

**IN THE COURT OF  
APPEAL AT NAIROBI**

**(CORAM: MUMBI NGUGI JA, (IN CHAMBERS))**

**CIVIL APPEAL (APPLICATION) NO. E179 OF**

**2022 BETWEEN**

**CAPITAL GROUP LIMITED.....APPLICANT**

**AND**

**GRACE WANGUI NGENYE.....RESPONDENT**

*(Being an application for extension of time to file and serve Record of Appeal and Memorandum of Appeal in Nairobi Civil Appeal No. E179 of 2022 dated 21<sup>st</sup> March 2022 out of time on an appeal from the judgment of the High Court at Nairobi (L. Njuguna J) dated 15<sup>th</sup> November 2018*

*in*

***HCCC No. 1009 of 2005)***

***\*\*\*\*\****

**RULING**

1. By its application dated 11<sup>th</sup> June 2025, the applicant, **Capital Group Limited**, prays that this Court be pleased to extend time to file and serve the Record and Memorandum of Appeal in Nairobi Civil Appeal No. E.179 of 2022 dated 21<sup>st</sup> March 2022 out of time; that in exercising its unfettered discretion under rule 4, this Court admits Nairobi Civil Appeal No. E179 of 2022 and deems it as duly filed and properly on record; that the Court be pleased to issue further orders and directions as it may deem fit to serve the ends of

substantive justice in the circumstances of this case; and for the costs of the application to abide the outcome of the appeal.

2. The application is brought under rules 4 and 43 of the Court of Appeal Rules, 2022, sections 3A and 3B of the Appellate Jurisdiction Act, and Articles 40, 50, and 159 (2) of the Constitution. The application is based on the grounds on its face and is supported by an affidavit sworn by Elizabeth M. Gatuhi on 11<sup>th</sup> June 2025. In its grounds in support of the application, the applicant urges the Court to uphold a candid (sic) principle of striving at all times to hear parties on merit instead of having its application and Nairobi Civil Appeal No. E179 of 2022 disposed of on technicalities; that the respondent will not be prejudiced if the orders sought are granted as she has already received a security sum of Kshs. 6,000,000 as ordered by the High Court on 14<sup>th</sup> March 2019 and the remainder of Kshs. 3,000,000 is currently deposited in a joint interest earning account which will be secure for release to either party depending on the outcome of the appeal; that should this Court not grant the orders sought, the applicant will suffer substantial loss and its appeal will be rendered

nugatory, and it asserts that it is

in the interests of substantive justice that its constitutional right of appeal be protected.

3. Ms. Gatuhi, an advocate in the firm of Ndungu, Njoroge & Kwach Advocates, who are on record for the applicant, expounds further on these grounds in her affidavit in support of the application. She avers that in its decision rendered on 11<sup>th</sup> December 2015 in Civil Appeal No. 40 of 2010, this Court dismissed the appeal against the 1<sup>st</sup> respondent (Chris Kirubi) and allowed the appeal against the 2<sup>nd</sup> respondent, the present applicant, and entered judgment against it on liability for defamation. It further ordered that the suit against the applicant be set down in the High Court for proof of damages.
4. It is further averred that in its decision dated 15<sup>th</sup> November 2018, the High Court entered judgment in favour of the respondent for general and aggravated damages, and damages in lieu of apology, all totalling Kshs 9,000,000, as well as costs and interest thereon; that on 14<sup>th</sup> March 2019, the High Court granted stay of execution of the judgment pending hearing and determination of the intended appeal on condition that the applicant pays the

respondent Kshs. 6,000,000, while the balance of Kshs. 3,000,000 is deposited in Court; that subsequent thereto, by its ruling dated 14<sup>th</sup> November 2019, the High Court reviewed its earlier orders and directed that the said amount be deposited in a joint interest earning account in the names of the parties' advocates; and it also extended the order of stay of execution pending hearing and determination of the intended appeal.

