



**LWK v SKG (Civil Application E045 of 2025) [2025] KECA 1268 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1268 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E045 OF 2025  
A ALI-ARONI, JA  
JULY 10, 2025**

**BETWEEN**

**LWK ..... APPLICANT**

**AND**

**SKG ..... RESPONDENT**

*(An application seeking an extension of time to file an appeal against the Judgment of the High Court of Kenya at Nyeri (Kizito Magare, J.) delivered on 26th September 2024 in Matrimonial Cause No. E003 of 2021 (O.S))*

**RULING**

1. Before the court is an application by way of a notice of motion dated 20<sup>th</sup> March 2025, brought under Sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#), Rule 4 of the Court of Appeal Rules 2022, and Section 10 of the [Judicature Act](#), seeking leave to file an appeal out of time; 60 days within which to file the notice of appeal, the memorandum of appeal and the record of appeal; and for stay of execution of the impugned judgment.
2. The application is predicated on the grounds stated in the motion, and rehashed in the affidavit of the applicant, LWK, sworn on 20<sup>th</sup> March 2025, where she deposed that; judgment was delivered on 26<sup>th</sup> September 2024; she was unaware of the judgment at the time it was delivered because she was ill and her advocate could not reach her; her illness was accompanied by memory loss, chronic depression, and which led to an ongoing mental instability; she became aware of the judgement several months after it had been delivered as her health condition hindered her ability to coordinate effectively with her counsel regarding the appeal process, resulting in her counsel not receiving instructions to file an appeal, which was coupled with financial constraints; she is dissatisfied with the impugned judgement; she has now retained a counsel to assist with the appeal; she has an arguable appeal; and is likely to suffer substantial loss.



3. In oppositions the respondent, SKG filed a replying affidavit, sworn on 22<sup>nd</sup> April 2025, stating that; the applicant's counsel was present when the judgment was read; that the notice of change of advocates dated 10<sup>th</sup> March 2025, is an attempt to shift blame on counsel; the application was filed after he sought to execute the orders issued by the High Court; the impugned judgement follows a divorce between the parties and division of matrimonial property cause the applicant initiated; there is no reason why the applicant cannot relocate to the portion of the property that was awarded to her; the delay of the execution of the judgment; the suit property currently has a tenant who is likely to be inconvenient; during the hearing, the applicant appeared to have a sharp memory; the issue of memory loss was never raised; the medical documents from March 2025 only indicate that she is diabetic, with no evidence supporting claims of memory loss; if the applicant is genuine, she should comply with court orders and move to her allotted portion of the property as directed by the court.
4. Learned counsel for the applicant filed submissions dated 14<sup>th</sup> April 2025 and a list of authorities. Counsel reiterated the averments in the supporting affidavit and submitted that the application has been filed promptly after receipt of a copy of the judgment. The time taken to apply is not unreasonable, especially considering the applicant's illness and the inadvertent delay in being informed of the judgment's delivery. He contended further, that the reasons for the delay have been adequately explained in the supporting affidavit and relied on the case of *Lecchini vs. Attorney General & Another (Civil Appeal (Application) E584 of 2021)* [2022] KECA 458 (KLR), to support his argument that the court should exercise its discretion in favour of the application as the reasons for delay have been sufficiently explained.
5. On the part of the respondent, his learned counsel filed submissions dated 1<sup>st</sup> July 2025. Counsel rehashed the contents of the replying affidavit and argued that the application is an afterthought based on false information. He submitted that following the judgment, the respondent requested the applicant to move into the property allocated to her by the court, in a letter dated 14<sup>th</sup> October 2024, to which the applicant replied in a letter dated 26<sup>th</sup> February 2024, acknowledging her awareness of the judgment and requesting additional time to vacate the property.
6. Further counsel highlighted that the divorce was granted in 2011, and the two senior parties have been involved in court proceedings since then. He asserted that the application lacks valid grounds and has been brought too late in the day.
7. The applicant has sought an extension of time, which is properly before me sitting as a single judge matter, alongside a prayer for stay of execution, which is a matter for hearing by a full bench and cannot be dealt with at this forum. In the interest of justice, I will proceed to deal with the matter properly before me and will not address the prayer for a stay of execution, as I lack the mandate to do so. Should the prayer for extension of time be successful, the applicant may then move for a full bench to consider a stay of execution.
8. Having considered the application, the affidavit in support, the replying affidavit, and the respective submissions, the issue to be determined is whether the applicant is deserving of the orders sought. Rule 4 of this Court's Rules grants the court unfettered discretion to extend the time limited by the Rules for doing any act authorised or required. In the case of *Leo Sila Mutiso vs. Helen Wangari Mwangi* [1999] 2 EA, this Court set out the principles to be applied in the exercise of this discretion as follows:

