an inordinate delay of 20 days from the date of the ruling and that the reasons given for the delay were not genuine.
11. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
12. The principles upon which this Court exercises its discretion pursuant to Rule 4 to extend time or not are now old hat. The Court has wide and unfettered discretion in deciding whether to extend time or not. However, in exercising its discretion, the Court should do so judiciously.
13. See Patel V Waweru and 2 others [2003] KLR 361 at pp. 362-3 where this Court had the following to say in respect to Rule 4 of the Court of Appeal Rules:

“ This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single Judge explaining the reason for what was clearly an inordinate delay. How does a single Judge exercise his discretion” In Leo



Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application no. NAI. 251 of 1997 this Court stated:-

“It is now 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”

14. In the instant case and as regards the length of the delay, the impugned ruling was delivered on 17<sup>th</sup> March 2025, whereas the instant motion was filed on or about 8<sup>th</sup> April 2025. There has therefore been a delay of about 22 days which I do not consider to be inordinate.
15. Turning to reasons proffered for failing to file the appeal on time, it was contended that the same was occasioned by inadvertence on the part of counsel for the applicant, who failed to diarize the ruling date and therefore failed to attend court on the day of the delivery of the ruling.
16. From the circumstances of this case, I consider the reasons given for failing to file the appeal on time to be plausible/reasonable as in some instances, such as this one, mistakes of counsel should not be visited upon an innocent litigant and therefore, I am of the considered opinion that the delay herein has been sufficiently explained to the satisfaction of this Court.
17. As to the arguability or otherwise of the intended appeal, I cannot make a determination of this issue sitting as a Single Judge and I will therefore not delve into the issue.
18. Finally on prejudice, I am satisfied that the applicant will stand to suffer prejudice if the instant motion is not allowed as it will have been completely shut out from the seat of justice.
19. Taking into totality all the circumstances of this case, I am of the considered view that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time.
20. Accordingly, the applicant’s motion dated 8<sup>th</sup> April 2025, is merited and the same is hereby allowed as prayed.
21. The applicant shall proceed to file the intended appeal within a period of 30 days from the date of this ruling, failure to which these orders shall stand vacated.
22. The costs of this motion shall abide the outcome of the intended appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF DECEMBER 2025.**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