5. The applicant asserts that it has complied with the orders of the High Court; that it has filed and served a notice of appeal dated 15<sup>th</sup> November 2018 on time; that it has followed up on issuance of the certified copies of the judgment, decree, typed proceedings and certificate of delay, all of which was done when the country was hit by the Covid-19 pandemic; and that it managed to file the Record of Appeal dated 21<sup>st</sup> March 2022 on 4<sup>th</sup> April 2022 and paid the requisite fees and security for costs with respect thereto.
6. The applicant avers that in the course of compliance and filing the Record of Appeal, while the applicant was adjusting to the hard times experienced during the Covid-19 pandemic and the new systems and rules set by the

government and

Judiciary for all litigants, the respondent filed Civil Application No. E035 of 2022 seeking to strike out the Notice of Appeal; that this application was subsequently withdrawn and Civil Application No. E292 of 2022 also seeking to strike out the applicant's Record and Memorandum of Appeal filed; and that a request for a hearing date of the said application was made.

7. Ms. Gatuhi avers that the applicant's counsel on record, who took over the matter from the previous counsel has, since the Covid-19 pandemic, gone through significant restructuring. The applicant maintains that its appeal was filed amidst extremely tough times and it should not be taken away from the seat of justice, nor should its constitutional right of appeal be thwarted because of the challenges faced by its advocates.
8. The respondent opposes the application by an affidavit which she swore on 23<sup>rd</sup> June 2025. She terms the present application a callous and contemptuous abuse of the court process, calculated at disregarding all the rules of this Court enacted to give good order in the conduct of and delivery of justice. She further avers that the judgment and decree sought to be appealed against was delivered more

than six

years ago on 15<sup>th</sup> November 2018; that the applicant's counsel wrote to the Deputy Registrar of the High Court on 16<sup>th</sup> November 2018 seeking certified copies of the proceedings; that contrary to the provisions of rule 84(2) of this Court's Rules, the letter bespeaking proceedings was neither copied nor served on her Advocates; that the applicant having filed its notice of appeal on 15<sup>th</sup> November 2018, it ought to have filed its Record of Appeal not later than 14<sup>th</sup> January 2019 as required by the proviso to rule 84(1); but the letter bespeaking proceedings not having been copied to the respondent, the proviso to rule 84(1) was not available to the applicant.

9. The respondent avers further that on 29<sup>th</sup> July 2020, the Deputy Registrar of the High Court notified the applicant's counsel that the proceedings were ready and could be collected upon payment of the requisite fees; that the applicant ought to have filed its Record of Appeal within 60 days from the said date; that in the certificate of delay, the applicant states that it paid for the proceedings on 27<sup>th</sup> August 2021; and that the applicant does not explain why it took more than one year to pay for the proceedings.

10. The respondent avers that even after paying for the proceedings on 27<sup>th</sup> August 2021, the applicant did not collect the proceedings until 26<sup>th</sup> October 2021. It is the respondent's averment that the applicant failed to file and serve its Record of Appeal within 60 days from the 26<sup>th</sup> October 2021, or on or before 26<sup>th</sup> December 2021; that it has deliberately misrepresented that preparation and supply of the proceedings took a period of 1,075 from 16<sup>th</sup> November 2018 to 26<sup>th</sup> October 2021, yet it had been notified by the Deputy Registrar that the proceedings were ready on 27<sup>th</sup> August 2021, a period of 610 days from 16<sup>th</sup> November 2018; that the 'sham' Certificate of Delay was not collected on the date the proceedings were ready or when they were paid for or when they were collected; and that no explanation has been offered for the delay.
11. The respondent further avers that even after filing the Record of Appeal without leave of this Court, the applicant did not serve it on her advocates on record, thereby contravening the provisions of rule 92 of this Court's Rules.
12. The respondent avers that she filed and served on the applicant's Advocates Civil Application No. E035 of 2022

dated 8<sup>th</sup> February 2022; that the parties' counsel received directions from the Registrar of this Court with respect to the said application; that on 10<sup>th</sup> March 2022, her Advocates wrote to the applicant's advocates, Ndung'u Njoroge & Kwach Advocates, seeking to prompt them to serve their Replying Affidavit to the said application as directions had already been given thereon; that on 25<sup>th</sup> July 2022, the Registrar of this Court served directions on the parties Advocates in regard to the applicant's appeal, Civil Appeal No. E179 of 2022, which directions the applicant's advocates acknowledged; that on 22<sup>nd</sup> July 2022, the respondent's advocates wrote to the Registrar, with a copy to the applicant's advocates, indicating that neither they nor the respondent were aware of Civil Appeal No. E179 of 2022, but the applicant's advocates did not serve the Record of Appeal on her advocates.

