



**Moronge & 6 others (Suing On Their Own Behalf and On Behalf of the  
General Kenyan Public Affected) v Safaricom PLC Kenya & 3 others (Civil  
Application E118 of 2023) [2024] KECA 426 (KLR) (5 April 2024) (Ruling)**

Neutral citation: [2024] KECA 426 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E118 OF 2023  
HA OMONDI, JA  
APRIL 5, 2024**

**BETWEEN**

**CRISPINE MORONGE ..... 1<sup>ST</sup> APPLICANT  
FELICIA AYOTI ..... 2<sup>ND</sup> APPLICANT  
PENINA ODUKE ..... 3<sup>RD</sup> APPLICANT  
AUSTINE NYAORI ..... 4<sup>TH</sup> APPLICANT  
HELEN OGWANG ..... 5<sup>TH</sup> APPLICANT  
FLORENCE MUSAU ..... 6<sup>TH</sup> APPLICANT  
JOSEPH MUSOMBA (AKA JOE HANNINGTON) ..... 7<sup>TH</sup> APPLICANT  
SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE GENERAL  
KENYAN PUBLIC AFFECTED**

**AND**

**SAFARICOM PLC KENYA ..... 1<sup>ST</sup> RESPONDENT  
PUBLIC LIKES KENYA ..... 2<sup>ND</sup> RESPONDENT  
ROBERT NDUNGU GACHUHI ..... 3<sup>RD</sup> RESPONDENT  
ZEGE TECHNOLOGIES ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Decision of the High Court of Kenya at Kisumu (Aburili,  
J.) dated 29th December, 2022 in Constitutional Petition No. E002 of 2020)*



## RULING

1. By a Notice of Motion dated 13<sup>th</sup> September 2023, and supported by an affidavit dated 15<sup>th</sup> September, 2023, sworn by Crispine Moronge seeks leave for the applicant to file the record of appeal out of time; that the annexed record of appeal be deemed as duly filed, and costs of this application be provided for.
2. The applicants had filed Kisumu Constitutional Petition No .E002 of 2020 against the respondents; the 4<sup>th</sup> respondent raised a preliminary objection to the Petition; and on 29<sup>th</sup> December, 2022 the High Court at Kisumu (Aburili, J.) gave the ruling dismissing the petition. The applicants were aggrieved, and now seek to appeal against that outcome. According to the applicants, and supported by the record, by 12<sup>th</sup> January, 2023 they had filed and served the requisite Notice of Appeal upon all the respondents; on the same date, they also applied to the court for copies of typed proceedings and ruling; and copied the letter to the respondents.
3. It is acknowledged that the said ruling was ready in good time, but the proceedings were not ready until 11<sup>th</sup> September, 2023, which in turn meant that the proposed Record of Appeal could not be filed before preparation. The applicants urge this Court not to blame them for the delay, pointing out that their advocate kept a regular physical follow up on the typed proceedings; and even wrote emails (copies are annexed), but the backlog at the typing pool was huge, consequently the delay in lodging the record of appeal was caused by the court registry. It is also argued that the impugned ruling was delivered during the December New/Year festivities, which normally interferes with the courts' schedule. The appeal is described as meritorious and raises pertinent point of law that has a high chance of success.
4. The applicants also point out that the court registry has issued a Certificate of Delay of the said proceedings; the present application has been brought timeously without undue delay; and the respondents will suffer no prejudice if application is allowed.
5. I confirm that as at the time of writing this ruling, there were no responses filed by the respondents either by way of replying affidavits or written submissions.
6. Rule 4 of the *Court of Appeal Rules* gives this court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. This Court in *Leo Sila Mutiso v Rose Wangari Mwangi* CA No. Nai. 255 of 1997 (UR) held that the discretion of a single judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously and upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in *Julius Kamau Kithaka v Waruguru Kithaki & 2 Others* Nyr CA No. 14 of 2013 [2013] eKLR.
7. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

“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 has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
8. From the material placed before me, the applicants have not been indolent, their counsel zealously followed up on the proceedings as demonstrated by the annexed emails, and the root of the delay is adequately supported by the certificate of delay duly issued by the Deputy Registrar, and dated 14<sup>th</sup> September 2023.



9. On the issue of whether or not the intended appeal has chances of success, this Court is conscious of the fact that it is not the role of a single judge to determine the merits or

otherwise of the appeal. Indeed, this Court has held in the case of *Athuman Nasura Juma v Afwa Mohammed Ramadhan* [2016] eKLR, that:

“...this court has to be careful to ensure that the intended appeal has merit or not is not an issue to be determined with finality by a single Judge”.

10. The above principles should be born in mind whilst determining this application. In this case, ruling was delivered on 29<sup>th</sup> December 2022, and the Notice of Appeal was duly filed in a timely manner. The instant application was filed on 13<sup>th</sup> September 2023, but that is because the proceedings only got to be ready on 11<sup>th</sup> September 2023, so the present application has been made without undue delay, and any delay, if at all has been sufficiently and satisfactorily explained in my view.

11. As regards the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondents in granting an extension. The applicants are aggrieved by the ruling which dismissed their petition on a preliminary point.

The respondents have not as much as raised a whimper to the prayer for extension of time. From the circumstances of the application before me, the delay has been adequately explained, and cannot be blamed on the applicant. I find that the applicants have met and satisfied the principles set out for this Court to exercise its discretion in their favor and grant the extension of time as sought.

12. The upshot is that the notice of motion dated 13<sup>th</sup> September, 2023 is allowed as follows:

- i. That the time within which to file and serve the respondents with the record of appeal be and is hereby enlarged.
- ii. That the record of appeal annexed be and is hereby deemed as properly filed and served.
- iii. Costs of this application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT KISUMU THIS 5<sup>TH</sup> DAY OF APRIL, 2024.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

