



REPUBLIC OF KENYA



**M'Mboga v Mahmud (Civil Appeal (Application) E019 of 2020)
[2024] KECA 1162 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1162 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E019 OF 2020
GV ODUNGA, JA
SEPTEMBER 20, 2024**

BETWEEN

MERCY CASSANDRA M'MBOGA APPELLANT

AND

SAID AHMED MAHMUD RESPONDENT

*(Being an Appeal against the entire decision of the Environment and Land Court,
Malindi (J.O Olola, J) delivered on 2nd October 2020 in Civil Suit No. 52 of 2014)*

RULING

1. The applicant herein, Mercy Cassandra M'Mboga, by a Notice of Motion dated 28th January, 2021 brought under Section 3A and 3B of the *Appellate Jurisdiction Act*, Rule 4, 41, 75 and 77 of CAR, 2010 and Article 159(2) (d) of Constitution seeks an order for the extension of time limited for service by the applicant on the respondent with the Notice of Appeal dated 5th October, 2020 and that the said Notice of Appeal served on 29th November, 2020 be deemed to have been duly served upon the respondent within such an extended time.
2. According to the supporting affidavit sworn by Jacqueline Waihenya, she was instructed by the applicant to prefer an appeal from the High Court's decision of 2nd October 2020 on 5th October 2020; that a Notice of Appeal was filed on 5th October 2020 and was received back via email dated 6th October 2020; that the applicant further instructed her to file and serve an application dated 19th October 2020 for stay of execution pending appeal which was served on 19th October 2020; that the said Notice of Appeal was annexed to the application; that the intention was to serve both the Notice of Appeal and the Notice of Motion simultaneously but this was inadvertently not done; and that upon discovery that the Notice of Appeal had not been served, the applicant wrote a letter dated 25th November, 2020 to the respondent advocates and effected service via email.



3. It was averred that the applicant has an arguable appeal with an overwhelming chance of success which will be rendered nugatory should the appeal be struck out; that the appeal proposes to consider whether an advocate can be held to have failed to uphold a professional undertaking where a seller and/or their advocate has blatantly failed, neglected and/or refused to provide bank account details to render payment in contravention of the provisions of Rule 15 of the Law Society of Kenya Digest of Professional Conduct and Etiquette thereby deliberately frustrating the performance of the parties sale agreement; that the appeal further aims to consider important and weighty matters to be considered within the course of conveyance transactions particularly as pertains to the relationship between advocates on record for the buyer and the seller respectively; that the respondent will suffer no inconvenience or prejudice if the application is allowed and leave is granted; that the applicant will suffer irreparable damage if the application is not allowed; and that the application ought to be granted in the interest of equity and justice.
4. The respondent, in response to the application, relied on the replying affidavit sworn by Said Ahmed Mahmud on 10th May 2023 in which it was averred that upon being served with the Record of Appeal on 10th December 2020, he instructed his advocate to apply for the striking out of the Notice of Appeal served on him on 25th November, 2020; that a ruling thereon was delivered on 31st March 2022; that no explanation or reasonable explanation has been given for the delay in serving the Notice of Appeal; that the application for extension of time was triggered by his said application; that although the application filed in the court below carried the Notice of Appeal, the said application was filed and served on the 19th October 2020, meaning that even if the Notice of Appeal was served on the same day as was the intention of the process server as detailed in her affidavit of service, the same would still have been out of time as the rules provide that service of the Notice of Appeal be affected before or within seven (7) days of its lodging; that the Notice of Appeal that was filed lodged on 5th October 2020 ought to have been served by latest on the 12th October 2023; that the rules do not provide for constructive service and there clearly was no intention to serve the Notice of Appeal upon him and his advocate; that the timelines provided in the rules go to the jurisdiction of the Court and they affect the delivery of justice; that since he filed his case on 20th March 2014 and the delivery of the said ruling on 2nd October 2020 in his favour, he has not been able to enjoy the fruits thereof due to an otherwise void appeal and this has caused him loss and damage; that he is prejudiced by the failure by the applicant to serve the Notice of Appeal on time and the filing of the application for extension of time as a reaction to his application to strike out her Notice of Appeal.
5. I heard the application on the Court's virtual platform on 24th July 2024 during which Learned Counsel Ms Jacqueline Waihenya appeared for the applicant while Mr Tukero Ole Kina appeared for the respondent. Both counsel relied on their written submissions which they briefly highlighted.
6. On behalf of the applicant, it was submitted that: the Notice of Appeal was filed 5th October 2020, well within the time contemplated in Court of Appeal Rules; that the Application for stay was filed and served upon the respondent within 8(eight) days of the said Notice of Appeal herein being lodged; that a copy of the Notice of Appeal was served upon the respondent albeit annexed to the Stay Application and the respondent having attended to this application ought rightly to be deemed to have had notice that an appeal had been lodged and the Notice of Appeal that initiated the appeal on 19th October 2020; that immediately upon realization that the original Notice of Appeal had not been served, the applicant caused the same to be served upon the respondent on 25th November 2020, within 37 (thirty-seven) days from the filing of the original Notice of Appeal; that the error in service is attributable to human error and is as outlined the Affidavit of Service sworn on 25th November 2020; that the delay was therefore inadvertent and at all times the appellant has taken all necessary steps to prosecute the appeal; that this Court should find that the appeal is arguable and poses/raises important questions



