



**Thika Muslim Housing Cooperative Society Ltd v Zubeidi (Civil Application  
E180 of 2023) [2025] KECA 195 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 195 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E180 OF 2023  
A ALI-ARONI, AO MUCHELULE & GV ODUNGA, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**THIKA MUSLIM HOUSING COOPERATIVE SOCIETY LTD ..... APPLICANT**

**AND**

**HASSAN A. ZUBEIDI ..... RESPONDENT**

*(Being a reference from the decision of a single judge in an application for an extension of time to file a notice of appeal and a record of appeal out of time from the Ruling of the High Court of Kenya at Nairobi (Apondi, J.) delivered on 20th December 2010 in HCC No. 493 of 2004)*

**RULING**

1. This case has remained in the court registers since 2010. The respondent filed suit against the applicant and requested summary judgment for Kshs 14,600,000, which was granted on 20<sup>th</sup> December 2010. It will suffice to say that the matter has had a chequered history since the summary judgment, with the applicant filing several applications for stay, extension of time, etc.
2. The applicant filed notice of motion dated 13<sup>th</sup> April 2023 brought under rule 4 of this Court's Rules 2022, which was heard and determined by a single judge who declined to allow the extension and dismissed the application.
3. The matter is now before us following a letter dated 31<sup>st</sup> July 2024 by the applicant's counsel seeking to have the application heard by a three-judge bench as a reference pursuant to rule 57 of this [Court's Rules](#).
4. The application subject of this reference sought an extension of time to lodge and serve the notice of appeal and a record of appeal out of time from the ruling of the High Court of Kenya (Apondi, J.) of 20<sup>th</sup> December 2010 and for the notice of appeal dated 27<sup>th</sup> March 2023 to be deemed as duly filed and served upon payment of the requisite court fees.



5. The application was based on the grounds on the face of it and the supporting affidavit of its Chairman Abdalla Said Ndope, who deponed that the applicant's former advocates, Njoroge Kugwa & Co. Advocates, did not timely inform the applicant of the ruling until sometime in 2011, when the applicant inquired about the status of its case, and when the said advocates filed a notice of appeal on 23<sup>rd</sup> February 2011, two months after the ruling. Further, the former advocates failed to inform it of the necessity to apply for leave to file the notice of appeal out of time; instead the former advocates filed various applications, leading to a further delay in applying for an extension of time to file the notice of appeal; that mistakes by counsel should not be visited on the applicant; the former advocates filed a notice of appeal without seeking leave from the court, prompting the respondent's advocate to apply to strike out the notice of appeal; which application was granted on 11<sup>th</sup> February 2015, in Civil Application No 70 of 2011; the counsel now on record could not immediately file the application seeking leave because the court file could not be located, which delay complicated the matter further; if the orders sought are not granted, the appeal will be rendered nugatory; the appeal has a high likelihood of success.
6. In opposition, the respondent filed an undated replying affidavit where he deponed that the current appeal exemplifies abuse of the court process; the case was initiated in 2004 and centered around a contract signed between the parties on 7<sup>th</sup> April 1999; in the agreement, the respondent committed to drilling two boreholes on the applicant's properties, designated as numbers 10821/59 and 10821/53, for a total price of Kshs 14,600,000/-; the respondent fulfilled his obligations under the contract; however, the applicant failed to meet its contractual responsibilities, prompting the respondent to file suit.
7. He further deponed that since the applicant's defence did not present any triable issues, the respondent applied for summary judgment; on 20<sup>th</sup> December 2010, the court made a ruling in favor of the respondent; thereafter, the applicant filed various unsuccessful applications to stay the judgment; it is misleading for the applicant to claim to have been unaware of the judgment issued on 20<sup>th</sup> December 2010; the claim is not only made in bad faith but also serves to undermine the administration of justice; the applicant's Chairman Abdalla Saidi Ndope, was well aware of the judgment; following the delivery of the judgment, he instructed the counsel on record then to apply for a stay of execution on 4<sup>th</sup> August 2014; in support of the application, Abdalla Saidi Ndope swore a supporting affidavit.
8. Further, in an application dated 20<sup>th</sup> August 2016, the applicant sought an extension of time to file an appeal; the application was dismissed on 27<sup>th</sup> January 2016; in the ruling, this Court noted that there had been a long delay since the dismissal of the earlier notice of appeal; the application is therefore res judicata; should the applicant have any complaints regarding its former advocates, it ought to initiate a professional misconduct claim against them or seek indemnification for any losses incurred.
9. The respondent further asserted that the delay of over 13 years is inordinate, oppressive, and contumelious and has not been sufficiently explained; further, the appeal has no chance of success as the applicant's statement of defence did not disclose any triable issues; the superior court entered summary judgment against the applicant after considering all the arguments on its probity of the defence; the applicant has not demonstrated that it has an arguable appeal as no draft memorandum of appeal was attached to the application.
10. Learned counsel for the applicant filed submissions and a list of authorities dated 3<sup>rd</sup> October 2024. He has highlighted four issues: (i) whether the court has jurisdiction to determine the application; (ii) whether the reference is premature; (iii) whether the single judge's decision should be set aside or varied; (vi) whether the intended appeal is arguable



