



St John of God Hospital Tigania v Michubu (Legal Representative of the Estate of Agnes Kawira) (Civil Application E052 of 2024) [2026] KECA 744 (KLR) (24 April 2026) (Ruling)

Neutral citation: [2026] KECA 744 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E052 OF 2024
K M'INOTI, A ALI-ARONI & S OLE KANTAI, JJA
APRIL 24, 2026**

BETWEEN

ST JOHN OF GOD HOSPITAL TIGANIA APPLICANT

AND

**JACKNON MICHUBU (LEGAL REPRESENTATIVE OF THE ESTATE OF
AGNES KAWIRA) RESPONDENT**

(Reference to the Full Court from the ruling and order of a Single Judge (J. Mohammed, JA) dated 20th September 2024 dismissing an application for extension of time to appeal from the judgment of the High Court of Kenya at Meru (Cherere, J.) dated 29th February 2024 in HCCC No. E024 of 2021)

RULING

1. This is a reference to the full Court under rule 57 of the Court of Appeal Rules, from the ruling and order of a single judge (J. Mohammed, JA) dated 20th September 2024 in which the learned judge dismissed the applicant's application for extension of time to appeal from the judgement and decree of the High Court of Kenya at Meru (Cherere, J.) dated 29th February 2024.
2. The brief background to the reference is as follows. The respondent obtained judgment from the High Court of Kenya at Meru against the applicant in a medical negligence claim and was awarded a total of Kshs. 11,412,860.00 made up of general damages for pain and suffering, loss of expectation of life, loss of dependency and special damages. The respondent was also awarded costs and interest.
3. The applicant was aggrieved and lodged a notice of appeal on 12th March 2024, and served the same upon the respondent's advocates on the same day. As is readily apparent, the notice of appeal and service thereof were within the period prescribed by rules 77 (2) and 79(1) of the Court of Appeal Rules. On 22nd March 2022, the applicant applied for certified copies of the judgment and proceedings. Again, that application was made in writing and within 30 days from the date of the judgment of the



- High Court, as required by the proviso to rule 84(1). The only error that the respondent committed was to omit to serve the letter bespeaking the proceedings on the respondent's advocates as required by the Rules.
4. Having failed to serve upon the respondent a copy of the letter bespeaking the proceedings, the applicant was obliged by rule 84(1) to file the appeal within sixty days from the date of lodging the notice of appeal. The applicant did not file the appeal within that time and on 7th June 2024, it applied before a single judge for extension of time to file the appeal.
 5. The applicant candidly owned up that the failure to copy the letter bespeaking the proceedings was an accidental slip for which they beseeched the Court not to visit upon the respondent. The applicant further explained that there was a delay in obtaining the proceedings because the court file was not available, due to a pending application for stay of execution of the Judgment of the High Court, which was determined on 2nd May 2024. An additional reason was that having made follow ups online, they expected to obtain responses online, but they were forced to undertake follow ups physically, commuting from Nairobi to Meru.
 6. Lastly, the applicant averred that the delay involved was also occasioned by the post-judgment change of advocates and the fact that when its new advocates ultimately obtained the file from the previous advocates, they found most documents illegible and had to approach the respondent's advocates for legible copies, which they ultimately obtained on 22nd May 2024. The applicant obtained copies of the certified proceedings and judgment on 23rd May 2024 and ultimately filed the application for extension of time on 7th June 2024.
 7. In its submissions, the applicant argued that the delay was not inordinate as the application for extension of time was made within 24 days from the date when the appeal ought to have been filed; that it had offered security for costs and that the respondent would not suffer any prejudice because the applicant had already paid to the respondent part of the decretal amount to the tune of Kshs. 2,853,212.
 8. It was also contended that the intended appeal had high chances of success and raised, among other issues, the correct test for medical negligence; whether a multiplier is applicable in assessment of general damages for loss of dependency under the *Fatal Accidents Act* where the deceased was not an employed or skilled worker; and whether the court erred by adopting a speculative salary in a profession as the multiplicand.
 9. The respondent opposed the application vide a replying affidavit sworn on 9th July 2024 and submissions dated 13th July 2024. He contended that even the notice of appeal was filed late and confirmed that the applicant did not serve on his advocates the letter bespeaking proceedings. He also disputed the unavailability of the court file and the applicant's challenge in getting legible copies of the pleadings. It was the respondent's position that the delay involved was inordinate and unexplained and that the intended appeal was not arguable. As regards the intended appeal, the respondent went to great lengths regarding the merits of the judgment of the High Court, discussing ground by ground of the applicant's draft memorandum of appeal and submitted that the intended appeal was frivolous.
 10. Upon considering the application, the learned single judge dismissed it vide the ruling the subject of the present reference. The learned judge aptly considered the principles that guide this Court in an application for extension of time as set out in *Leo Sila Mutiso v. Rose Hellen Wangare Mwangi* [1999] 2 EA 231 and the Supreme Court in *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others* [2015] eKLR (we believe that the learned judge intended to refer to the decision of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others* [2014] (KLR), which *Fahim Yasin Twaha* quoted).