- for the administration of justice and in particular regarding the engagement of counsel in a transaction and whether or not either of them can unilaterally alter the party's terms and conditions duly agreed upon by them and performance having been effected.
7. It was submitted that the parties executed a sale agreement which was varied by a deed of variation in which it was a clear provision that any structural defects would be attended to by the respondent; that the respondent completely ignored the representations made for and on behalf of the appellants and the respondent's advocate after a silence of more than 2 years then proceeded to file the suit the subject matter of this appeal; that critical issues regarding the expectation of Advocates as well as persons participating in Conveyance transactions have been presented before the Court for determination as outlined in the Memorandum of Appeal herein; that the balance of competing interests lies in favour of invoking the constitutional right to be heard and allowing this case to proceed to be heard and determined on its merits; and that the application has been made without undue delay.
 8. In support of the application the applicants cited the case of Vishwa Stone Supplies Company Limited v RSR Stone [2006] Limited [2020] eKLR highlighting the principles as including the fact that the orders ought not to be granted liberally but on terms that are just unless the applicant is guilty of unexplained and inordinate delay in approaching the Court; the balance of competing interest of the parties, that is the injustice to the applicant in denying the application against the prejudice to the respondent in granting an extension; the conduct of the parties; the public interest issues implicated in the intended appeal and whether prima facie the intended appeal has chances of success or is a mere frivolity; the delay should be satisfactorily explained; and the right to a hearing is not only constitutionally entrenched in Article 159, it is also the cornerstone of the rule of law.
 9. The applicant also cited the case of Karny Zahrya & Another v Shalom Levi [2018] eKLR submitting that the mandate and discretion of the single Judge is wide and unfettered but must be exercised judicially and upon sound reason.
 10. At the hearing, Ms Waihenya referred the Court to the affidavit of service of Faith Lumire Chamwada, a court process server, sworn on 25th November 2020 in which the deponent she received the application dated 19th October 2020 together with the Notice of Appeal dated 5th October 2020 to effect service of the same upon the firm of Muli and Olekina Advocates; that while she served the documents, she inadvertently forgot to serve the original Notice of Appeal although the application served had a copy of the Notice of Appeal as an annexure; that it was not until 25th November 2020 that it came to her attention that the Notice of Appeal was not served and she forwarded the same via email to the respondent's advocates.
 11. The applicant urged this Court to allow her application.
 12. It was submitted on behalf of the respondent that there is no dispute that on 31st March 2023 a 3 Judge bench of this Court through the respondent's application dated 12th December 2020, struck out the applicant's Notice of Appeal dated 5th October, 2024 for having not being served within 7 days from the date of filing; that no explanation for the delay has been given by the applicant; that the applicant's application has not been brought within the parameters set out in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others [2013] eKLR. The respondent urged this Court to find the application lacks merit and dismiss it with costs.
 13. In his oral address, Mr Ole Kina submitted that the appeal is in respect of enforcement of professional undertakings by advocates in the course of a trial, a very basic instrument of trade; that where an advocate fails to discharge a professional undertaking, the enforcement procedure is provided and there is a strict adherence to the process; that there are scant grounds to challenge the decision of the court