13. The respondent states that she further filed Civil Application No. E508 of 2022 dated 4<sup>th</sup> August 2022, but that she later withdrew both Civil Application No. E035 of 2022 and E508 of 2022 and filed Civil Application No. E292 of 2022 dated 8<sup>th</sup> August 2022, seeking to strike out the Record of Appeal on

account of the incompetence of the said appeal, which application is still pending

14. The respondent contends that the applicant was always aware of her intention to strike out its Notice of Appeal and the Record of Appeal, but it chose to do nothing about it; that on 14<sup>th</sup> June 2025, the Registrar of this Court served both parties with a Notice for mention for case management in Civil Application No. E035 of 2022; that she informed the Registrar on 5<sup>th</sup> June 2025 that Civil Application No. E035 of 2022 had been withdrawn and that the respondent was seeking directions on Civil Application No. E292 of 2022; and that it is only on 11<sup>th</sup> June 2025, while the parties were awaiting directions with respect to Civil Application No. E292 of 2022 that the applicant filed the present application, which is calculated to frustrate her application to strike out the Record of Appeal.
15. The respondent asserts that the applicant has been indolent and is guilty of laches; that ignoring the Rules of this Court ousts its jurisdiction, and Article 159(2) of the Constitution cannot cure the defaults in the appeal; and that the applicant has not explained why the application is being brought this

late in the day, if not to defeat justice. She prays that the application be dismissed with costs.

16. The applicant filed a Further Affidavit sworn by Ms. Gatuhi on 30<sup>th</sup> June 2025 in response to the respondent's affidavit. She avers that contrary to the respondent's averments, the applicant was seeking exercise of its inherent and constitutional right to appeal, right to access justice and right to a fair hearing; that the letter requesting for a certified copy of proceedings, as evidenced in exhibit GWNI annexed to the respondent's Replying Affidavit, indicates that the respondent's advocates received the said letter, although under protest, as they were not expressly copied; and that the respondent's advocates were also subsequently served with a letter copied to them and to all correspondence addressed to the superior court as the applicant was following up on issuance of a certified copy of proceedings.

17. Ms. Gatuhi avers that contrary to the respondent's averments, the proviso to rule 84 (1) of this Court's Rules, 2022 is available to the applicant as the respondent's advocates were served with the letter and subsequent correspondence requesting for a certified copy of

proceedings. She observes

that the respondent had, in Civil Application No. E508 of 2022, properly calculated the time within which the applicant ought to have filed the Record of Appeal, being 60 days from the date of issuance of the Certificate of Delay, 4<sup>th</sup> November 2021, as 4<sup>th</sup> January 2022. The applicant avers that rule 84

(2) as read with rule 84 (1) only requires proof of service as opposed to copying the other party. The applicant avers that the delay in payment and collection of the Certificate of Delay has been sufficiently explained in the Certificate of Delay, and that no evidence has been provided by the respondent that the said Certificate is a forgery.

18. The applicant avers that the respondent has acknowledged at paragraph 22 of her Supporting Affidavit in Civil Application No. E035 of 2022 that litigants, advocates and the country in general faced numerous challenges during the Covid-19 pandemic; and that delays were also caused by issuance of further invoices by the superior court and parties communication on who should pay further court fees on the decretal amount.
19. The applicant avers that the present application has been made in good faith; that sufficient reasons have been

provided and proved for this Court to exercise its unfettered discretion under rule 4; and that the record of appeal was filed during the Covid-19 pandemic on 4<sup>th</sup> April 2022 as opposed to 4<sup>th</sup> January 2022, which is 3 months after the legally prescribed timeline. The applicant avers that the filing of this application is a result of the numerous instances of restructuring of the firm due to the Covid -19 pandemic and harsh business environment in Kenya under which Ms. Gatuhi recently took over the matter from her senior colleague, and this should not be used to drive the applicant from the seat of justice.

