



REPUBLIC OF KENYA



**Ndiritu v Kinuthia (Civil Application E356 of 2024)
[2025] KECA 781 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 781 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E356 OF 2024
M NGUGI, FA OCHIENG & AO MUCHELULE, JJA
MAY 9, 2025**

BETWEEN

JOHN MALOGO NDIRITU APPLICANT

AND

MOSES KINUTHIA RESPONDENT

(An application for extension of time and leave to file an appeal out of time from the ruling of the Commercial and Admiralty Division of the High Court of Kenya at Nairobi (J.W.W. Mong'are, J.) delivered on 13th May 2024 in HC. COMM No. E456 of 2022)

RULING

1. Before us is a reference brought by the applicant, under Rule 57(1)(b) of the Court of Appeal Rules, seeking to vary or reverse the decision of a single judge dated 8th November 2024. The learned judge had declined the applicant's application dated 9th July 2024, seeking an extension of time to file a notice of appeal against the ruling of the High Court (Mong'are, J) dated 13th May 2024 in Milimani HCCOMM No. E456 of 2022.
2. The underlying application sought an extension of time to appeal the High Court's ruling, which allowed summary judgment in favour of the respondent for Kshs. 104,000,000. The applicant's application for the consolidation of suits and for leave to file a defence out of time was also dismissed.
3. In the ruling, the learned judge outlined the principles for exercising discretion under Rule 4 of the Court of Appeal Rules to extend time, noting that the court has wide and unfettered discretion, to be exercised judiciously. The learned judge referred to the case of *Mwangi v Kenya Airways Limited* [2003] KLR 486 and cited the guidelines set out in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application No. Nai 255 of 1997 (unreported). The guidelines include considering: the length of the delay; the reason for the delay; the (possible) chances of the appeal succeeding; and the degree of prejudice to the respondent if the application is granted.



4. Applying these principles, the learned judge found the delay of 56 days to be "certainly inordinate" since the ruling was delivered on 13th May 2024, and the motion was dated 9th July 2024. Regarding the reasons for the delay, the learned judge held that the explanation (innocent assumption of an interlocutory judgment by the applicant's counsel) was not plausible or reasonable. The judge pointed out that the applicant had been ably represented by counsel who was present when the ruling was delivered.
5. On the possibility of the intended appeal succeeding, the learned judge held that it was not the place of a single judge to determine the merits and made no further comments. However, the learned judge noted that the applicant had been afforded an opportunity to file a defence, but he instead opted to file an application for consolidation.
6. Regarding prejudice, the learned judge was satisfied that the respondent would suffer a high degree of prejudice if the motion was allowed, as the applicant had been indebted to the respondent for a long time. Given the circumstances, the learned judge concluded that the applicant had not demonstrated and satisfied the existence of the principles for the court to exercise its discretion under Rule 4 to extend time.
7. Consequently, the learned judge dismissed the applicant's motion in its entirety with costs to the respondent.
8. When the application came up for hearing on 11th December 2024, Mr. Mbichire, learned counsel, appeared for the applicant, whereas Mr. Kiplang'at, learned counsel, appeared for the respondent. Counsel relied on their respective written submissions, which they exhaustively highlighted.
9. Mr. Mbichire indicated that they had filed submissions dated 2nd December 2024 for the reference, and also wished to rely on submissions filed before the single judge on 6th September 2024.
10. Counsel specifically referred to paragraphs 18, 19, and 20 of the impugned ruling, where the learned judge had declined the application for extension of time, and leave to appeal out of time due to an inadequately explained period of delay and the implausibility of the delay in filing the appeal.
11. Counsel addressed the 56-day delay between the delivery of the High Court ruling (being the subject of the intended appeal) on 13th May 2024, and the filing of the application. He submitted that this delay was explained to be because the applicant had filed an application to set aside the summary judgment in the High Court on 14th May 2024, which was one day after the ruling. The High Court had scheduled the hearing of this application on 8th July 2024.
12. Counsel further submitted that the 56 days were spent pursuing the application to set aside the judgment in the High Court, under Order 36, Rule 10, because the judgment was issued under Order 36, Rule 29. He was of the view that the applicant was diligent in pursuing the appeal, but only realized that he needed to appeal when the High Court declined to set aside its judgment. This was so because the application for extension of time and leave to appeal was filed on 9th July 2024, one day after the High Court's decision.
13. Counsel was of the view that the learned judge failed to consider that the applicant was never heard on their defence. He informed the court about a pending, part-heard suit in the High Court (E813 of 2020) between the same parties, concerning the same issue of a breached deed of settlement.
14. Counsel submitted that the applicant had unsuccessfully applied for the consolidation of the two suits to avoid potentially conflicting judgments. He was of the view that the applicant faces significant prejudice due to the summary judgment, despite allegedly having paid the principal loan amount, and



