



REPUBLIC OF KENYA



KENYA LAW
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Midland Construction Co Limited v Bachulal Popatial (K) Limited & another (Civil Application E104 of 2025) [2026] KECA 25 (KLR) (22 January 2026) (Ruling)

Neutral citation: [2026] KECA 25 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E104 OF 2025
LK KIMARU, JA
JANUARY 22, 2026**

BETWEEN

MIDLAND CONSTRUCTION CO LIMITED APPLICANT

AND

BACHULAL POPATIAL (K) LIMITED 1ST RESPONDENT

I&M BANK LIMITED 2ND RESPONDENT

(Being an application for extension of time to file the notice of appeal from the Judgment of the High Court of Kenya at Kisumu (Musyoka B., J) dated 20th July, 2025 in HCCA No. E119 of 2025)

RULING

1. The applicant's notice of motion filed on 15th July 2025 is essentially made under Rule 4 of the Court of Appeal Rules seeking to be granted leave to file the notice of appeal out of time. The applicant states that it was aggrieved by the Judgment rendered in Kisumu HC Civil Appeal No. E119 of 2024 (Musyoka, B. J) on 20th June, 2025. The applicant averred that it did not file the requisite notice of its intention to appeal within the time prescribed under Rule 77(2) of the Court of Appeal Rules due to the fact that its director fell ill and was bedridden during the specific period. He could not therefore instruct counsel to lodge the notice of appeal in time. By the time the said director recovered from illness, the time that the notice of appeal should have been filed had lapsed. The applicant urged the Court to exercise its discretion in his favour and grant the leave sought as the period of delay was a couple of days and was not inordinate.
2. The application is opposed. Andrew Muchina, the legal Manager of the 2nd respondent swore a replying affidavit in opposition to the application. The thrust of the said affidavit is the contention that the intended appeal has no merit as the substratum of the appeal has ceased to exist. He deponed that the decree of the Superior Court was executed on 19th December, 2025 and the decretal sum paid to



the decree holder. The 2nd respondent was therefore of the view that any intended appeal will serve no purpose as the substratum of the appeal was no longer in existence. The 2nd respondent was not convinced by the reason given by the applicant for delay in lodging the appeal in time. They urged the Court to disallow the application.

3. This Court has carefully considered the application, the replying affidavit and the written submissions filed by the parties. Both parties appreciated that what is craved for by the applicant is the exercise of unfettered discretion by this Court under Rule 4 of the Court of Appeal Rules. The discretion is however guided by principles which have been laid down overtime by the Court which includes; the reason for the delay, the length of the delay, the chances of the appeal succeeding and the degree of prejudice to the respondent (See *Mwangi v. Kenya Airways LTD* [2003] KLR 486.
4. In the present application, the applicant explained the reason for delay to be on account of illness of its director at the crucial time when the notice of appeal was required to have been filed. The period of delay is about ten (10) days. The applicant timeously filed the present application. Although the respondent doubted the reason put forward by the applicant for the delay, this Court upon considering the facts of the application is convinced that the applicant is entitled to the exercise of this Court's discretion in its favour. The delay of a period of ten (10) days is not inordinate. The reason for the delay is excusable. The fact that the decree has already been executed is not a bar to this Court granting the applicant the chance to exercise its undoubted constitutional right of appeal.
5. In the premises therefore, the application has merit and is hereby allowed. The applicant is granted leave to lodge the notice of appeal out of time. The said notice of appeal shall be filed and served within fourteen (14) days of today's date. The record of appeal shall be filed and served within forty five (45) days of the service of the notice of appeal. There shall be no orders as to costs.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF JANUARY, 2026.

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR.