- 20.** The parties filed submissions dated 1<sup>st</sup> July 2025 and 26<sup>th</sup> June 2025 respectively. In its submissions, the applicant urges the Court to grant its application, noting that the outcome of this application affects Civil Application No. E292 of 2022 that seeks to strike out its Record of Appeal in Civil Appeal No. E179 of 2022. The applicant relies on several decisions of this court, among others Civil Appeal/Application No. 274 of 2016- **LSG Lufthansa Service Europa/Afrika GmbH & another v Eliab Muturi Mwangi (Practising in the name and**

**style of Muturi Mwangi & Associates Advocates**;  
**JTK v MWK** [2021] eKLR; **Imperial Bank Limited (in Receivership) & another v Ainashir Popat & 18 others** [2018] eKLR; and **Dakawou Transporters v National Land Commission & 3 others** [2021] eKLR to support its application.

21. In her submissions dated 26<sup>th</sup> June 2025, the respondent terms the present application an abuse of the legal process, citing in support the case of **In the Matter of Energy Regulatory Commission v John Sigura** [2021] KECA 1060 (KLR) in which this Court cited the Nigerian case of **Sarak v Kotoye** [1992] 9 NWLR 9PE 264 for the definition of abuse of judicial process.
22. The respondent submits that this application represents the brazen, unrepentant face of abuse of court process. She reiterates the chronology of events in the dispute and the actions (and inactions) by the parties since the initiation of her defamation proceedings against the applicant, the decision of this Court in 2015, and the various application she has filed to strike out the applicant's appeal prior to the present application. The respondent relies on the decisions in

**Kakuta Maimai Hamisi v. Peris Pesi Tobiko & 2 others** [2013] eKLR; **Nicholas Kiptoo Arap Korir Salat v. IEBC & 6 others** [2013] eKLR, **Ali v. Grain Industries Ltd** (Civil Application E66 of 2023) [2024] KECA 400 and **Musambayi & Others v. Katula & Another** (Civil Appeal (Application) E827 of 2022) [2024] KECA 186 to support her submission that compliance with the Rules is mandatory; and that the right of appeal cannot be exercised at the expense of orderly procedure. The respondent prays that the application be dismissed with costs so that her suffering from the publication of the defamatory statements in 2005 by the applicant can be brought to a close.

23. I have read and considered the pleadings, submissions and authorities before me. At its core, the issue for determination in the application is fairly straight forward. It is whether I should exercise discretion under rule 4 of the Rules of this Court to extend time and deem the Record of Appeal filed by the applicant on 4<sup>th</sup> April 2022 as duly filed. Though straightforward, the issue comes at the tail end of a prolonged dispute, starting in 2005, in which the respondent claimed damages against the applicant for

defamation, and from the

extent of the averments before me, the issue is hotly contested. I have therefore set out above, in some detail, the chronology of events preceding the filing of the application in order to properly gauge whether the applicant has satisfied the Court on the factors to be considered on such an application.

24. These factors are well settled- see **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others** [2014] eKLR and **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi** [1999] 2 EA 231. It is settled that in exercising discretion under rule 4, the Court should consider the length of the delay; the reason for the delay; (possibly) the chances of the appeal succeeding; and the degree of prejudice to the respondent should the orders sought be granted.
25. The averments before me indicate that judgment on liability was settled by this Court in favour of the respondent in its judgment dated 11<sup>th</sup> December 2015. Following formal proof, judgment on damages was entered in favour of the respondent by the High Court on 15<sup>th</sup> November 2018. The applicant then filed a Notice of Appeal on 21<sup>st</sup> November 2018, while the

respondent filed a Notice of Address for Service on 23<sup>rd</sup> November 2018. The applicant also sent a letter to the Deputy Registrar requesting for certified copies of the proceedings on 16<sup>th</sup> November 2018. The respondent contends that the letter was not, as required under rule 84(2) of the Court of Appeal Rules, copied to her Advocates, and that this rendered the proviso to rule 84(1) unavailable to the applicant. In response, the applicant contends that it served the letter, and that what was required under rule 84 (2) was service thereof, not that the letter should be 'copied' to the respondent.

