

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: MUSINGA (P), MUMBI NGUGI & TUIYOTT,

JJ.A.) CIVIL APPLICATION NO. E359 OF 2024

BETWEEN

CYLLUS GODFREY ONYANGO.....APPLICANT

AND

DR. SELINA VUKINU AMBE.....RESPONDENT

*(Being a reference under rule 57 (1) (b) of the Court of Appeal Rules from the Ruling of Kiage, JA. dated 28th March 2025 in an application for extension of time to file and serve a notice of appeal out of time from the Judgment and Decree of the High Court of Kenya at Nairobi (**Ongeri, J.**) dated 24th May 2024*

in

HCCC No. 174 of 2018)

RULING OF THE COURT

1. This is a reference to the full Court made under **rule 57 (1) (b)** of the Rules of this Court arising from the decision of a single judge, (**Kiage, JA.**) delivered on 28th March 2025. In that decision, the learned judge considered an application by **Cyllus Godfrey Onyango** seeking an extension of time to file and serve a notice of appeal out of time against the

Judgment and Decree

of the High Court at Nairobi (Ongeri, J.) delivered on 24th May 2024. The application for extension of time had been brought pursuant to **rule 4** of the Rules of this Court.

2. In the application that gave rise to this reference, the applicant contended that he had been desirous of appealing against the whole judgment and had duly instructed his advocates on record to file a notice of appeal and request for certified typed proceedings. He contended, however, that his advocates inadvertently failed to pay for the drafted notice of appeal, which resulted in the delay. In the supporting affidavit which the learned single judge observed was phrased in the second person, he attributed the omission to counsel's inadvertence but did not provide any evidence of the alleged draft notice of appeal nor any affidavit from the advocate admitting or explaining the oversight.
3. The respondent opposed the motion through her replying affidavit sworn on 23rd July 2024, contending that the application was unmerited, that the delay of over a month was both inordinate and unexplained, and that no sufficient cause had been shown to warrant this Court's indulgence.

4. In his ruling, Kiage, JA. reiterated that the discretion under rule 4 is unfettered but must be exercised judiciously, guided by established considerations such as the length of delay, reasons for the delay, the possible chances of success of the intended appeal, and the prejudice to the respondent if the extension of time is granted, as restated by the Supreme Court in **Nicholas Kiptoo Arap Salat v IEBC & 7 Others [2015] eKLR**. The judge found that the applicant had failed to lay a proper basis for the exercise of discretion in his favour. He held that the explanation offered was hearsay, speculative, and unsupported by evidence, since the applicant did not demonstrate personal knowledge of the alleged inadvertence or specify from whom the information was obtained. The judge further observed that filing a notice of appeal is a simple procedural task, for which a sample form exists in the Court's schedule, and that a mere claim that counsel "forgot to pay or file" was insufficient to excuse a month-long delay.
5. In the end, the judge held that the delay was long and unexplained, and that no credible reason had been shown to

justify the indulgence sought. Consequently, the application

was found to be without merit and was dismissed with costs to the respondent.

6. The refusal by the judge to exercise his discretion in favour of the applicant precipitated the filing of this reference. Through written submissions dated 21st October 2025 which were highlighted by learned counsel **Mr. Saende**, the applicant contends that this Court has the discretionary jurisdiction under rule 4 to extend time where sufficient cause is shown. The applicant contends that the discretion should be exercised judiciously to advance substantive justice. In this regard, the applicant cites the decision of **Adriano Muhadachi Imbisi v Land Registrar Kakamega & 2 Others [2024] eKLR**, where Ngugi, JA. emphasized that procedural lapses should not bar the right of appeal.
7. As regards the exercise of discretion by the single judge, it is contended that he erred in finding that the delay of about one month was excessive and unexplained. The applicant relies on **Martin Nyongesa v Milton Mboya Lukuyu [2025] KECA 1044 (Nairobi)**, where this Court excused a 36-day delay, underscoring that the right to appeal should

not be defeated by

technicalities when intent to appeal is evident. The applicant reiterates that the delay arose from inadvertence by counsel in failing to pay filing fees for the notice of appeal, not from indifference or bad faith. He points this Court to a letter dated 28th May 2024 requesting certified proceedings as proof of genuine intention to appeal.

