**Gichimo v Kenya Ordinance Factories Corporation (Civil Appeal (Application) E017 of 2021) [2025] KECA 1196 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1196 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL (APPLICATION) E017 OF 2021**

**DK MUSINGA, M NGUGI & GV ODUNGA, JJA**

**JULY 4, 2025**

**BETWEEN**

**ANNE GICHIMO ..... APPLICANT**

**AND**

**KENYA ORDINANCE FACTORIES CORPORATION ..... RESPONDENT**

***(Being a reference under rule 55 of the Court of Appeal Rules, 2010 from the Ruling of (Laibuta, JA.) dated 9th July 2021 in an application for extension of time to file an appeal out of time from the Judgment of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) dated 26th October 2018 in ELRC Case No. 1353 of 2014)***

**RULING**

1. This is a reference to the full Court, under rule 55 (now rule 57) of this Court's Rules from the decision of a single judge of this Court (Laibuta, JA.) dated 9th July 2021. The learned judge considered an application by Anne Gichimo seeking extension of time to file and serve a record of appeal. The intended appeal arose from a ruling delivered by Wasilwa, J. on 26th October 2018 in Nairobi Employment and Labour Relations Court (ELRC) Case No. 1353 of 2014. The application seeking extension of time was brought under the provisions of rule 4 of the Rules of this Court.

2. In the said application, the applicant contended that she filed her Notice of Appeal in time, specifically on 5th November 2018, shortly after delivery of the judgment. She further contended that typed proceedings were collected by a clerk from her advocate's office on 5th November 2019 but were filed away without the knowledge of her counsel. This error went unnoticed until 4th May 2020. She claimed that on 28th May 2020, she filed an application for extension of time vide the email provided by the Court viz, to kenjeff2012@gmail.com, owing to the Covid-19 protocols, but no confirmation or acknowledgment was received from the Court. The applicant attributed the delay in filing the record of appeal to inadvertent human error and argued that it would be unjust to penalize her for her advocate's

oversight. She also asserted that the intended appeal raised substantial grounds with high chances of success.

3. Opposing the application, Colonel Julius Mutugi Ngatia, on behalf of the respondent, admitted that the applicant filed her Notice of Appeal and requested proceedings in good time. However, he emphasized that the delay of 729 days in filing the record of appeal was excessive and lacked credible justification. He pointed out that there was no certificate of delay to account for the time taken, nor had the applicant furnished proof of the alleged email transmission to the registry. He submitted that the duty to diligently prosecute an appeal rested with the applicant, and that indolence should not be excused. He urged the Court to dismiss the application and to deem the Notice of Appeal as withdrawn in accordance with rule 83 of the Court's Rules.

4. In his ruling, Laibuta, JA. reiterated that rule 4 granted the Court unfettered discretion to extend time for filing appeals. He considered the well-established principles outlined in precedents such as Leo Sila Mutiso v Helen Wangari Mwangi [1999] 2 EA p231, Fakir Mohammed v Joseph Mugambi and 2 others [2005] eKLR, and Wasike v Swala [1984] KLR p591, which require the Court to assess the length of the delay, the reason for the delay, the chances of success of the intended appeal, and the prejudice that may be occasioned to the respondent.

5. The judge found that the delay, which extended over nearly two years, was inordinate and not sufficiently explained. Further, the judge noted that even after proceedings were collected, there was no justifiable reason for the continued inaction for seven more months. The absence of a certificate of delay and supporting evidence for the purported email sent to the Court also did not assist the applicant's case. The judge observed that while counsel's mistake may be relevant, it did not absolve the applicant of responsibility, especially in the absence of any effort to verify the status of an active matter. He concluded that the delay reflected lack of diligence and was not excusable.

6. On the merit of the intended appeal, the judge reviewed the draft memorandum of appeal and found that the grounds lacked arguability or a reasonable chance of success. He noted that the issues raised, particularly allegations of defamation and sexual harassment, had already been determined in the trial court and no compelling evidence had been presented to show that the trial court had failed to address them substantively. As for the sexual harassment claim, there was no evidence that the matter had been successfully prosecuted in criminal proceedings which would have strengthened a civil claim for damages. The judge concluded that the proposed grounds of appeal lacked sufficient merit to justify granting the extension sought.

7. According to the judge, and in light of the unexplained and prolonged delay, there was no need to analyze the question of prejudice to the respondent as doing so would be academic. He emphasized that discretion under rule 4 should be exercised judiciously, not as a remedy for prolonged inaction or unexplained omissions.