26. The proviso to rule 84 (1) and rule 84 (2) provide as follows:

***Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.***

***(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.***

27. I note from annexure '**GWN1**' annexed to the respondent's affidavit sworn on 23<sup>rd</sup> June 2025 that the applicant's letter bespeaking the proceedings, though not copied to the respondent's advocates as is the norm, was served on them. It has a receipt stamp dated 23<sup>rd</sup> November 2018, with the advocates indicating that the letter '***is not copied to us as it is addressed to the Deputy Registrar***'. The proviso to rule 84(2) would therefore be available to the applicant. That, however, is not the end of the matter.

28. The respondent has annexed to her affidavit as annexure **GWN3** a document that she refers to as a 'sham' Certificate of Delay' dated 4<sup>th</sup> November 2021. The Certificate indicates that the typed proceedings were paid for on 27<sup>th</sup> August 2021 and collected on 26<sup>th</sup> October 2021. The Certificate further states that the time taken by the court to prepare and supply the proceedings was from 16<sup>th</sup> November 2018 to 26 October 2021, that is a period of

1,075 days.

**29.** The applicant staunchly defends the authenticity of the Certificate of Delay, but there is something peculiar about it, with paragraph 2 thereof suggesting that it was prepared by counsel for the applicant, rather than the Deputy Registrar. The said paragraph states: ***'That we received a letter at our offices on from the Deputy Registrar (sic) to collect the typed proceedings upon payment of the requisite court fees. The letter from the Deputy Registrar was dated 29<sup>th</sup> July 2020.'***

30. From the Certificate of Delay, which is accepted as such for the purposes of this application, the applicant was notified that the proceedings were ready on 29<sup>th</sup> July 2020. It paid for the proceedings on 27<sup>th</sup> August 2021 and collected them almost two months later, on 21<sup>st</sup> October 2021. It was issued with a Certificate of Delay dated 4<sup>th</sup> November 2021. Under the Rules of this Court, the applicant should have filed its record of appeal within 60 days of 4<sup>th</sup> November 2021. It filed its record of appeal on 4<sup>th</sup> April 2022, clearly outside the period allowed under the Rules of this Court, and without seeking the leave of the Court to file its appeal out of time. The present application for extension of time was filed on 11<sup>th</sup>

June 2025, three years after the filing of the appeal out of time.

31. How does the applicant explain the delay? Ms. Gatuhi blames it, primarily, on the Covid 19 pandemic; and secondly, on 'restructuring' within the applicant's advocates' law firm. However, other than making these general statements about the 'restructuring' in the law firm and the Covid 19 pandemic, nothing specific has been placed before me that adequately explains the close to four -year year delay in filing the record of appeal, or to seek to regularise it by obtaining leave of the Court to deem the appeal filed out of time as duly filed.
32. I say this noting that even though the applicant's advocates were notified that the proceedings were ready on 29<sup>th</sup> July 2020, no effort was made to pay for and collect the proceedings till nearly a year later. Further, no sufficient reason has been advanced for the further inordinate delay between 2022 and 2025 in seeking extension of time from this Court. It is to be observed that the applicant's advocates' firm was in operation in 2021 and 2022; it was receiving and exchanging correspondence with the respondent's advocates; it had

been served with three applications by the respondent

seeking to strike out its appeal, so clearly the firm was not so affected by the 'restructuring' blamed by Ms. Gatuhi for the delay as to render it incapable of normal operations.

33. A further consideration in an application under rule 4 is the chances of success of the intended appeal. Judgment on liability in this matter was settled by this Court more than ten years ago, and the only issue that can properly arise on appeal is the quantum of damages. The success of an appeal with respect to damages, requiring interference with the exercise of the trial court's discretion, is not one that a single judge can adequately gauge in an application for extension of time.

34. What can be gauged is the prejudice to the respondent should the Court grant the orders sought in the application. As I noted earlier, this matter arose from a defamation claim on a publication by the applicant in 2005, twenty years ago. Judgment on liability was entered in 2018, seven years ago. The respondent is an individual, and while the respondent may well afford and mentally sustain decades-old litigation, it seems to me that the justice of the cause would demand that the respondent be no longer troubled by the issues arising from defamation of her

character decades ago.

35. In any event, having found that the applicant has not given sufficient reasons for the inordinate delay in seeking extension of time, I find the present application to be devoid of merit. It is hereby dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of December, 2025**

**MUMBI NGUGI**

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

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

*Signed*

**DEPUTY REGISTRAR**

