



**Muthee v Consolidated Bank of Kenya (Civil Application
E122 of 2024) [2025] KECA 861 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KECA 861 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E122 OF 2024
GV ODUNGA, JA
MAY 15, 2025**

BETWEEN

DENNIS MWANGI MUTHEE APPLICANT

AND

CONSOLIDATED BANK OF KENYA RESPONDENT

*(Being an application for extension of time to file the Record of
Appeal) against the Judgment and decree of the High Court at Kericho
(Karanja, J) delivered on 2nd May 2024 in HCCA No. 63 of 2022)*

RULING

1. The applicant, being aggrieved by the Judgment and decree of the High Court at Kericho in Civil Appeal No. 63 of 2022 (Karanja, J) delivered on 2nd May 2024, lodged a Notice of Appeal dated 15th May 2024 on 16th May 2024.
2. Before me is the applicant's Notice of Motion dated 20th December, 2024, brought under rule 4 of this Court's Rules, seeking extension of time to file the record of appeal.
3. The application is based on the grounds: that on 31st May 2024, he served the Notice of Appeal together with a letter bespeaking proceedings upon the respondents; that he followed up with the registry and obtained the judgment and proceedings, but the decree was delayed; that on 19th July 2024, he received a Certificate of Delay, but just as he was about to file the Record of Appeal his house and all his belongings were gutted by fire and he fell into depression and was financially strained, thus was unable to mobilise the funds for the preparation and filing of the Record of Appeal; that the tragedy was beyond his control and therefore excusable; that he will suffer irreparable damage/loss if the orders sought in the present application are not granted as the intended appeal has a likelihood of success; and that Article 159(2)(d) enjoins the Court to do substantive justice without undue regard to technicalities.



4. The applicant submits: that he fully complied with rule 84 of the Court of Appeal rules as he served his notice of appeal and letter bespeaking proceedings within 30 days, thus he should benefit from the provision under the rule, to enable him to file the Record of Appeal past the 60-day statutory timeline; that section 4 of the Appellate Jurisdiction (sic) grants this Court discretionary power to extend time to do any action under the rules; that the time spent in the preparation of proceedings as stated in the certificate of delay issued on 19th July 2024 should not be computed and therefore were it not for the tragedy which struck he would have filed record of appeal by 10th September 2024 hence his delay is only for 2 months, which is not inordinate; that he has explained the reason for the delay, which is a fire tragedy, which resulted in his falling into depression as shown in the exhibited documents; that his claim is for compensation for livelihood and career destroyed by the respondent's conduct, and therefore, if he does not get his day in court, he will be devastated, and the devastation cannot be compensated by costs; that he has an appeal that raises an important point of law and therefore an arguable appeal; that the Court should allow his application.
5. The application was not opposed by the respondent.
6. I have considered the application, affidavit in support of the application, the submissions and authorities relied upon.
7. Rule 4 of the Court's Rules which donates to the Court the power to extend time, provides that:

“The Court may, on such terms as may be 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.”
8. In application such as the present one the guiding principles have, over time been crystalized. This Court has unfettered discretion to extend the time prescribed for taking any action permitted under the Rules. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. Some of the considerations that the Court takes into account are, first, the period of the delay; secondly, the reasons for such a delay; thirdly (possibly), whether the proceedings for which time is sought to be extended is frivolous; and fourthly, whether the respondent in those proceedings will be unduly prejudiced if the application were to be granted. See *Leo Sila Mutiso v Helen Wangari Mwangi*, Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231.
9. 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. The Court would of course also consider the overriding objective spelt out in Sections 3A and 3B of the *Appellate Jurisdiction Act*.
10. 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.”

11. Regarding the length of the delay, 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.”

12. In the instant case, the applicant has explained his desire to appeal which was unfortunately thwarted by the misfortune of his house burning down sending him into depression. That illness can be a ground for extension of time to lodge an appeal was appreciated by this Court in Crispinus Makokha Maloba v Okinyo Nawiri, Civil Application No. Nai. 31 of 1999.

13. I am therefore satisfied that the reason given for the delay is in the circumstances of this case justifiable. On the issue of prejudice, the respondent’s position is that this application is an afterthought aimed at keeping the appellant from its rightful judgment. However, as appreciated by Waki, JA, while citing Grindlays Bank International (K) & Another v George Barbour, Civil Application No. Nai. 257 of 1995 and Gichuhi Kimira v Samuel Ngunu Kimotho & Another, Civil Application No. Nai. 243 of 1995 in Janet Ngendo Kamau v Mary Wangari Mwangi, Civil Application No. Nai. 338 of 2002:

“Unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court’s discretion, the Court should in so far as it may be reasonable prefer, in the wider interest of justice, to have a case decided on its merits... The consideration that one case should not hang over the heads of parties indefinitely must be weighed against the wider interests of justice, namely that where possible cases must be brought to a close after a hearing on the merits.”

14. It is now appreciated that the broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. In Chemwolo and Another v Kubende [1986] KLR 492; [1986-1989] EA 74, it was held that:

“Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs since the Courts exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

15. Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure.



16. In the circumstances of this case, I find that this is a just and proper case to exercise discretion in favour of the applicant. I accordingly allow the Notice of Motion dated 20th December, 2024, and extend the time for filing the record of appeal with a period of 30 days.

17. No order as to costs

18. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF MAY, 2025.

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