below; that the 3 Judge bench was very sceptical of the service of the Notice of Appeal by accident; that the applicant has not explained the delay; that the applicant must bring her application within the rules since fair hearing is grounded on the rules as observed in the *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others* (supra).

14. I have considered the application, affidavit in support of and in opposition to the application, the submissions and authorities relied upon.
15. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the Court of Appeal Rules are well settled. This Court has unfettered discretion to extend the time prescribed for taking any action permitted under the Rules. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain considerations that the Court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly (possibly), whether the proceedings for which time is sought to be extended is frivolous; and fourthly, whether the respondent in those proceedings will be unduly prejudiced if the application were to be granted. See *Leo Sila Mutiso v Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231*.
16. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations. The Court would of course also consider the overriding objective spelt out in Sections 3A and 3B of the *Appellate Jurisdiction Act*.
17. Those principles were restated by Waki, JA in *Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR* as follows:

“The exercise of this Court’s discretion under Rule 4... 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: See *Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR)*, *Mwangi vs. Kenya Airways Ltd [2003] KLR 486*, *Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR)* and *Murai v Wainaina (No 4) [1982] KLR 38*.”
18. On its part, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court Application *No. 16 of 2014 [2014] eKLR*, while expressing itself on the matter, opined that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondent if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.
19. Regarding the length of the delay, in the instant case the process server swore that on 19th October 2020, she served the application for stay but inadvertently forgot to serve the Notice of Appeal and it was not until 25th November 2020 that it came to her attention that the Notice of Appeal was not served and she forwarded the same via email to the respondent’s advocates the same day. It is not contested that



by 19th October, 2020, the prescribed period for service of the Notice of Appeal had not run out. The delay is therefore from 19th October, 2020 to 25th November 2020, a period of 37 (thirty-seven) days.

20. In the case of *Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor* [2014] eKLR it was appreciated that:

“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”

21. From that authority, it is clear that the litmus test for inordinate delay is that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. In other words, in determining whether or not the delay is inordinate, it is not a matter of arithmetic. All the surrounding circumstances, including the reason for the delay must be considered by the Court. For example, in *Boniface Njuguna Gakuru v Paul Njoroge Gakuru Civil Application No. Nai. 301 of 2009*, a delay of similar period was found not to be inordinate with the Court holding that:

The Court have, apart from considering the factors which guide the court in the exercise of the court’s discretion under rule 4 of the Court of Appeal Rules, also considered the factors that assist in giving effect to the overriding objective as set out in the *Appellate Jurisdiction Act*. This is because the 02 principle is the whole objective of the *Appellate Jurisdiction Act* and therefore the 02 principle is both substantive and procedural. The factual basis is that the total delay occasioned was 37 days which period elapsed as the applicant made arrangements to change representation and the I have also taken into account that the matter involves ownership of land. In addition, I have also taken into account the apparent arguability of what prima facie appears to be a substantive jurisdictional issue touching on the initial tribunal and the decision subsequent making bodies and thus my inclination is to grant a reasonable extension of time. Since the purpose of the overriding objective is to enable the Court to do justice in the special circumstances of each appeal, I consider that in the special circumstances before me (to the effect that the applicant’s erstwhile advocate had advised her that there was nothing more that could be done), preventing the applicant from having an appeal which touches on jurisdiction heard on merit because of a delay of 37 days and which has been satisfactorily explained would be unjust.”