11. After applying the principles to the application before her, the learned judge found that the delay by the applicant was 24 days. She rejected the applicant's explanation of an accidental slip in failure to serve the letter bespeaking the proceedings on the respondent's advocates. She relied on the decision in *Habo Agencies Ltd v. Wilfred Odhiambo Musingo* [2015] KECA 596 (KLR), where a single judge held that inaction on the part of an advocate is not an excusable mistake that may attract the sympathy of the Court.
12. As regards the non-availability of the court file due to the pending application for stay of execution in the High Court, the single judge agreed with the respondent that the applicant had not attached any evidence to substantiate the contention. On the merits of the intended appeal, the learned judge observed that the issue cannot be determined with finality by a single judge in an application for extension of time. Lastly, as regards prejudice, the learned judge observed that she was called upon to balance the competing interests of the parties, namely, the injustice to the applicant in denying it extension of time, against the prejudice to the respondent in granting extension. The learned judge does not appear to have determined on which side the balance tilted.
13. Ultimately, the single judge concluded that the delay in filing the application for extension of time was inordinate and that the reasons given for the delay were not plausible and satisfactory to warrant the exercise of this Court's discretion in favour of the applicant.
14. The applicant was aggrieved and made this reference vide a letter to the Registrar dated 24th September 2024, which was within seven days as required by rule 57 (1)(b) of the Rules. In support of the reference, the applicant appreciated that in a reference to the full Court, the Court does not readily interfere with exercise of discretion by a single judge unless it is demonstrated that the single judge exercised his or discretion erroneously.
15. It was the applicant's submission that the delay involved was a mere 24 days, which in the circumstances was not inordinate. Further, that the single judge laid emphasis on the lack of access to the court file due to the pending application on stay of execution, but did not consider or adequately consider the other reasons put forth by the applicant, among them, mistake by counsel, delayed communication from the court, and delay in obtaining legible copies of the pleadings.
16. It was also contended that the applicant had attached a copy of the High Court's ruling on the application for stay of execution, which gave credence to the argument that the file was with the judge preparing the ruling. Lastly, the applicant faulted the learned judge for failure to consider that it was the applicant who stood to suffer greater prejudice than the respondent because it had proposed to offer security for costs if need be, and had paid part of the decretal amount.
17. Although duly served with a hearing notice and directions requiring him to file submissions, the respondent did not file any submissions against the reference.
18. We have anxiously considered this reference. As aptly pointed out by the applicant, the single judge was acting on behalf of the Court and therefore the Court will not interfere with exercise of discretion by the single judge except where it is demonstrated that the single judge took into account irrelevant matters or failed to take into account relevant matters; misapprehended a relevant point of fact or law; or, looked at in its entirety, the decision of the single judge was plainly wrong.
19. In *Kenya Canners Ltd v. Titus Muiruri Doge*, Civil Application No. 119 of 1996, this Court explained its approach in a reference to the full Court from a decision of a single judge as follows:

“A reference to the full court is not an appeal although it is in the nature of one and in exercising the discretion under rule 4, the single judge was exercising the power on behalf



of the full court and his discretion would not therefore be easily upset except on sound principles and these are that the single judge took into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account; that he misapprehended or not properly appreciated some point of law or fact applicable to that issue; or that the decision, looked at in relation to the available evidence and the relevant law is plainly wrong...A breach of any or all of such principles would entitle the full court to interfere and the applicant must satisfy the Court that it ought to do so.”

