Nkoimo (Suing as the Legal Representative of the Estate of Stanley Lemoiyo Nkoimo - Deceased) ((Suing as the Legal Representative of the Estate of Stanley Lemoiyo Nkoimo - Deceased)) v Asanyo & 4 others (Civil Application E005 of 2024) [2025] KECA 832 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KECA 832 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E005 OF 2024

GV ODUNGA, JA

MAY 15, 2025

BETWEEN

ANGELINE NKOIMO ..... APPLICANT

(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF STANLEY LEMOIYO NKOIMO - DECEASED)

AND

GEOFFREY MAKANA ASANYO ..... 1ST RESPONDENT

VINCENT KANTEET KAPEEN (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN LEMUTA NAIGURAN - DECEASED) ..... 2ND RESPONDENT

INTONA INVESTMENTS COMPANY LIMITED....3RD RESPONDENT

DISTRICT LAND REGISTRAR TRANSMARA ..... 3RD RESPONDENT

DISTRICT LAND REGISTRAR TRANSMARA ..... 4TH RESPONDENT

THE CHAIRMAN, TRANSMARA LAND CONTROL BOARD .... 5TH RESPONDENT

(Being an application for extension of time to file a reference against the decision of a single judge (G.W.N. Macharia, JA) delivered on 12th April, 2024 from the ruling and order of the Environment and Land Court at Kilgoris (Washe, J) dated 19th December, 2022 in ELC Case No. E005 of 2022)

RULING

1. On 12th April 2024, a single Judge of this Court (G.W. Ngenye- Macharia, JA) delivered a ruling in this matter by which the learned Judge dismissed the applicant's Notice of Motion dated 19th January

2024. That motion sought extension of time for filing and serving the Memorandum and Record of Appeal against the ruling and order made on 19th December 2022 in Kilgoris ELC Case No. E005 of 2022. The motion also sought that the Memorandum and Record of Appeal annexed thereto be deemed as duly filed as well as a provision for the costs of the application.

2. Before me is the applicant's Notice of Motion dated 15th October 2024 brought under Rule 4 and 57(1) of this Court's Rules seeking orders that this Court extends time to file a reference against the said ruling of the single Judge. The application is brought pursuant to rule 57(1) (b) of this Court's Rules. Consequent upon the extension of time, it is sought that the letter to the Registrar be deemed as properly on record.

3. The Application is based on the grounds that: following the instructions given to the applicant's erstwhile advocates, M/s Tuya Kariuki & Co. Advocates, a notice of appeal was duly filed on 4th January 2023 pursuant to which injunctive orders were obtained; that the applicant was informed by her said advocates that an appeal had been filed; that it however transpired that the said advocates were late in filing the appeal and had sought for extension of time to file the appeal; that being unhappy with the manner in which the matter was being handled, the applicant instructed the firm of Gathenji & Co Advocates to take over the conduct of the matter; that it was only upon the perusal of the record that the applicant's new advocates informed her that the application for extension of time had been dismissed on 12th April 2024; that the fact of dismissal of the said application was discovered on 30th September 2024 after the time prescribed for making a reference to the full bench had lapsed; that her previous advocates never informed her of the dismissal of the application; the delay in approaching this Court has not been deliberate but has been as a result of fault of her former advocates; the Applicant is an innocent party suffering due to the mistake of her former advocates; and that the applicant will be highly prejudiced if not granted her day in court.

4. The 1st and 3rd respondents opposed the application by a replying affidavit sworn by the 1st respondent on 31st January 2025 wherein it was averred: that the applicant's failure to file the appeal within the permitted statutory timelines prompted them to file an application dated 7th November 2023 seeking the court to deem the Notice of Appeal dated 4th January 2023 as withdrawn under Rule 85 of this Court's rules; that it is only after filing the application that the Applicant filed the application dated 15th January 2024 seeking leave of the court to file the appeal out of time, which was subsequently dismissed by the learned Judge; that the applicant has simply blamed her advocate without telling the court why the delay should be excused; the applicant has not shown the Court what steps she took between April 2024 when the ruling was delivered and October 2024 when she moved this Court, a period of more than 6 months; that the respondents stand to be prejudiced as they have been treated to unending litigation by the applicant; and that the application should be dismissed with costs.

