



REPUBLIC OF KENYA



**Embe Water and Sanitation Company Limited v Njuguna (Civil Application
E132 of 2024) [2025] KECA 128 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KECA 128 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E132 OF 2024
GV ODUNGA, JA
JANUARY 30, 2025**

BETWEEN

EMBE WATER AND SANITATION COMPANY LIMITED APPLICANT

AND

DANIEL MUTUKU NJUGUNA RESPONDENT

(Being an Application for extension of time to file the Memorandum of Appeal and Record of Appeal out of time from the Judgment, Orders and Decree of the Employment and Labour Relations Court at Nyeri (O. Makau, J) dated 18th April, 2024 in Cause No. E015 of 2023)

RULING

1. By a Notice of Motion dated 18th December 2024, the applicant seeks orders: for extension of time to file an appeal against the judgment of Onesmus Makau, J dated 18th April, 2024; for provision for timelines for filing of the Memorandum of Appeal alongside the Record of Appeal; and for deeming as duly filed and served the Notice of Appeal filed on 30th April 2024 and served upon the Respondent.
2. The applicant is based on the fact: that the respondent sued the applicant for damages arising from unlawful termination of employment and the trial court found for the respondent and awarded him the sum of Kshs. 1,682,970.00 with interest from the date of the judgment; that aggrieved, the applicant through his former advocates, M/s H.N Njiru & Co. Advocates, lodged a Notice of Appeal dated 30th April 2024; that although the respondent filed a Notice of Motion dated 16th May 2024 vide Civil Application No.E044 of 2024 before this Court seeking stay of execution of the judgment pending the hearing and determination of the appeal, which application was allowed on 27th September 2024, the Memorandum of Appeal whose copy was annexed to the application was inadvertently not filed; that the omission to file the same was not deliberate and/or due to laxity on the part of the applicant and/or their advocates but out of an oversight and mistaken belief that the same had already been filed; that although the applicant was furnished with typed proceedings on 5th December 2024,



he has not been furnished with a copy of the judgement, decree and the Certificate of Delay; that no prejudice will be suffered by the respondent that cannot be compensated in costs; that the applicant is willing to abide by the any conditions set by this Court; that it was only on 5th December 2024 when, upon being furnished with a copy of typed proceedings from the Court registry, that he realized that there was an oversight on their part in filing the Memorandum of Appeal.

3. The respondent did not file a replying affidavit to the application.
4. The application was heard on 30th January 2025 on the Court’s virtual platform during which learned counsel, Mr Henry Wamwea, appeared for the applicant while learned counsel, Mr Namada, appeared for the respondent. Mr Wamwea relied on his written submissions while Mr Namada opted to address the Court orally. According to Mr Namada no excusable reason was given for the delay since the mere change of counsel is not a good reason for the delay. In support of this position, learned counsel relied on the Supreme Court of Kenya decision in Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR.
5. I have considered the application, affidavit in support of the application and the submissions and authorities relied upon. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the Court of Appeal Rules are now well settled. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain matters that the Court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly, whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal; and fourthly, whether the respondent will be unduly prejudiced if the application were to be granted. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations.
6. Those principles were restated by Waki, JA in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR as follows:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See *Mutiso vs. Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”
7. On its part, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court Application No. 16 of 2014[2014] eKLR while expressing itself on the matter opined that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.



8. In *Leo Sila Mutiso v Helen Wangari Mwangi* Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231 this Court set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondents can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
9. In this case, the factual averments in so far as they address the said principles are not disputed since no replying affidavit was filed. In the case of *Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor* [2014] eKLR it was appreciated that:

“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”
10. From that authority, it is clear that the litmus test for inordinate delay is that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. In other words, in determining whether or not the delay is inordinate, it is not a matter of arithmetic. Therefore, the fact that there is a long delay does not, of itself, necessarily mean that the delay is inordinate. All the surrounding circumstances, including the reason for the delay must be considered by the Court.
11. In this case, the decision sought to be appealed against was delivered on 18th April 2024 and the Notice of Appeal was served on 30th April 2024, within time. The applicant had 60 days from that date to file its Record of Appeal. It did not do so due to inadvertence on the part of counsel. It was not until 5th December 2024 that it realised that it had not filed the Memorandum of Appeal although it had been annexed to the application for stay. It is clear that the delay was just for some few months and it is explained on the ground of inadvertence.
12. Since there is no allegation of any prejudice that is likely to be occasioned to the respondent if the application is allowed, on the authority of *Touring Cars (K) Ltd & Anor v Ashok Kumar N. Mankanji* Civil Application No. 78 of 1998 and *Grindlays Bank International (K) & Another v George Barbour* Civil Application No. Nai. 257 of 1995 and as it is not shown that there is fraud or intention to overreach I find merit in this Motion which I grant. Accordingly, the Notice of Appeal is deemed to have been filed and served within time and the time within which to file and serve the Memorandum and Record of Appeal is extended with a period of 14 days from the date of the delivery of this ruling.
13. The costs of this application are awarded to the respondent.
14. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JANUARY, 2025.



G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