11. Issues No (i) & (ii) are related, and in support, the learned counsel relied on the case of *Thuita Mwangi v Kenya Airways Ltd* Civil Application No Nai 162 of 2002, where the court stated that the circumstances under which the full bench would be entitled to interfere with the exercise of the discretionary power by a single judge are similar to those under which an appellate court would be entitled to interfere with the exercise of discretion by a trial judge.
12. On the second issue of whether the reference is premature, learned counsel submitted that the ruling was delivered on 24<sup>th</sup> July 2023, and he filed the reference on 31<sup>st</sup> July 2023, within 7 days from the ruling. Hence, this reference is not time-barred.
13. Lastly, on the issue of whether the intended appeal is arguable, learned counsel submitted that the applicant has drafted his draft memorandum of appeal, which has stated 10 grounds of appeal that are all weighty and require this Court's directions, which, if granted, this matter could be heard on merits and not technicalities.
14. Learned counsel for the respondent filed submissions dated 29<sup>th</sup> May 2023. He distills the issues into three: (i) have the principles that govern the extension of time under rule 4 been met? (ii) whether the intended appeal is arguable; (iii) whether the respondent would suffer any prejudice if the application for an extension of time is granted.
15. In support of the first issue, learned counsel referred to the cases of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231, and *Fakir Mohammed v Joseph Mugambi & 2 others* ([2005] KECA 340 (KLR)).
16. Learned counsel further submitted that whereas the court has the discretion to extend time, such discretion should be exercised judiciously and not capriciously. He urged that in the instant case, the applicant has not explained the reason for the delay, and as such, it should not be allowed to hold the respondent hostage through oppressive litigation.
17. On the second issue of whether the intended appeal is arguable, learned counsel submitted that the intended appeal is not arguable since it has not raised any triable issues worth consideration by this Court and in support he referred to the case of *Muchugi Kiragu v James Muchugi Kiragu & another* (1998) eKLR where the court held that an extension of time may be granted where the appeal is arguable.
18. Lastly, regarding whether the respondent would suffer any prejudice if the application for an extension of time is granted, learned counsel points out that the judgment was delivered on 20<sup>th</sup> December 2010. Following this, the respondent proceeded to execute the judgment. On 20<sup>th</sup> June 2016, the court issued vesting orders on the property, LR No 10821/53 Thika Municipality, which was subsequently sold to Screen Check Africa Limited. As a result, third parties have acquired interests in the subject matter. The delay would significantly prejudice the respondent, who would be called to answer to claims that have effectively gone stale, especially since the matter has already been litigated before a competent court.
19. In her ruling of 24<sup>th</sup> July 2023, G.W. Ngenye-Macharia, JA, held that the lack of information regarding the judgment being delivered is acceptable. However, the applicant could not rely on this reason after 23<sup>rd</sup> February 2011, since the first notice of appeal had been filed; further the applicant took no steps for 4 years, and the notice was struck out; hence, its inaction shows a blatant disinterest in its appeal. The judge further held that the proffered reason that the court file went missing, was not tenable because after the notice of appeal was struck out in 2015, the next action was taken sometime in 2021. The learned judge found the delay to be inordinate, inexcusable, and the explanation was untenable.