5. In her submissions, the applicant relied on the case Kibunja v *Kariuki & another (Civil Application 308 of 2019*) [2021] KECA 354 (KLR), where the Court found the reason for the delay well explained and therefore excusable as the applicant who trusted the good workmanship of her advocate in the processes undertaken to progress her intended appellate process had no policing power over her advocate in the discharge of those functions. The Applicant urges this Court to exercise its discretion judiciously and allow the application.

6. On their part the 1st and 3rd respondents relied on the case of Kenya Power & Lighting Co. Limited v Noorlands Limited [2021] KLR to highlight the fact that the applicant had not wholly explained the period for the delay in bringing this application and the case of Fuad Mahmoud Mohamed v Diamond Trust Bank Kenya Limited & Another [2025] eKLR for the position that the client ought to show the diligence in pursuing the case.

7. I have considered the application, affidavit in support of and in opposition to the application, the submissions and authorities relied upon.

8. Rule 57(1) of this Court's Rules provides that:

    1. Where under the proviso to section 5 of the Act, any person, being dissatisfied with the decision of a single judge—

    a. in a criminal matter, wishes to have his or her application determined by the Court; or

    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.

9. There is no doubt that the Court has the power to extend the time prescribed under rule 57(1) aforesaid since rule 4 of the Court's Rules provides that:

    a. 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

    b. 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.

10. It follows that the principles applicable to extension of time in respect to the other provisions of the Rules apply with equal force to the present application.

11. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the Court of Appeal Rules are well settled. 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. To guide the Court on what to consider when exercising the same discretion, the case law has established certain considerations that the Court would look into. These 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.

12. 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*.

13. Those principles were restated by Waki, JA in Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR as follows:

    (a) _____(a) "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."

14. On its part, the Supreme Court of Kenya in Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, Supreme Court Application No. 16 of 2014 [2014] eKLR while expressing itself on the matter opined that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondent if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

15. 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:

    (a) 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."

16. In the instant case, the applicant's application seeking extension of time was dismissed on 12th April 2024. According to her, she was not aware of the dismissal until she instructed her present advocates to take over the matter and it was not until 30th September 2024 that it came to her knowledge that the application had been dismissed. Of course, by then the time prescribed for making a reference to the full bench had run its full course. The applicant has explained the delay between 12th April 2024 and 30th September 2024 on the fact that her advocates did not disclose to her the fact of dismissal of the application. Before that she had been in touch with her said advocates who informed her that the appeal had been filed and even gave her the number of the appeal. On her own initiative she disappeared that what had been filed was, in fact, the application for extension of time. She then took the step of changing her advocates but by then it was too late as the horses had bolted by the fact that the application had been dismissed.

17. The present application was made two weeks after the applicant's discovery of the dismissal of the earlier application. That in my view is not an inordinate delay. The dealy between 12th April 2024 and 30th September 224, though inordinate, is explained on the fact that despite the applicant's efforts, the advocate failed to disclose to her the true position of her matter. This Court, while citing Murai v Wainaina (No. 4) [1982] KLR 38, in Shital Bimal Shah & 2 Others v Akiba Bank Limited Civil Appeal (Application) No. 159 of 2005 [2006] 2 EA 323 held that:

    (a) "Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more

readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate."

18. Ringera, AJA, as he then was in Githiaka v Nduriri, [2004] 2 KLR 67 held that:

> (a) Under rule 4 of the Court of Appeal Rules the court is perfectly invested with a clear and unfettered discretion to extend the time limited by the Rules or its decisions and such a discretion like all judicial discretions, is to be exercised judicially, that is to say on sound reason other than whim, caprice, or sympathy. In exercising the discretion the Court's primary concern should be to do justice to the parties and in considering which way the scales of justice tilt, the Court should among other things consider the length of the delay in lodging the notice and record of appeal and, where applicable, the delay in lodging the application for extension of time, as well as the explanation therefore; whether or not the intended appeal is arguable; and the public importance, if any, of the matter, and generally the requirements of the interest of justice in the case... Oversight has been defined to mean the omission or failure to see or notice. It is inadvertence. Whilst ignorance may not be equated to a mistake, it may and normally does arise through negligence."

