



**Director of Criminal Investigations v Mutiso & another (Civil Application E793 of 2024) [2025] KECA 352 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KECA 352 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E793 OF 2024  
F TUIYOTT, JA  
FEBRUARY 28, 2025**

**BETWEEN**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... APPLICANT**

**AND**

**DANIEL MASILA MUTISO ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

*(An application under Section 1A, 1B and 3A of the Civil Procedure Act, Section 3, 3A and 3B of the Appellate Jurisdiction Act and Rules 4, 44, 45 and 47 of the Court of Appeal Rules 2022, seeking enlargement of time to file a notice of appeal and memorandum of appeal against the Judgment of the High Court of Kenya at Machakos (F. Rayola, J) delivered on 30th July 2024 in HCCC Petition No. E019 of 2021)*

**RULING**

1. On 30<sup>th</sup> July 2024, Honourable Justice F. Rayola Olel delivered a ruling in Machakos HCCC Petition No. E019 of 2021 in which he allowed the petition dated 4<sup>th</sup> October 2021 with the result that it quashed the decision of Chief Inspector Caroline Kinoti to charge the 1<sup>st</sup> respondent with the offence of obtaining/forgery, terminated Machakos CMCC No. E149 of 2021 and condemned the Director of Criminal Investigation (DCI), the applicant herein, to pay costs in the sum of Kshs.250,000.00.
2. The DCI is aggrieved by the decision but is late in filing a notice of appeal and is now before this Court in a notice of motion dated 9<sup>th</sup> October 2024 seeking enlargement of time to file a notice of appeal and memorandum of appeal against the said judgement. A raft of provisions of the Civil Procedure Act, the Appellate Jurisdiction Act and the Court of Appeal Rules are cited yet it would be enough to cite Rule 4 of the *Court of Appeal Rules, 2022*.



3. It is explained in a supporting affidavit sworn by Mercy Mumo John on 9<sup>th</sup> October 2024 that, before the High Court, the DCI was represented by the Director of Public Prosecutions (DPP or 2<sup>nd</sup> respondent) but she is now on record for the applicant. She is a State Counsel in the office of the Attorney General. The deponent explains that owing to deliberations on the judgment within the offices of the DCI, she received instructions to lodge an appeal against the judgment on 1<sup>st</sup> October 2024. She contends that the delay was neither intentional nor inordinate. She asserts that the intended appeal is arguable with high chances of success. She states that the respondents will not be prejudiced by grant of the orders sought.
4. The application is opposed by the 1<sup>st</sup> respondent only who swore a replying affidavit on 24<sup>th</sup> October 2024. It is his response that; the Court is not told what occasioned the delay in getting instructions; the ODPP had conduct of the matter before the High Court and it is the ODPP who had the responsibility of filing the notice of appeal; the filing of a notice of appeal does not require any instructions as compared to the filing of the appeal since the notice of appeal can always be withdrawn without any consequences; the memorandum of appeal is amorphous and does not indicate the desired outcome; the order of the High Court has been transmitted to the Criminal Court *in Machakos Criminal Case E149 of 2021* and the charges have been terminated and court file closed and; even if the appeal were to succeed and judgment set aside, the charges cannot be re- opened and the intended appeal will be an exercise in futility.
5. I have considered the motion, the response to it and the submissions filed for and against the motion.
6. The jurisdiction of this Court to extend leave for the doing of any act authorised or required by the Court of Appeal Rules or by order of the Court is reposed in Rule 4, and is discretionary. A discretion that is to be judiciously guided by the following principles; the length of the delay; the reasons for the delay; (possibly) the chances of the appeal succeeding if the application is granted; and prejudice to the respondent if the application is granted (See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997.*)
7. Even before considering the substance of the application, i make an observation about the contention by the 1<sup>st</sup> respondent that the criminal court proceedings have been quashed and terminated, and so the charges cannot be re-opened. This is an argument that the application before the Court has been overtaken by events and allowing the motion would be otiose. The simple answer to the argument is that if this Court were to grant the orders now sought and the ensuing appeal were to succeed, then the order of the High Court quashing the bringing of charges against the 1<sup>st</sup> respondent would be set aside. Such an order would enable the ODPP to commence fresh proceedings against the 1<sup>st</sup> respondent. So, the application is not overtaken by events simply because the terms of the judgment delivered on 30<sup>th</sup> July 2024 have been implemented.
8. I agree with the 1<sup>st</sup> respondent that a notice of appeal can be filed by counsel conducting a matter even before seeking instructions to appeal. This serves to safeguard that right of appeal within the short timelines allowed by the Rules. Further, the client can suffer no harm because if he/she does, not eventually pursue the appeal, then the notice of appeal can be withdrawn within no consequence to him/her. For that reason, it may not be a good reason for the applicant to say that it took him sometime to deliberate on the judgment and whether to file an appeal before filing the notice of appeal.
9. That said, the motion before court is brought about 55 days after the last day allowed for the filing of the notice of appeal. That delay is not inordinate. This Court is willing to excuse the short delay, never mind that it was not well explained. In doing so, I have considered that the 1<sup>st</sup> respondent has not demonstrated how grant of the extension order will prejudice him.



10. The notice of motion dated 9<sup>th</sup> October 2024 is hereby allowed. The applicant shall file and serve a notice of appeal within 14 days hereof and thereafter lodge the appeal within the time prescribed by the Rules of the Court.

11. Costs shall be in the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY 2025.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

*Signed*

Deputy Registrar.

