



Kombo (Suing as the Legal Representative of the Estate of Hamisi Ndegwa Mashudi) v Family Bank Limited & another (Civil Application E099 of 2024) [2025] KECA 926 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KECA 926 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E099 OF 2024
F TUIYOTT, JA
MARCH 7, 2025**

BETWEEN

**MASHUDI NDEGWA KOMBO APPLICANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF HAMISI
NDEGWA MASHUDI**

AND

**FAMILY BANK LIMITED 1ST RESPONDENT
SOLOMON MWANGI MBURU 2ND RESPONDENT**

(Being an application for extension of time to file a Notice of Appeal out of time from the judgment of High Court of Kenya at Mombasa (T.A. Odera, J.) dated 26th March, 2024 in Civil Appeal No. E071 of 2021)

RULING

1. Before me is a Notice of Motion dated 26th August, 2024 in which the applicant seeks the leave of this Court to extend the time within which the applicant may file, lodge and serve a notice of appeal against the judgment delivered on 26th March, 2020 by Lady Justice T.A. Odera in Mombasa Civil Appeal No. E071 of 2021.
2. The application is opposed by the 1st respondent through the replying affidavit sworn on 3rd December, 2024 by Joan Gachomba, the Assistant Manager, Legal Services in the 1st respondent. Amongst other matters she, importantly, deposes that the applicant had on 28th May, 2024 filed a similar application before the Honorable Court in Mombasa Civil Application No. E056 of 2024 which was dismissed for want of prosecution on 11th July, 2024. She argues that instead of filing a fresh application, the



applicant ought to have filed an application to reinstate the dismissed application and thus the conduct of the applicant amounts to misuse and abuse of the court process.

3. A copy of Application No. E056 of 2024 is annexed to the replying affidavit. It is word for word the application now before me. The applicant neither rebuts its existence nor dismissal and this Court accepts the assertion of the respondent to be true. The applicant, further, failed to disclose these facts in the current matter.
4. A party whose application or appeal has been dismissed for non- attendance may apply to court to restore the application or appeal for hearing and, specifically, for a dismissed application, rule 58(3) provides:

“Where an application has been dismissed or allowed under subrule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re- hear it, as the case may be, if that party can show that he or she was prevented by any sufficient cause from appearing when the application was called on for hearing.”
5. It is not clear why the applicant did not choose the path provided for by the Rules, to seek reinstatement. In such an application, the party will have to persuade the court that the reason(s) for absence was plausible or excusable and the application ought to be restored for hearing. To file a fresh application as though none ever existed is an abuse of process and it is a greater travesty still not to make disclosure of its existence and dismissal. A travesty committed by the current applicant.
6. As the power to extend time granted to a single judge under Rule 4 is discretionary, I am unwilling to exercise it in favour of a party who has abused process. The notice of motion dated 26th August, 2024 is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2025.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