19. Appreciating that oversight on the part of counsel may warrant extension of time, Shah, JA when faced with a similar situation in Michael Njoroge B. & Others v Vincent Kimani Chege Civil Application No. Nai. 217 of 1997 held that advocates may have many things to deal with leading as a result of which an oversight may lead to delay in rectifying mistakes and that such mistakes should not be visited on the client and that the Court of Appeal being the last court ought to give a litigant a chance to be heard on merits. In arriving at that decision, the learned Judge appreciated that where rules of procedure should not be flouted with impunity since they serve specific purposes, are good servants but bad masters but should not be flouted with impunity as all rules have specific purposes but and should not drive a litigant out of judgement seat if all other rules allow such a litigant to come back to the Court. In his view, though professional standards must be maintained, if an error is remediable, the client ought to be heard.

20. I am therefore satisfied that the reason given for the delay is in the circumstances of this case justifiable. Regarding the prospects of success of the reference, the consideration of this issue, however, does not apply in all cases. Dealing with that consideration, this Court in Mwangi v Kenya Airways Ltd [2003] KLR 486, where the court stated:

> a. It is clear that the third issue for consideration, namely, the chances of the appeal succeeding if the application is granted is merely stated as something for a "possible" consideration, not that it must be considered. This is understandable because the "the chances of an appeal succeeding" is normally dealt with by this Court under the rubric of "an arguable appeal" or "an appeal which is not frivolous" and the full court normally considers that issue under rule 5(2)(b) of the rules when the question is whether or not there should be a stay of execution, an injunction and so on. The requirement for the consideration of whether an intended or proposed appeal has any chances of success appears to have its origins in the case of Bhaichan Ghagwanji Shah v D

Jamnadas & Co. Ltd [1959] EA 838 where Sir Owen Corrie, Ag. JA is recorded as saying at pg. 840 Letter I to pg 841 at Letter A:

b. ..... It is thus essential in my view, that an applicant for an extension of time under r 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice. In the applicant's affidavit of September 19 last no indication whatever of the nature of the case is included and I hold that if that affidavit stood alone, not sufficient ground would have been shown for granting application."

21. The court then observed that the Shah case (ante) was decided under rule 9 of the former rules which required that "sufficient cause" be shown before extension of time could be obtained. It then concluded: -

(a) "It must not be forgotten that even the recent case of Mutiso did not lay it down that the single judge is obliged to consider the issue of the chances of an appeal succeeding; the case only put that issue down as one for possible consideration."

22. In Ramesh Shah v Kenbox Industries Limited [2007] eKLR, this Court debunked the myth surrounding the arguability of the intended appeal in applications of this nature by observing that:

> The issue therefore arises as to whether the arguability of an intended appeal would outweigh all other relevant factors open for consideration in applications under rule 4. For our part we think, that except in very exceptional and limited circumstances, that proposition is not acceptable and is not borne out by authority. Indeed it is open to abuse. At its absurd best, it would mean that a party who for no or no sufficient reason sleeps over his right of appeal for ages, may one fine morning wake up and persuade the court that he had an arguable appeal after all and ought therefore to be allowed to appeal despite the delay."

23. While in certain borderline cases the Court may consider the chances of success of the intended action, in my view, that condition plays a very peripheral role where the other conditions have been fulfilled particularly where the applicant has a right to take up the proceedings in question. In this case where what is sought is extension of time to file a reference, it would be inadvisable to go into the prospects of the success of the reference.

24. 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:

(a) 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."

25. 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:

    (a) 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."

26. 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. In this case, I did not hear the respondent contend that if the application is allowed, they will suffer such prejudice that cannot be compensated by an award of costs.

27. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See Waljee's (Uganda) Ltd v. Ramji Punjabhai Bugerere Tea Estates Ltd, [1971] EA 188.

28. 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 15th October 2024 and extend the time for filing the reference to the full bench from the decision made on 12th April 2024. Let the reference be filed within 7 days from the date of this ruling

29. The costs of this application are awarded to the respondent.

30. 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