



Abdi v National Bank of Kenya Limited; Abdi (Interested Party) (Civil Application E178 of 2025) [2025] KECA 1460 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KECA 1460 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E178 OF 2025
J MOHAMMED, JA
JULY 31, 2025**

BETWEEN

MARIAM ABDI APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

AND

ALI MOHAMED ABDI INTERESTED PARTY

(An application for extension of time to file the record of appeal against the judgment of the High Court at Milimani (F. Tuiyott J. (as he then was)) delivered by D. S. Majanja, J. dated 28th September, 2022 in HCCC No. 86 of 2003 (Consolidated with HCCC No. 1466 of 2001)

RULING

1. Mariam Abdi (the applicant), has vide a notice of motion dated 20th March 2025 invoked the jurisdiction of this Court pursuant to the provisions of Rule 4 of the *Court of Appeal Rules* (this Court's Rules) seeking the following orders:
 - a. Spent
 - b. That this Court be pleased to extend the time within which the applicant may file the record of appeal in this matter
 - c. That costs of this application be in the cause
 - d. That the Court be pleased to grant any other relief it deems fit National Bank of Kenya Limited is the respondent while Ali Mohamed Abdi is named as an Interested Party herein although he is indicated as the 1st appellant as per the Notice of Appeal dated 6th October 2022.



2. The motion is supported on the grounds on the face of the motion and an affidavit of learned counsel Stephen Owino who has the conduct of the matter on behalf of the applicant. He deposed, inter alia, that: the applicant is aggrieved with the decision of F. Tuiyott J. (as he then was) delivered on his behalf by D.S. Majanja J. on 28th September, 2022 in Milimani HCCC No. 85 of 2003 as consolidated with Milimani HCCC No. 1466 of 2001 and filed a Notice of Appeal dated 6th October, 2022 signifying her intention to appeal against the said decision; that after delivery of judgment, the applicant instructed the said firm to take over the matter from D.B. Wati & Co. Advocates and proceed with the appeal on her behalf; that a former associate of the firm, Mr. Absalom Osodo, was entrusted with the task of preparing and filing the Memorandum of Appeal and Record of Appeal, which he purportedly completed and dated 27th February, 2024; the requisite filing fees were sent to Mr. Osodo via Mpesa for filing of the record and Mr. Osodo subsequently confirmed that the case number COACA/E896/2024 had been assigned to the appeal. That after Mr. Osodo's services were terminated and during a routine review of the firm's CTS portal in January, 2025, it was uncovered that the appeal was not listed in the system; that a court inquiry revealed that Civil Appeal No. E896 of 2024 does not exist and that no appeal had been filed in respect of the applicant. Further that Mr. Osodo's criminal conduct of stealing by servant was immediately reported to Central Police Station and O.B No. 28 of 28/2/2025 was issued; that as a result of these unfortunate developments, the applicant has now approached the Court seeking the exercise of its discretion to allow the filing and service of the record of appeal out of time, noting that the application has been brought without undue delay and in timely manner upon discovery of the fraud. That the criminal and fraudulent conduct of an individual lawyer should not be visited upon the applicant, who acted in good faith at all times in pursuit of her right to appeal; that granting leave to file the appeal out of time serves the interest of fairness and equity; that the appeal raises substantial and arguable legal issues with high chances of success warranting its consideration; that it would be in the interest of justice to extend the time for filing the appeal, as such an extension would enable the applicant to effectively pursue her constitutional and statutory rights of appeal; that extending time will not cause undue hardship or prejudice to the respondent as they will still have an opportunity to respond to the appeal; that the application is made solely to uphold the applicant's right to appeal in accordance with the law.
3. The application is opposed by the respondent through a replying affidavit sworn by learned counsel Mutua Molo for the respondent. He deposed that the application is incompetent and cannot be granted for reasons that it only seeks extension of time to file the record of appeal yet by virtue of the provision of rule 85 of this Courts Rules, the Notice of Appeal for the intended appeal is deemed to have been withdrawn and therefore no longer operative; and that in so far as the applicant has not sought for extension of time within which to lodge and serve a notice of appeal, the Court would be acting in vain if it were to grant the application herein. Further, that the application and supporting affidavit do not disclose any reasonable explanation for failure and/or delay in filing a record of appeal as the omission is attributed to alleged misconduct on the part of Absalom Osodo as no material is placed on record to confirm the allegation that the said Osodo was at the material time associated with the law firm acting for the applicant and if so when such association ceased; no invoice for payment of the alleged filing fees has been exhibited to confirm the basis upon which any unspecified money could have been transferred to the said Mr. Osodo as alleged to be applied towards payment of filing fees; that the evidence of transfer of the fees to the said Mr. Osodo is not exhibited; that the alleged report to the police do not have any bearing or probative value with regard to the alleged misconduct there being no statement of complaint or extract of the Occurrence Book. Further that the applicant has not laid any basis upon which the Court's discretion to extend time as sought would be exercisable in favour of the applicant. Counsel sought for the application to be dismissed with costs for want of merits.



