



REPUBLIC OF KENYA



**Mwibanda v FN & another (Suing as Legal Representatives of the Estate of BN (Deceased))
(Civil Application E039 of 2025) [2025] KECA 712 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KECA 712 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E039 OF 2025
HA OMONDI, JA
APRIL 25, 2025**

BETWEEN

ROSE NANGAMI MWIBANDA APPLICANT

AND

FN & ANOTHER RESPONDENT

SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF BN (DECEASED)

(Being an application for extension of time to file and serve a Notice of Appeal from the Judgment of the High Court of Kenya at Bungoma (Ougo, J.) dated 12th February 2025 in HCCA No. 53 of 2018)

RULING

1. The applicant Rose Nangami Mwibanda was aggrieved by the decision rendered on 12th February 2025, in Bungoma HCCC No. 53 of 2018, and is desirous of appealing against that decision. The applicant explains that the Notice of Appeal ought to have been filed on or before 25th February 2025, (i.e. within 14 days from the date of the decision), however there was a delay of 23 days, and it was filed on 19th March 2025.
2. In the supporting affidavit dated 14th March 2025, sworn by Ms. Tindi advocate, she explains that after delivery of the judgment, she was unable to get in touch with the appellant herself and inform her of the outcome; as well as get instructions on way forward post judgment. By the time contact was made, and the applicant expressed her desire to pursue an appeal, 14 days had already lapsed. Consequently, the applicant instructed her counsel, Tindi Munyasi and Company Advocates to file the Notice of Motion seeking extension of time.
3. In urging the Court to grant her prayers, the applicant contends that 23 days delay is not inordinate, drawing from *Kiu & Another v Khaemba & 3 Others* (Civil Appeal (Application) E270 of 2021) [2021] KECA 318 (KLR) (17 December 2021) where Nambuye J, held that that a delay of 2 months and 12



days was not inordinate; and in the instant application, the period of delay is much less than what was under consideration; and in any event, the respondent will not suffer any prejudice.

4. It is also argued that the applicant has an arguable appeal as demonstrated by the annexed memorandum of appeal; and for good measure the applicant has applied for typed copies of the proceedings and judgment by a letter dated 13th March, 2025. In support of this, proposition, the Court is referred to the decision in *Salat v Independent Electoral and Boundaries Commission & 7 Others* (Application 16 of 2014) [2014] KESC 12 (KLR) (4 July 2014) (Ibrahim and Wanjala JJSC) set out what needs to be considered in a prayer of this nature as being the length of the delay, reason for the delay; "possibly" arguability of the intended appeal; any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.

5. In opposing the application, the respondent Felix Natwati Simiyu by a replying affidavit date contends that the application is made in bad faith; and calculated at denying him enjoyment of the fruits of his judgment;

that the reasons for the delay are not plausible as the applicant's counsel was present when the judgment was delivered; and the letter bespeaking the proceedings ought to have been written within 30 days of the decision; and the applicant has not met the threshold to warrant grant of the orders sought.

6. I have considered the application, the grounds in support thereof, submissions filed, authorities cited and the law. The issue for determination is whether the application is deserving of the orders sought. Rule 77 of the *Court of Appeal Rules* requires an intended appellant to lodge the Notice of Appeal, before or within fourteen (14) days of the decision, then within 7 days of lodging the notice of appeal, serve copies thereof on all persons directly affected by the appeal, this did not happen. The discretion that I am called to exercise in the determination of this application is unfettered and is provided under rule 4 of the Court of Appeal Rules which provides as follows:

The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

7. Rule 4 of the *Court of Appeal Rules* does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the locus classicus, laid down the parameters 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."

8. In *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No.190 of 2019 observed that:

"Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay,



the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

9. How long was the delay in this instance? 23 (twenty-three) days. What was the reason? From the explanation by the applicant's counsel, there was a challenge in reaching the applicant; and by the time they connected, time had lapsed. There is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible. For instance, in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

10. Undoubtedly the notice of appeal should be lodged within 14 days of the delivery of the decision which it seeks to appeal against and served within 7 (seven) days after lodging, that did not happen, not because counsel was unaware of the outcome, nay she was present, but unable to communicate with the applicant; and get instructions on whether to contest the decision or let it be. In my considered view, that is not tantamount to delaying tactics with an intention to scuttle fruits of the outcome.

11. In the present application, the applicant has given the reason for the delay in lodging the appeal in time. The letter bespeaking the proceedings could not have been written earlier, for the very reason that counsel had not yet received instructions. The period of delay is not inordinate, the reason given is plausible; and no prejudice is occasioned to the respondent as he will have his day in court on appeal, bearing in mind that he does not allude to any execution process having begun.

12. The application is merited and is allowed. The applicant is granted extension of time to lodge and serve the notice of appeal. The same shall be filed and served within fourteen (14) days of today's date. There shall be no orders as to costs.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL, 2025.

H. A. OMONDI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

