



REPUBLIC OF KENYA



**Automarks Industries (K) Limited v Commissioner of Customs & Border Control
(Civil Application E534 of 2024) [2025] KECA 1204 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1204 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E534 OF 2024**

F SICHALE, JA

JULY 4, 2025

IN THE MATTER OF THE INTENDED REFERENCE TO FULL BENCH

BETWEEN

AUTOMARKS INDUSTRIES (K) LIMITED APPLICANT

AND

COMMISSIONER OF CUSTOMS & BORDER CONTROL RESPONDENT

(Being an Application for Leave for Extension of Time to apply in writing to the Registrar for Reference of the decision of a Single Judge to a Full Bench dated 31st May 2024)

RULING

1. Before me is the motion on notice dated 19th October 2024, brought pursuant to the provisions of Rule 4 of the *Court of Appeal Rules*, in which Automarks Industries (K) Limited (“the applicant” herein) seeks the following orders:
 - “i. That this Honourable Court be pleased to grant the applicant leave to apply in writing to the registrar of this Honourable Court for reference of the decision of the Single Judge made on 31st day of May 2024.
 - ii. That the costs of and incidental to this application be provided for.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by one Festus Milonde who deposed inter alia; that the applicant had filed an application dated 10th November 2023, seeking to lodge and serve Notice of Appeal out of time against the judgment of the High Court dated 17th July 2023, which application was dismissed by M’Inoti JA, on 31st May 2024.



3. He further deposed that the Managing Director of the applicant one Mayur Khara who is based in India was indisposed and that by the time the judgment (sic) was transmitted to him, he was not in office and was not in a position to attend to his work.
4. That, they could not refer the matter to full Bench without his instructions, hence the reason why the reference was not filed within time.
5. That, he had now obtained medical certificate from the doctor who was treating him to confirm that indeed he was unable to give instructions and that further this application had been filed without delay.
6. There was no response on part of the respondent despite having been served with a copy of the application on 26th October 2024.
7. It was submitted for the applicant that they had explained that the delay herein was occasioned by the fact that the director who was to give instructions as whether to write to the Registrar to refer the matter to the full Bench was unwell and could not be reached and that a report from his doctor to this effect, had been attached showing that he could not perform his ordinary business from 20th May to 30th September 2024.
8. On prejudice, it was submitted that no prejudice would be suffered by the respondent by referring the matter to a full Bench as the respondent would be able to participate and that further, the applicant had given security of Kshs 4,000,000/= which was still in deposited in court.
9. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicant's submissions, the cited authorities and the law.
10. The principles upon which this Court exercises its discretion pursuant to Rule 4 to extend time or not have now taken a well beaten path. The Court has wide and unfettered discretion in deciding whether to extend time or not. However, in exercising its discretion, the Court should do so judiciously.
11. See *Mwangi vs. Kenya Airways Limited* (2003) KLR 486 where this Court stated thus:

“Over the years, the Court has set out guidelines on what a single Judge should consider when dealing with an application for extension of time under Rule 4 of the *Rules*. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (Civil Application No. Nai 255 of 1997 (unreported), the Court expressed itself thus;

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are; first the length of the delay, secondly, 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.”
12. In the instant case it is indeed not in dispute that the applicant's application for extension of time was dismissed by the Court (M'Inoti JA) on 31st May 2024.
13. The applicant has contended that the failure to lodge a reference to the full Bench was due to sickness of the applicant's Director who is based in India and could therefore not issue instructions.
14. I have looked at the annexure annexed to the motion and marked as “FM4” which is the doctor's report (albeit it being barely legible), which indicates that the applicant's Director was ill and thus unable to give instructions.



15. Given the circumstances, I am of the considered opinion that the reasons given for failing to file the reference on time are reasonable/plausible, and the same have been sufficiently explained to the satisfaction of this Court.

16. Accordingly, the applicant's motion dated 19th October 2024, is merited and the same is hereby allowed as prayed.

17. The costs of this motion shall abide the outcome of the intended reference.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2025.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