8. Ultimately, the judge concluded that the applicant had failed to meet the threshold for extension of time, noting that the delay was inordinate, the reasons offered were unsatisfactory, and the intended appeal was not arguable. The application was therefore dismissed with costs to the respondent.

9. The refusal by the judge to exercise his discretion in favour of the applicant precipitated the filing of this reference. Through written submissions dated 21st February 2024, the applicant contends that the delay in filing the record of appeal arose from an honest and excusable mistake by her advocate. She contends that although the typed proceedings were collected from the trial court on 5th November 2019, they were erroneously filed away by a clerk in her advocate's office without notifying the advocate on record. This error was only discovered in May 2020 and that upon realizing the oversight, the advocate promptly prepared and attempted to file the application via email on 28th May 2020 in

line with prevailing court directives due to the COVID-19 pandemic. However, the application was never received by the Court, a fact only discovered after a follow-up by the Deputy Registrar on 20th January 2021. The applicant argues that this sequence of events constitutes sufficient cause for delay, citing Wilson Cheboi Yego v Samuel Kipsang Cheboi [2019] eKLR, where it was said that "sufficient cause" must be rational, plausible, logical and convincing explanation that does not leave gaps in the chronology.

10. To support the argument that a full bench should review and reverse the single judge's decision, the applicant cites Simeon Okingo & 4 Others v Benta Juma Nyakako [2021] eKLR, where this Court clarified that the full bench may interfere with the discretion of a single judge where it is shown that the judge ignored relevant considerations, considered irrelevant matters, or acted on a misapprehension of the evidence or law. In this regard, the applicant contends that in arriving at the conclusion that there was inordinate and inexcusable delay, the judge failed to consider the comprehensive explanation offered in the affidavits of the applicant and that of her advocate, Vincent Anyona. According to the applicant, the affidavits provided a clear and candid explanation for the delay.

11. As regards the standard for assessing arguability of the intended appeal, the applicant contends that instead of conducting a prima facie assessment of whether the appeal raises a legitimate point of law worthy of judicial inquiry, the judge delved into the substantive merits of the appeal, which the applicant argues is inconsistent with settled jurisprudence such as Kiu & Another v Khaemba & 3 Others [2021] eKLR and Athuman Nusura Juma v Afwa Mohamed Ramadhan, *CA No. 227 of 2015*, where the Court emphasized that an arguable appeal is not necessarily one that must succeed, but one that raises a bona fide issue deserving of judicial interrogation. She contends that her grounds of appeal especially those challenging the application of res judicata, the Employment and Labour Relations Court's failure to address claims of defamation and sexual harassment, and the dismissal of arguments on unfair termination are all legitimately arguable and ought to be ventilated on appeal.

12. On the issue of discretion to extend time and whether there are sufficient grounds to warrant the varying and/or discharge of the orders issued by the single judge, the applicant relies on Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, where the Supreme Court outlined the principles guiding the extension of time, including the need for a reasonable explanation, absence of undue delay, and lack of prejudice to the opposing party.

13. The applicant further contends that there will be no prejudice to the respondent if the appeal is allowed to proceed as they will have an opportunity to respond and participate in the hearing. She makes reference to Article 159(2)(d) of *the Constitution* which requires courts to administer justice without undue regard to procedural technicalities. Additionally, she emphasizes that rule 4 grants the Court unfettered discretion to extend time to do any act required under the Rules or orders of the Court, a power that should be exercised to promote access to justice.

14. Lastly, the applicant asserts that courts should be slow to punish innocent litigants for the faults of their counsel. She invokes Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR, where the Court held that in the vicissitudes of legal practice, inadvertent errors by counsel, if explained plausibly, should not bar access to justice. She urges the Court to adopt a judicious and equitable approach, one that promotes substantive justice over rigid procedural adherence.

15. In response, the respondent contends that the applicant has not met the legal threshold to justify a reversal, variation, or discharge of the single judge's ruling. The respondent affirms that the discretion under rule 4 must be exercised judicially as espoused in Leo Sila Mutiso v Rose Hellen Wangari Mwangi (supra) and that while the rule grants leeway, it also imposes on the Court the obligation to consider the totality of circumstances, including the length of delay, reason for delay, chances of success of the

intended appeal, and the degree of prejudice to the other party. The respondent contends that the single judge applied these principles correctly, and thus, his decision should not be interfered with unless a material misdirection of law or fact is demonstrated.

