

**IN THE COURT OF
APPEAL AT
NAIROBI**

**(CORAM: JAMILA MOHAMMED, J.A. (IN
CHAMBERS)) CIVIL APPEAL (APPLICATION) NO.
E461 OF 2025 BETWEEN**

KENNEDY SUKALI WAMBUA.....APPLICANT

AND

THE NAIROBI HOSPITAL.....RESPONDENT

**(Being an application for leave to file record of appeal out
of time against the Ruling and Orders of the High Court at
Nairobi**

(C. Meoli, J.) dated 21st November

2024 in

Nairobi HCCC NO. E226 of 2021)

****** RULING**

Background

1) **Kennedy Sukali Wambua** (the applicant) has moved this Court by way of Notice of Motion dated 24th July 2025 expressed to be brought under **Sections 3A** and **3B** of the **Appellate Jurisdiction Act** and **Rules 4** and **84** of the **Court of Appeal Rules, 2022** (this Court's Rules), seeking in the main leave to file and serve the record of appeal out of time.

The Nairobi Hospital is the respondent herein.

2) The impugned ruling of the High Court (**C. Meoli, J.**) was delivered on 21st November 2024. A notice of appeal was lodged on 25th November 2024. By

a letter dated 16th December 2024, the applicant applied for certified typed proceedings.

- 3) The applicant relies on a certificate of delay dated 27th June 2025 and contends that the delay in filing the record of appeal was occasioned by delay in preparation of proceedings.
- 4) The respondent opposes the application on the ground that the applicant failed to serve or copy the letter bespeaking proceedings upon counsel for the respondent as required under **Rule 84(2)** of this Courts Rules.
- 5) The issue for determination is whether, in the absence of proof of service of the letter bespeaking proceedings, the applicant can rely on the proviso to **Rule 84(1)**, and if not, whether this Court should nevertheless exercise discretion under **Rule 4** in his favour.
- 6) **Rule 84(1)** requires that an appeal be instituted within sixty (60) days of lodging the notice of appeal. The proviso allows exclusion of time certified as necessary for preparation of proceedings, provided the application for such proceedings was made in writing within thirty (30) days and served upon the respondent.
- 7) **Rule 84(2)** is couched in mandatory terms: an appellant shall not be entitled to rely on the proviso unless a copy of the written request for proceedings was served upon the respondent.

- 8) The language of the rule is prohibitive. The entitlement to exclude time does not arise unless service is demonstrated. Compliance is therefore a condition precedent.
- 9) This Court has consistently affirmed this position. In **Musambayi & others** **(Sued on his own behalf and on behalf of 41 others) v Katula & another (Suing as the legal representatives of the Estate of Stephen Katula Muyendi) (Civil Appeal (Application) No. E827 of 2022 [2024] KECA 186 (KLR)** the Court held that failure to serve the letter bespeaking proceedings disentitles an applicant from invoking the proviso and renders the certificate of delay ineffectual.
- 10) Likewise, in **Marwa v Chacha [2025] KECA 2151 (KLR)**, this Court reiterated that where service of the letter bespeaking proceedings is not demonstrated, time runs uninterrupted and the applicant cannot benefit from the exclusion contemplated under **Rule 84**.
- 11) The purpose of **Rule 84(2)** is substantive, not technical. It ensures transparency and procedural fairness by notifying the respondent that time may be excluded and that an appeal is actively being pursued. It guards against ambush and uncertainty in litigation.
- 12) In the instant case, although the applicant has annexed the letter

dated 16th December 2024 requesting proceedings there is no evidence that it was copied or served on counsel for the respondent. Further, there is no affidavit

of service or other credible evidence that has been placed before this Court to demonstrate service upon the respondent or its counsel.

13) In the absence of proof of service, the applicant is disentitled from relying on the proviso to **Rule 84(1)**. The sixty-day period for filing the record of appeal therefore ran uninterrupted from the date of lodging the notice of appeal. The record of appeal was not filed within that period.

14) The applicant urges this Court to exercise its discretion under **Rule 4**. It is settled law, as stated in *Leo Sila Mutiso v Hellen Wangari Mwangi*

[1999] 2 EA 231, that the Court considers the length of delay, the reason for delay, the arguability of the appeal, and prejudice to the respondent.

15) However, discretion under **Rule 4** is equitable in nature. It is not exercised to cure deliberate or unexplained non-compliance with mandatory procedural safeguards.

16) The failure to comply with **Rule 84(2)** is not a minor procedural lapse. It goes to the very jurisdictional foundation upon which exclusion of time rests. To overlook it would amount to rewriting the rule.

17) **Article 159** of the **Constitution** and the overriding objective cannot be invoked to circumvent express and mandatory provisions governing the institution of appeals. Timelines in appellate practice are central to

certainty and finality in litigation.

18) To grant the orders sought in the face of clear non-compliance would undermine the integrity of the Rules and erode the discipline intended in appellate procedure.

19) I am therefore satisfied that the applicant has failed to demonstrate sufficient cause to warrant the exercise of discretion in his favour.

20) The Notice of Motion dated 24th July 2025 is hereby dismissed.

21) The respondent shall have the costs of this application.

Dated and delivered at Nairobi this 27th day of February, 2026.

JAMILA MOHAMMED

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JUDGE OF APPEAL

I certify that this is
a true copy of the
original

Signed

DEPUTY REGISTRAR