- the only issue in dispute being the interest. He submitted that denying the applicant a chance to defend the suit would result in double payment.
15. Counsel was of the view that the learned judge failed to appreciate the explanation for the delay and the significant prejudice the applicant would suffer by being denied a hearing. He informed the court that execution proceedings were ongoing and that they had received a ruling on the bill of costs, awarding Mr. Kiplang'at Kshs. 2,400,000 as legal fees.
 16. Counsel submitted that he could not file an application for stay of execution without leave to appeal being granted, leaving the applicant exposed and the current application at risk of being rendered nugatory if execution proceeds. He reiterated that the appeal only sought the right to be heard in the superior court.
 17. Counsel relied on several authorities, including *Muchugi Kiragu v James Muchugi Kiragu & Another* [1998] eKLR, *Sokoro Savings and Credit Co-operative Society Ltd* [2023] KECA 381 (KLR) and *Peter Kimani Kairu v Anna Marie Cassiende & Another* [2017] eKLR to buttress his submissions.
 18. In admitting that a mistake was made by the advocates in not filing the appeal in good time, counsel pleaded with the court not to attribute this mistake to the applicant, who he claimed has a good defence. He urged the court to review the judgment.
 19. Learned counsel, Mr. Kiplagat opposing the application, urged the court to resist the temptation to delve into the merits of the appeal or conduct a fresh determination of the extension of time application, as it was a reference, and to restrict itself to whether the single judge exercised her discretion judiciously.
 20. Counsel referred to the case of *Margaret Muthoni Muchinga v Esther Kamori Gichobi* [2010] eKLR, when outlining the factors for determining whether a single judge's discretion was exercised judiciously as: whether the judge considered irrelevant factors; failed to consider relevant factors; applied incorrect principles; or if the decision was plainly erroneous.
 21. Counsel submitted that the impugned ruling explicitly set out the ingredients for seeking an extension of time: the length of delay; the reason for delay; the arguability of the intended appeal, which the single judge did not consider, believing it was for a full bench; and the prejudice to the respondent. He submitted that the judge properly identified and analyzed these principles, leading to the dismissal of the application. Counsel pointed out that the court should only interfere if the ruling offended judicial logic, not merely if the court would have reached a different conclusion.
 22. On the length of delay, counsel acknowledged the 56 days from the summary judgment to the application for extension but submitted that the learned judge correctly found this to be inordinate. He cited the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, where the court stated that the law does not set a minimum or maximum delay period, provided it is sufficiently explained. He pointed out that the summary judgment ruling was delivered in the presence of the applicant's counsel, who was also present for the dismissal of the consolidation application, yet no notice of appeal was filed for either decision within the stipulated time.
 23. Counsel submitted that the applicant's main explanation for the delay, a mistaken belief that the summary judgment was interlocutory, was untruthful. He referred to the case of *Gituma v Njuka* [2024] KECA 135 (KLR), which emphasized the need for candor in explaining delays. He submitted that the applicant's grounds of opposition to the summary judgment application indicated an understanding of its finality and potential for execution.