16. Drawing from Mbogo & Another v Shah [1968] EA 93, a decision that was adopted by the Supreme Court in Parliamentary Service Commission v Martin Nyaga Wambora & Others [2018] eKLR, the respondent submits that appellate interference with a discretionary ruling is permissible only where there is a clear error in principle, disregard of material facts, consideration of irrelevant matters, or the decision is plainly wrong that it results in manifest injustice. In the circumstances herein, the respondent asserts that none of these errors are evident and that on the contrary, the single judge examined the affidavits of the applicant and her counsel, assessed the alleged delay, and found the explanation namely a misplaced file and an unsuccessful email submission insufficient, implausible, and not indicative of a party diligently pursuing justice.

17. The respondent emphasizes that discretion is a tool for ensuring equity and not for rescuing litigants from their own indolence or the failures of their counsel, citing Anastasia Njeri Kamau v David Gitau Kamau & 2 Others [2012] eKLR, where the Court held that discretion must not be exercised based on sympathy or emotion.

18. The respondent also cites Ethics and Anti-Corruption Commission v George Joshua Okungu & 3 Others [2020] eKLR and Kenya Co-Operative Creameries Ltd v Fims Ltd [2006] eKLR to distinguish a reference from an appeal. It is contended that when dealing with a reference, the Court is not sitting to re- evaluate the merits of the original application but only to examine whether the single judge acted in misdirection or contrary to legal norms.

19. The respondent contends that there was inordinate and inexcusable delay and that permitting the reference would effectively open the floodgates for dissatisfied litigants to disguise failed applications as reviewable errors of discretion contrary to settled jurisprudence. To this end, the respondent affirms that rule 4 is not a license to circumvent rules of timeliness, especially where the delay is occasioned by neglect. In conclusion, the respondent prays that the reference be dismissed with costs as the applicant has failed to demonstrate any legal or procedural misstep that would warrant disturbing the discretionary finding of the single judge.

20. At the hearing of this application Mr. Charles Kanjama, Senior Counsel, appeared together with learned counsel Mr. Anyona for the applicant, while the respondent was represented by Mr. Tororei, learned counsel. Counsel made brief oral highlights of their respective client's written submissions.

21. We have considered the submissions by the parties and the applicable law. The principles that guide the exercise of judicial discretion are now well settled. In Githiaka vs. Nduriri [2004] 1 KLR 67 it was held, inter alia, that judicial discretion is to be exercised judiciously, that is to say, on sound reason rather than whim, caprice or sympathy.

22. The circumstances in which an appellate court can interfere with discretionary orders of a superior court were set out in the case of Mbogo & Another vs. Shah [1968] EA 93 wherein it was held:

> "An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he/she should not have acted upon or failed to take into consideration matters which he should not have taken into consideration and in doing so arrived at a wrong conclusion."

23. In John Koyi Waluke vs. Moses Masika Wetangula & 2 others [2010] eKLR, this Court, dealing with a reference from the decision of a single judge, stated thus:

> "Having considered all that has been urged before us in this Reference we would say that we have stated time without number that in exercising the unfettered discretion under Rule 4 of this Court's Rules, a single Judge of the Court is doing so on behalf of the whole Court, and the full bench of the Court would only be entitled to interfere with the exercise of discretion if it be shown that in the process of exercising the discretion, the single Judge has taken into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account or that he misapprehended some aspect of the evidence and the law applicable or short of these, that his decision was plainly wrong and could not have been arrived at by a reasonable tribunal properly directing itself to the evidence and the law. It is not enough, for example, to show the full Court that had it been sitting in place of the single Judge, it would have arrived at a different result."

24. With regard to the application on which this reference is predicated, it is not in dispute that there was a delay in lodging the appeal and in bringing the application which was considered by the single judge. The applicant offered the following explanation for the delay: that being dissatisfied with the decision of the trial court, she instructed her advocate to file a Notice of Appeal and request for typed proceedings, both of which were duly lodged on 5th November 2018. The proceedings were subsequently collected from the court by a clerk from the advocate's office, one Caroline Mumbi, on 5th November 2019. However, due to inadvertence, the proceedings were placed in the office file without the knowledge of the advocate handling the matter. As a result, the advocate continued under the mistaken belief that the proceedings had not yet been availed. It was not until April 2020 that the advocate discovered the proceedings were in fact already in the office file. At that point, recognizing that the record of appeal was overdue, its deadline having been in January 2020, the advocate proceeded to prepare an application for extension of time. In light of the COVID- 19 pandemic and pursuant to prevailing directions from the Court, the application was submitted for filing via email on 28th May 2020 using the email address vonvancha@mumakanjama.com, directed to kenjeff2012@gmail.com. Unfortunately, it later emerged that the email was not received by the Court, a fact only discovered on 20th January 2021 when the Deputy Registrar issued reminders to several advocates, including the applicant's counsel, regarding outstanding appeal records. Upon reviewing their correspondence,the advocate realized that there had been no acknowledgment of receipt by the Court, prompting the realization that the initial email transmission had failed.

