



**Kukam Limited & another v Odundo (Civil Application
E521 of 2024) [2025] KECA 1202 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1202 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E521 OF 2024**

F SICHALE, JA

JULY 4, 2025

BETWEEN

KUKAM LIMITED 1ST APPLICANT

METRA INVESTMENTS LIMITED 2ND APPLICANT

AND

ANTHONY ODHIAMBO ODUNDO RESPONDENT

*(Being an Application for Extension of Time to file an Appeal out of time
against the Judgment and Orders of the Environment & Land Court at Nairobi
(Mogeni J), dated 15th April 2024 in (Nairobi ELC Case No. 693 of 2016)*

RULING

1. Before me is the Notice on Motion dated 9th October 2024, brought pursuant to the provisions of Article 50 (2) (k) and Article 159 (2) (e) of *the Constitution*, Sections 3A and 3B of the *Appellate Jurisdiction Act*, Chapter 9 of the Laws of Kenya, Rules 4 and 5 (2) (b) of the Court of Appeal Rules 2022; in which Kukam Limited and Metra Investments Limited (“the applicants” herein), seek the following orders:
 - “i. Spent.
 - ii. That this Honourable Court be pleased to enlarge the time within which to serve the Notice of Appeal dated 2nd May 2024 and allow the applicant to serve the same out of time.
 - iii. That this Honourable Court be pleased to enlarge the time for filing the intended appeal against the judgment delivered on 15th April 2024.



- iv. That costs of this application be provided for.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Rahab Karei Mukiyama, a Director of the applicants who deposed inter alia that being aggrieved with the judgment delivered by Mogeni J, in Nairobi ELC Case No. 693 of 2016, they had filed a Notice of Appeal dated 2nd May 2024, which was endorsed by the Deputy Registrar on the same date.
 3. That, however due to inadvertence and miscommunication between the applicants and their advocates, the Notice of Appeal was not served upon the respondent within the prescribed time.
 4. She further deposed that despite having lodged a Notice of Appeal in time, their advocates kept assuring them that they had lodged an appeal against the impugned judgment.
 5. She thus deposed that the delay in serving the Notice of Appeal and lodging the appeal in time was occasioned by their previous advocates who failed to execute their instructions to appeal and that as such, the delay was excusable.
 6. The motion was opposed vide a Notice of Preliminary Objection dated 8th November 2024, in which the respondent contended that this Court was divested of the requisite jurisdiction to hear and determine the instant motion for want of compliance with the express provisions of Rule 4 as read with Rule 77 (1) of the Court of Appeal Rules 2022.
 7. It was submitted for the applicants that immediately after the trial court delivered the judgment on 15th April 2024, one of the applicants Director’s namely; Rahab Karei Mukiyama, instructed their previous advocates to file an appeal, but despite lodging the Notice of Appeal, the said advocates failed to lodge the appeal on time and that it was only on 26th September 2024, when she met with their previous advocates and discovered that they had not executed their instructions to appeal and the alleged appeal was therefore non-existent.
 8. It was thus submitted that the mistake made by the applicants previous advocates should not preclude the Court from exercising its jurisdiction to hear the appeal on its merits and that further, there had been no undue delay by the applicants since upon learning on 26th September 2024, that no appeal had been lodged, they promptly filed the instant motion.
 9. On the other hand it was submitted for the respondent that the Notice of Appeal dated 2nd May 2024 and filed on the same date offends the provisions of Rule 77 (2) of the Court of Appeal Rules which was couched in mandatory terms as it was filed 17 days from the date of the impugned judgment well outside the 14 days’ timelines provided by the Rules.
 10. It was further submitted that no leave had either been sought or granted by this Honourable Court to extend time to file the purported Notice of Appeal and that as such, the same was improperly on record and was ripe for striking out.
 11. Turning to reasons offered for the delay, it was submitted that the same was predicated on the alleged inaction of the applicants previous advocates but the applicants had made no efforts in adducing evidence of the alleged follow ups that they purportedly made with their previous advocates and that further, no material had been laid before the Court to show the irreparable harm/prejudice they would suffer if the instant motion was not allowed.
 12. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the Notice of Preliminary Objection, the respective parties’ submissions, the cited authorities and the law. 13. The principles upon which this Court exercises its discretion pursuant to Rule 4 to extend time or not are



now old hat. 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.

13. See *Mwangi v 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.”

14. In the instant case and as regards the length of the delay, the impugned judgment was delivered on 15th April 2024. The applicants therefore ought to have lodged the Notice of Appeal within 14 days from 15th April 2024 i.e. on 29th April 2024.
15. In the instant matter however, the same was lodged on 2nd May 2024, a delay of 2 days which from the circumstances of this case I do not consider to be inordinate.
16. Turning to reasons proffered for the delay, it was contended by the applicants that the same was due to inaction by their previous advocates and that it was only on 26th September 2024, when they met with their previous advocates and discovered that the appeal had not been filed, pursuant to which they engaged their current advocates who promptly filed the instant application.
17. From the circumstances of this case, I consider the reasons given for the delay to be reasonable/plausible and ultimately therefore, I am of the considered opinion that the delay herein has been sufficiently explained to the satisfaction of this Court.
18. As to the arguability or otherwise of the intended appeal, it would not be in my place to make a determination on the same sitting as a Single Judge and I will therefore make no comment regarding the same.
19. Finally on prejudice, I am satisfied that the applicants will be greatly prejudiced if the instant motion is not allowed as they will have been completely shut from the seat of justice. On the contrary, if the instant motion is allowed, both parties will have their day in Court and they will be accorded an opportunity to ventilate their respective positions.
20. The totality of my findings therefore is that that the applicants have demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time.
21. Accordingly, the applicants’ motion dated October 9, 2024, is merited and the same is hereby allowed as prayed. The applicants Notice of Appeal dated May 2, 2024 and lodged in Court on the same day shall be deemed to have been filed within time.
22. The applicants shall proceed to serve the same upon the respondent within 7 days from the date of this ruling and further file the appeal within a period of 30 days from the date of this ruling failure to which these orders shall stand vacated.



23. The costs of this motion shall abide the outcome of the intended appeal.

It is so ordered.

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

F. SICHALE

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