24. Counsel pointed out that the explicitness of the summary judgment ruling left no room for confusion. He further pointed out the failure by the applicant to appeal the dismissal of the consolidation application on time, stating that no explanation was offered. He was of the view that the learned judge correctly found no plausible explanation for the delay.
25. Regarding prejudice, counsel submitted that the ongoing execution was a natural consequence of a proper judgment and should not influence the court's discretion. He submitted that the applicant had the opportunity to challenge the summary judgment application through filed grounds of opposition and submissions. He explained that the dispute arose from a dishonored deed of settlement, leading to the summary judgment application based on the agreed payment terms. He was of the view that the only prejudice would be to the respondent in delaying the enjoyment of the judgment.
26. On the arguability of the intended appeal, counsel noted that the learned judge did not consider it. However, he directed the court to paragraphs 14-16 of their submissions, arguing that the intended appeal lacked merit because there was no draft defence or demonstration of arguable points raised at any time before the summary judgment. He concluded by urging the court to dismiss the reference with costs to the respondent.
27. In his brief reply, Mr. Mbichire reiterated the existence of the pending suit in the High Court on the same issue of breach of the deed of settlement, which Mr. Kiplang'at allegedly failed to mention and which could lead to conflicting judgments. He emphasized that both parties were before the High Court during the 56-day period in question, which Mr. Kiplang'at had not denied.
28. Counsel submitted that while the superior court considered the grounds of opposition, its judgment explicitly stated that the summary judgment was granted due to the failure to attach a draft defence. He stated that the applicant had attempted to attach a defence with available evidence on the following day in their application to set aside the judgment, but this was declined. He pleaded for a chance to defend the suit on its merits, stating that the failure to file a draft defence initially was a mistake.
29. We have carefully considered the submissions by both parties and the ruling of the single judge. Our remit in a reference under Rule 57(1)(b) is not to rehear the application for extension of time but to determine whether the single judge properly exercised her wide discretion. We must consider if the single judge considered irrelevant factors; failed to consider relevant factors; misapprehended the law or facts, or if the decision was plainly wrong.
30. Rule 57 of the *Court of Appeal Rules* 2010 which deals with rescinding of orders (now rule 59 of the Court of Appeal Rules, 2022) states as follows:
 1. Any order made on an application heard by a single judge may be varied or rescinded by that judge or in the absence of that judge, by any other judge or by the court on the application of any person affected thereby, if –
 - a. The order was one extending the time for doing any act, otherwise than to a specific date; or
 - b. The order was one permitting the doing of some act without specifying the date by which the act was to be done; and the person on whose application the order was made has failed to show reasonable diligence in the matter.
 2. An order made on an application to the court may be varied or rescinded in terms of sub-rule (1) by the Court.



31. In the case of *Kenya Co-operative Creameries Ltd v Fims Ltd* [2006] eKLR, this Court held that:

“In hearing matters brought under rule 4 of this Court’s Rules, the single Judge exercises unfettered discretionary powers which in law must be exercised upon reason and not capriciously. Once the single Judge has so exercised the same discretion, and made a decision on the matter, the full bench will be very slow in interfering with the same exercise of discretion by a single Judge unless it is demonstrated that the single Judge, in the exercise of the same discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice (see the case of *Mbogo v Shah* [1968] EA 93 at page 96).”

32. The single judge considered the length of the delay (56 days) and found it to be inordinate. The single judge also considered the reasons for the delay, specifically the argument of a mistaken belief by counsel, and found this explanation implausible. This Court finds no basis to fault the single judge’s assessment on this ground, especially considering the applicant was represented by counsel who was present when the ruling on summary judgment was delivered. The fact that the applicant pursued an application to set aside the summary judgment in the High Court does not automatically render the delay in filing a notice of appeal excusable, particularly given the nature of a summary judgment.

33. While the single judge refrained from determining the merits of the intended appeal, this Court notes the respondent’s arguments that the appeal was not arguable as no new defence was presented. The primary ground of appeal appears to be the refusal of consolidation and the denial of leave to file a defence out of time, matters that were part of the High Court’s ruling.

34. The single judge also considered the prejudice to the respondent and was satisfied that allowing the motion would cause a high degree of prejudice due to the applicant’s long-standing indebtedness.

35. Applying the principles for interfering with a single judge’s discretion, this Court finds that the applicant has not demonstrated that the single judge took into account any irrelevant factor; failed to take into account any relevant factor; misapprehended any point of law or fact; or that her decision was plainly wrong. The single judge considered the key factors under Rule 4 and reached a decision based on her assessment

of those factors. This Court should not interfere simply because it might have reached a different conclusion.

36. In the premises, the reference dated December 2, 2024, challenging the ruling of the Honourable Lady Justice F. Sichale, JA. delivered on November 8, 2024, is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2025.

MUMBI NGUGI

JUDGE OF APPEAL

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F. OCHIENG

JUDGE OF APPEAL

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A. O. MUCHELULE

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