4. The applicant filed her written submissions dated 14th April 2025 reiterating the grounds in support of the application and submitted that the delay in filing the record of appeal was not attributable to any fault, negligence or omission on the part of the applicant. That it is a well- established principle of law that mistakes or error committed by an advocate should not be visited upon an innocent litigant citing the case of *Philip Keipo Chemwolo & Another v Augustine Kubende* (1986) KECA 87 (KLR). The applicant’s counsel submitted further that the intended appeal raises weighty and arguable issues of law and fact with high chances of success which necessitate due consideration by this Court. That the circumstances surrounding the delay have been sufficiently explained demonstrating that it was neither inordinate nor due to inaction or laxity and that remedial measures including the instant application were undertaken. Counsel urged that the applicant should not be unjustly barred from exercising her statutory right to be heard on appeal citing the case of *Mbaki v Macharia & Another* (2005) 2 EA 206 at page 210 that:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

5. The applicant’s counsel summed up his arguments that no prejudice will be occasioned to the respondent should the Court grant the leave sought as the respondent will have an opportunity to respond. That conversely, the applicant stands to suffer irreparable financial loss should she be deprived of the opportunity to challenge the decision of the lower court.
6. On the other hand, counsel for the respondent filed his submissions dated 16th May, 2025 reiterating the contents of his replying affidavit and arguing that this Court has over the years recognized that the parameters to consider in arriving at a decision whether or not to extend time are not exhaustive and the Court is bound to take into account and consider such factors as would be relevant in the circumstance of each case citing *Gerald Kitbu Muchanje v Catherine Muthoni Ngare & Another* (2020) KECA 511(klr). That from the foregoing, the factors relevant in this matter are the explanation of the delay, the merits of the intended appeal and the potential prejudice to the respondent. Counsel submitted that the notice of appeal is not operative by virtue of Rule 85 of this Court’s rules, the explanation given for the delay is misleading and not plausible; that no *prima facie* basis can be made by this Court as to the possible chances of success of the intended appeal and that it will be prejudicial to the respondent if the application is allowed as it will lead to unnecessary costs yet the ultimate fate of the appeal is discernible. That the applicant has not made out a case for this Court to exercise its discretion in her favour and extend time as sought.

Determination

7. The discretion granted to this Court by Rule 4 of this *Court’s Rules* when considering an application for extension of time must be exercised judiciously. The party seeking extension of time must have a good explanation for the delay, demonstrate that the delay is not inordinate and that the respondent will not suffer prejudice if an extension of time is granted and, possibly, that the intended appeal has good prospects of success. See *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR).
8. The institution of an appeal is provided for under rule 82 of the 2010 rules (now *rule* 84):-

“84. Institution of appeals



1. Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
 - a. a memorandum of appeal, in quadruplicate;
 - b. the record of appeal, in quadruplicate;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal.

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such times may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

An appellant shall not be entitled to rely on the proviso to sub- rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction, outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

9. The impugned judgment was delivered on 28th September, 2022 and a notice of appeal duly lodged in the High Court on 6th October, 2022. The appeal was required to be filed sixty (60) days of the latter date and pursuant to the proviso to Rule 84, the applicant would benefit from the freeze placed on the time required for preparation and delivery of proceedings in computing the time within which the appeal ought to be instituted.
10. The certificate of delay attached by the applicant for purposes of working out the period to be excluded in computing the time within which the appeal ought to have been instituted is dated 26th February 2024. The certificate indicates that the letter bespeaking proceedings was lodged on 15th February, 2023. The certificate of delay states that the proceedings were ready on 26th February, 2024. As such the record ought to have been filed by 26th April 2024. The applicant states that the record of appeal was ready and purportedly filed as at 27th February, 2024 and was informed that her appeal was assigned number COACA/E896/2024.
11. The applicant’s counsel on record deposed that in January 2025 when doing routine review, he found that the applicant’s appeal was not listed in the firm’s CTS portal. Upon enquiry at the Court’s registry,



he was informed that no such appeal was filed in respect of the applicant. One of the remedial measures taken was then to file the instant application dated 20th March 2025.

12. As submitted by the respondent, it would have been prudent for the applicant to annex a copy of the invoice generated that prompted the applicant's counsel on record to release the filing fees to his associate, Mr. Osodo but none was availed.
13. Counsel for the applicant stated that he discovered the alleged fraud of his associate advocate during a routine review of their firm's CTS portal. From the record, the applicant did not make an enquiry as to progress of her appeal nor did the advocate on record update his client on the matter. The alleged fraud was allegedly discovered in January 2025 and the instant application was filed on 20th March 2025, approximately more than one month later.
14. The applicant and his counsel on record have indeed explained the reasons for delay as caused by Absalom Osodo, advocate. The applicant and the counsel on record, had a duty to follow up on the matter timeously. In *Bains Construction Co. Ltd. -v- John Mzare Ogowo* [2011] eKLR the Court observed:

“It is to some extent true to say mistakes of counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences”.
15. Further, in *Habo Agencies Limited -v- Wilfred Odhiambo Musingo* [2015] eKLR, it was thus stated:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”
16. Considering the success of the intended appeal, the applicant's contention is that the appeal raises weighty and arguable issues of law and fact with high chances of success. However, I am guided by the sentiments of this Court in *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR where this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”
17. As regards prejudice, the respondent was not served with a record of appeal for a period of over 2 years from the date of the impugned judgment on 28th September 2022 and no communication was done to them until the filing of the instant application. In all fairness, this Court finds that the respondent stands to suffer prejudice if the application is allowed as the delay is inordinate and is not well explained.
18. In the circumstances, I find that the applicant has not laid any proper basis for this Court to exercise its discretion in her favour. I, therefore, dismiss the notice of motion dated 20th March, 2025 with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2025

JAMILA MOHAMMED



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