20. The court also observed that the suit property has since vested to a third party who is not a party to the application and the intended appeal, a fact that the applicant did not inform the court. The court found that the applicant had not approached the court with clean hands as it failed to disclose pertinent information for the court's consideration, and which would aid the court in arriving at an objective decision. Further, the learned judge believed that events may have overtaken the application, and its hearing was no more than an academic exercise in futility. The learned judge declined to exercise her discretion in favour of the applicant and dismissed the application with costs.
21. Rule 57 of the *Court of Appeal (2022)* stipulates as follows:
1. Where under the proviso to section 5 of the Act, any person, being dissatisfied with the decision of a single judge
    - a. ...
    - b. in a civil matter, wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, that person may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.
22. The only issue for our consideration is whether the applicant has placed before us sufficient reason that would allow the bench to interfere with the single judge's discretion. This Court, in the case of *Thuita Mwangi v Kenya Airways Ltd (supra)*, set out the principles that the court should consider in an application seeking to vary or set aside a single judge decision as follows; -
- “...this Court has repeatedly said before that a single judge sitting alone and acting under rule 4 is exercising the powers vested in him alone by that rule on behalf of the whole Court and the whole Court can only interfere with the exercise of those powers, which are entirely discretionary, for very specific reason(s). The circumstances under which the full Court would be entitled to interfere with the exercise of the discretionary power by the single judge are similar to those under which an appellate court would be entitled to interfere with the exercise of a discretion by a trial judge. Those circumstances were specified by the Court of Appeal for East Africa in *Mbogo & another v Shah*, [1968] EA 93. That case is well known enough and we do not think it is necessary for us to set out the law on this aspect of the matter as therein stated. All we need to say is that before we could ever think of interfering with the exercise of a discretion by the single judge, and which discretion as we have already stated, is exercised on behalf of the whole Court, we would have to be positively satisfied that in coming to his decision, the single judge has taken into account some irrelevant factor, or that he has failed to take into account a relevant factor, or that he has not applied a correct principle to the issue before him or that taking into account all the circumstances of the case, his decision is plainly wrong.” (emphasis added)”
23. In this case, the single judge declined to extend the time for filing the notice and record of appeal because, in her view, the delay was inordinate and inexcusable, and the applicant's explanation was untenable. In addition, the judge found that extending time would be prejudicial to the respondent. The single judge considered the reasons for the delay, the length of time, and the fact that an extension of time would be against the respondent's interest.



24. In the case of *Leo Sila Mutiso v Hellen Wangari Mwang (supra)*, this Court stated regarding an application under rule 4 of this Court’s Rules as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. it is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted”

Similarly, in the case of *Fakir Mohammed v Joseph Mugambi & 2 others (supra)*, the court reiterated that:

“The exercise of this court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it 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.”

25. The delay in applying for the extension of time was 13 years. The applicant blamed its counsel for failing to advise when judgment was entered. However, the gaps in the periods the appellant became aware of the judgment and when the action taken was not sufficiently explained; the applicant’s assertion in the current application that it was not aware that the judgment was read does not sell, as it had much earlier filed an application for stay in the High Court such that the inaction of his advocate ought to have jolted it into action after coming across the information.

26. It has not been demonstrated that the learned judge in refusing to grant the extension relied on the wrong principles. Indeed, we too agree that 13 years is a long time, the property has changed hands, the third party is not part of the intended appeal, lastly that any intended appeal will be highly prejudicial to the respondent.

27. In the end, we decline to grant the application. It is dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**ALI-ARONI**

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**JUDGE OF APPEAL**

**A.O. MUCHELULE**

.....

**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**



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

Signed

**DEPUTY REGISTRAR**