8. In addition, the applicant contends that the learned judge narrowly focused on procedural delay while ignoring the applicant's demonstrated diligence and intent. This, according to the applicant, amounted to misdirection and a rigid application of procedure contrary to **Article 159 (2) (d)** of the **Constitution** which enjoins courts to administer justice without undue regard to procedural technicalities. The applicant therefore urges this Court to adopt a purposive and equitable approach, set aside the ruling of 28th March 2025, and grant leave to file and serve the notice and record of appeal out of time, so that the dispute may be determined on its merits rather than on a technical lapse.
9. In opposing the reference, the respondent through written submissions dated 17th September 2025 which were

highlighted

by learned counsel **Ms. Sheila Karue** who held brief for **Mr. Malenya**, contends that from the outset rule **57 (1) (b)** of the **Rules of this Court** requires a reference to be lodged with the Registrar within seven days of the single judge's decision. However, the reference, though dated 3rd April 2025, was not filed until 28th April 2025, and only paid for on 29th April 2025, some thirty days after the ruling was delivered. The respondent therefore contends that the applicant is attempting to disguise this delay by filing the reference as an attachment to a letter requesting a hearing date. Relying on **Charles Onyinge Abuso v Kenya Ports Authority [2018] KECA 374 (KLR)**, counsel argued that a reference filed outside the prescribed time without leave is a nullity, and that the Court lacks jurisdiction to entertain it.

10. On the second issue which relates to the learned judge's exercise of discretion, the respondent maintains that the single judge exercised his discretion judiciously and that the full court should only interfere where the discretion was improperly exercised. See **Geothermal Development Company v Lantech Africa Limited [2024] KECA 269**

(KLR). It is contended that

the judge properly considered the applicant's explanation that his counsel inadvertently failed to pay for the notice of appeal and correctly found it implausible and unsupported by evidence. The applicant had not annexed any draft notice of appeal, nor had his advocate sworn an affidavit confirming the alleged inadvertence. Further, there was no proof that any attempt had been made to file the notice within time; no screenshots, invoices, or filing confirmations were produced. The delay, which amounted to 47 days, was therefore inordinate and unexplained.

11. In addition, the respondent contends that allowing the extension would cause prejudice, as the matter concerned a defamation judgment, which is personal in nature, and the applicant's conduct was aimed at delaying enforcement and denying the respondent the fruits of her judgment. Citing **Kimathi & Another v Muriuki & 12 Others (Civil Application No. 61 of 2020 [2023] KECA 666 (KLR) (9 June 2023) (Ruling)**, it was submitted that equity does not aid the indolent, and compliance with prescribed timelines is a substantive requirement and not a mere procedural

technicality.

12. In conclusion, the respondent urges this Court to find that the reference is incompetent, having been filed out of time and, in any event, lacks merit since the single judge properly exercised his discretion. The respondent therefore prays that the reference be dismissed with costs.

13. We have carefully considered the submissions of counsel and the applicable law. Before delving into the merits of this reference, it is incumbent upon us to first address the question of its competence. **Rule 57 (1) (b)** upon which this reference is premised stipulates thus:

“(1) Where under the proviso to section 5 of the Act, any person, being dissatisfied with the decision of a single judge—

(a).....

(b) in a civil matter, wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, that person may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.” [Emphasis added]

14. In **Charles Onyinge Abuso v Kenya Ports Authority** (**supra**), this Court, dealing with a reference that had been filed outside the prescribed timeline, held thus:

“...Clearly this application broke all the rules pertaining to references from a decision of a single Judge. We fail to understand why learned counsel would violate all the relevant rules of procedure and expect to succeed in his application. Rule 55 is clear and needs no amplification. Even if we were to deem the route followed to get the application before us proper, the application was filed outside the 7 days prescribed under Rule 55 of the Rules. This was not a simple infraction or oversight which can be overlooked. Nor was it a simple case of non-compliance with Rules of the procedure. It flouted substantive law because as stated, the application itself was filed outside the 7 days within which the letter seeking reference should be sent to the Registrar of the Court. The procedure was improper and even if the Court was to close its eyes and assume that the procedure could be countenanced, the court would still not have jurisdiction because the application was out of time and no extension of time was sought.”
[Emphasis added]

15. Turning to the circumstances herein, the ruling giving rise to the reference was delivered on **28th March 2025**, while the reference, though dated **3rd April 2025**, was not filed until **28th April 2025**. Evidence from the Court Tracking System (CTS) clearly shows that the reference was paid for on **29th April 2025**, over thirty days after delivery of the impugned ruling. Under rule 57(1)(b) of the Rules of this Court, a reference must be lodged within seven days of the single

judge's decision. The

applicant neither sought nor obtained leave to file the reference out of time. Accordingly, the reference was filed without leave, out of time, and is therefore incompetent and bad in law, leaving this Court without jurisdiction to entertain it, and we must therefore down our tools.

16. Consequently, the reference dated **3rd April 2024** is hereby struck out with costs to the respondent.

Dated and delivered at Nairobi this 19th day of December, 2025.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

MUMBI NGUGI

.....
JUDGE OF APPEAL

F. TUIYOTT

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.