25. The applicant contends that the above explanation was plausible and avers that indeed there was a mistake on the part of her advocate for not following up on the matter and urges that the Court exercises its discretion so as not to punish her for his advocate's mistake.

26. In considering the reasons for the delay, the learned judge observed as follows:

> " In the absence of a Certificate of Delay, it is difficult to ascertain the real reasons for the delay in obtaining copies of the proceedings to facilitate filing of the record of appeal. Even after collection on 5th November 2019, the proceedings were placed on file and forgotten for a period of seven months. Granted that this constitutes mistake on the part of counsel for the Applicant, the decision in Landbank Real Estate Investment Trust Limited v Standard Chartered Bank Kenya Limited [2019] eKLR cannot be a licence for laxity... It is inexcusable

that the Applicant took so long to take the necessary steps to lodge her intended appeal. The delay, in my considered view, is inordinate in the circumstances of this case."

27. For determination in this reference is whether the single judge properly exercised his discretion in concluding that the delay had not been adequately explained in the absence of a certificate of delay, and that the delay in lodging the appeal was inordinate and inexcusable.

28. We have carefully considered the reasons advanced by the applicant to explain the delay. In our view, the applicant provided a detailed and plausible account for the delay. The delay arose from a bona fide mistake by a clerk in the applicant's advocate's office, who collected the typed proceedings but inadvertently filed them away without informing the advocate handling the matter. Upon discovering this oversight in April 2020, the applicant's advocate attempted to remedy the situation by filing an application for extension of time via email, in accordance with the Court's COVID- 19 filing protocols then in force. Unfortunately, the email was not acknowledged by the Court registry, and this went unnoticed until January 2021 when a reminder was issued by the Deputy Registrar.

29. While it is true that the advocate bore a duty to ensure receipt of the email, we cannot ignore the exceptional disruption caused by the COVID-19 pandemic to court operations throughout 2020. In our view, these circumstances, including the inadvertent misfiling of documents, the honest but mistaken belief that the proceedings were still pending, and the procedural uncertainty occasioned by the pandemic constitute a sufficient and reasonable explanation for the delay. These matters were set out in two affidavits sworn by the applicant and her advocate. In our view, had the learned judge properly considered the reasons advanced by the applicant, he would have found that the delay had been adequately explained and that it was excusable.

30. This Court has in numerous decisions declined to visit the mistakes of advocates upon their clients where it is sufficiently demonstrated that non-compliance with procedural requirements was attributable to the advocate's fault. See Owino Ger v. Marmanet Forest Co-operative Credit Society Ltd [1987] eKLR, Belinda Murai & 9 Others v. Amoi Wainaina [1979] eKLR, and Philip Keipto Chemwolo & Another v. Augustine Kubende [1986] eKLR. In the present case, the applicant's advocate made deliberate efforts to rectify the oversight once it was discovered. We are therefore not persuaded that the applicant should bear the consequences of her advocate's mistake. Moreover, we are not satisfied that the respondent would suffer any prejudice if the appeal were heard on its merits.

31. With regard to the prospects of success if the application were granted, Laibuta, JA. reviewed the draft memorandum of appeal and concluded that the grounds lacked arguability or a reasonable chance of success. We are mindful that an arguable appeal is not one that is necessarily bound to succeed, but one that raises at least a single bona fide issue worthy of consideration on appeal. In our view, issues such as res judicata, the alleged failure by the trial court to properly assess the claims of defamation and sexual harassment, and the legality of the dismissal, are not frivolous. We are satisfied that these matters merit interrogation on appeal. We are mindful of this Court's decision in M wangi v Kenya Airways Ltd [2003] KLR 486, where it stated that:

> " 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: '..... It is thus essential in my view, that an applicant for an extension of time under r9 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.'"

32. 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 that: -

> " 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."

33. In the circumstances, we are of the considered view that the learned judge improperly exercised his discretion under rule 4.

Accordingly, this reference is merited and is hereby allowed. The applicant is directed to file and serve the record of appeal within thirty (30) days from the date hereof. The costs of this reference shall abide the outcome of the intended appeal.

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

**D. K. MUSINGA (PRESIDENT)**

**.....**

**JUDGE OF APPEAL**

**MUMBI NGUGI**

**.....**

**JUDGE OF APPEAL**

**G. V. ODUNGA**

**.....**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**