“ the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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.”

9. As the court has repeatedly stated, the above list is not by any means exhaustive. In the case of *Fakir Mohamed vs. Joseph Mugambi & 2 Others* [2005] eKLR, this Court expounded on the issue as follows:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of ‘sufficient reason’ was removed by amendment in 1985. As it 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...”

10. The court must also examine the peculiar circumstances of the case, bearing in mind the overriding objectives as outlined in Sections 3A and 3B of the *Appellate Jurisdiction Act*. In the case of *Boniface Njuguna Gakuru vs. Pau Njoroge Gakuru* [2010] KECA 219 (KLR), in an application for extension of time, the judge, in considering the peculiar circumstances of the case, stated:

“I have considered the factors which guide the exercise of this Court’s discretion under rule 4 – see *Leo Sila Mutiso vs Rose Hellen Wangari*, Civil Appeal No. 255 of 1997 (unreported). I have also considered the factors which assist in giving effect to the overriding objective as set out in the *Appellate Jurisdiction Act*. I have deliberately brought in this important consideration, because the 02 principle is the whole objective of the *Appellate Jurisdiction Act*, and therefore, the 02 principle is both substantive and procedural”.

11. The applicant has explained that the delay was caused by her failing health and financial constraints. The respondent has downplayed the illness and has stressed that the applicant only suffers from diabetes. The applicant exhibited a medical report that he equally faults. However, the court cannot disagree with it, firstly because there is no other expert report to controvert the contents of the applicant’s report, and secondly, both parties describe themselves as senior citizens; the fact that the respondent has not indicated any ill health on his part does not preclude their respective situations from being different.
12. The impugned judgment was delivered on the 26<sup>th</sup> September 2024, and the application subject of this ruling was filed on the 20<sup>th</sup> of March 2025; 7 months in between. The parties were husband and wife, but have since divorced, and the intended appeal arises from a division of matrimonial property cause. From the averments of the parties, execution has not taken place. And although the draft memorandum of appeal has not been annexed, from the averments of the parties, one can discern the discontent of the applicant, as the judgment requires her to move out of her matrimonial home; this issue is by no means frivolous.
13. There is no hard and fast rule on the number of days that may be considered as inordinate. Each case ought to be determined on its facts. In the case of *Andrew Kiplagat Chemarungo vs. Paul Kipkorir Kibet* [2018] eKLR, this Court stated as follows:

“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 have to be valid and clear reasons upon which discretion can be favourably exercised."

14. I therefore find that the applicant has satisfactorily explained the delay in starting the process of her appeal and in the circumstances of the case, the 7-month delay cannot be considered inordinate. Further, the respondent did not allude to any likely prejudice he may suffer, and I am therefore inclined to allow the application for extension of time.
15. The applicant will file and serve the notice of appeal within the next 7 days of the date hereof. The record of appeal is to be filed and served within the next 45 days.
16. Costs will abide by the outcome of the appeal.

**DATED AND DELIVERED AT NYERI THIS 10<sup>TH</sup> DAY OF JULY, 2025.**

**ALI-ARONI**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