(See also *Mombasa Development Ltd v Jimba Credit Corporation Ltd & Another* [2005] KECA 271 (KLR);

George Itotia Ng’ang’a v Mary Wanjiku Kimaru [2007] KECA 299 (KLR); and *Rift Valley Machinery Services Ltd v Agro Complex (K) Ltd & 13 Others* [2023] KECA 1469 (KLR).

“A reference to the full court is not an appeal although it is in the nature of one and in exercising the discretion under rule 4, the single judge was exercising the power on behalf of the full court and his discretion would not therefore be easily upset except on sound principles and these are that the single judge took into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account; that he misapprehended or not properly appreciated some point of law or fact applicable to that issue; or that the decision, looked at in relation to the available evidence and the relevant law is plainly wrong...A breach of any or all of such principles would entitle the full court to interfere and the applicant must satisfy the Court that it ought to do so.”

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20. Further, the full Court will not interfere with exercise of discretion by a single judge merely because either would have exercised the discretion differently were it hearing the application. Some misdirection on the part of the single judge must be established.
21. The applicant’s complaint is that the single judge did not consider all the reasons he had put forward for the delay and did not consider some relevant matters. The learned judge found that the delay involved was 24 days and rejected the applicant’s explanation that the failure to serve on the respondent a copy of the letter bespeaking the proceedings was a result of an accidental slip on the part of the advocate. In that regard, the learned judge relied on the decision of a single judge in *Habo Agencies Ltd v. Wilfred Odhiambo Musingo* (supra) for the proposition that inaction by counsel is not an excusable mistake.
22. In itself, that was a misdirection because upon a reference to the full Court in *Habo Agencies Ltd v Wilfred Odhiambo Misuingo* [2015] KECA 987 (KLR), the full Court found that the single judge in the decision cited by the single judge in the present case, had misdirected himself by failing to consider some relevant facts. The reference was allowed, and time was extended. The single judge ought to have relied on the decision of the full Court rather than on that of the single judge, which was reversed.
23. The applicant also complains that in rejecting its explanation that the High Court file was not available because of the pending application for stay of execution in that Court, the single judge held that there was no evidence to substantiate the applicant’s assertions. We think that was another misdirection



because there was a ruling on the applicant’s application for stay of execution in the High Court, annexed to the application for extension of time. From the record, that ruling was delivered on 2nd May 2024, which makes the applicant’s contention that the file was with the learned judge for the preparation of the ruling plausible. Be that as it may, the learned judge did not consider this ruling in holding that the applicant had not substantiated this contention.

24. The other important issue which the learned judge ought to have considered but did not is the issue of prejudice. It was the applicant’s contention that it had already paid part of the decretal amount to the respondent and that it stood to suffer greater prejudice if it was denied an opportunity to appeal. The applicant had offered to provide security for costs. Regrettably, the single judge did not consider these relevant issues.
25. Failure to consider some relevant issues is a valid ground for the full Court to interfere with exercise of discretion by a single judge. We have indicated some of the important and relevant issues that the single judge did not address her mind to.
26. In the circumstances, we are inclined to allow this reference.

We set aside the order of dismissal of the applicant’s application for extension of time dated 7th June 2024 and substitute therefore an order allowing the application. The applicant shall file and serve the record of appeal within Twenty One (21) days from the date of this ruling. Costs of this reference shall abide the outcome of the intended appeal. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF APRIL, 2026.

K. M’INOTI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

A. ALI-ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