22. The reason for the delay in this case is that the process server who was instructed to serve both the application for stay and the Notice of Appeal only served the application but not the Notice of Appeal. However, one of the documents attached to the application was a copy of the duly filed Notice of Appeal. As this Court appreciated in *Daniel Nkirimpa Monirei vs. Sayialel Ole Koilel & 4 others* [2016] eKLR:

“The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal.



Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77(1) of the Court of Appeal Rules is couched in mandatory terms.”

23. It is however true that service of the Notice of Appeal must, as was held in the decision of this Court (Shah, JA) *Fortune Finance Limited v Geoffrey Ngugi Gathaiya Civil Application No. Nai. 22 of 1999 (UR)*, be actual, deliberate and not accidental. Therefore, the service of an application to which a copy of a Notice of Appeal is attached as an annexure does not amount to service of the Notice of Appeal.

24. However, the mistake has been explained. It was based on the inability by the process server to appreciate this intricate rule of procedure. A process server, ordinarily relies on the instructions given by the instructing counsel and where such instructions are not so clear, a mistake such as the one made herein may reasonably occur. In fact, even amongst senior advocates, such mistakes have been known to occur but as this Court held, while citing *Murai v Wainaina (No. 4) [1982] KLR 38*, in *Shital Bimal Shah & 2 Others v Akiba Bank Limited Civil Appeal (Application) No. 159 of 2005 [2006] 2 EA 323*:

“Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate.”

25. Ringera, AJA, as he then was in *Githiaka v Nduriri [2004] 2 KLR 67* held that:

“Under rule 4 of the Court of Appeal Rules the court is perfectly invested with a clear and unfettered discretion to extend the time limited by the Rules or its decisions and such a discretion like all judicial discretions, is to be exercised judicially, that is to say on sound reason other than whim, caprice, or sympathy. In exercising the discretion the Court’s primary concern should be to do justice to the parties and in considering which way the scales of justice tilt, the Court should among other things consider the length of the delay in lodging the notice and record of appeal and, where applicable, the delay in lodging the application for extension of time, as well as the explanation therefore; whether or not the intended appeal is arguable; and the public importance, if any, of the matter, and generally the requirements of the interest of justice in the case... Oversight has been defined to mean the omission or failure to see or notice. It is inadvertence. Whilst ignorance may not be equated to a mistake, it may and normally does arise through negligence.”

26. Appreciating that oversight on the part of counsel may warrant extension of time, Shah, JA when faced with a similar situation in *Michael Njoroge B. & Others v Vincent Kimani Chege Civil Application No. Nai. 217 of 1997* held that advocates may have many things to deal with leading as a result of which an oversight may lead to delay in rectifying mistakes and that such mistakes should not be visited on the client and that the Court of Appeal being the last court ought to give a litigant a chance to be heard on merits. The learned single Judge appreciated that whereas it is appreciated professional standards must be maintained, if an error is remediable, the client ought to be heard.



27. In *Mwangi v Mwangi* [1999] 2 EA 234, it was held, while citing *Njoroge “B” And Others v Chege* [1997] LLR 614 B (CAK); *Macfoy v United Africa Company Ltd* [1962] AC 152; *Pantin v Wood* [1962] 1 QB 594 that:

“Rules of procedure are said to be good servants but bad masters. This is not to say that they can be flouted with impunity. All rules have their specific purpose(s) but a rule of procedure should not drive a litigant out of judgement seat if other rule(s) allow such a litigant to come back to Court. The tendency of the court of last resort ought to give a chance to the litigant to be heard on merits as far as possible. Our rules of procedure have had their origin in England and the tendency in England is to move away from form to substance...Simple inaction by a lawyer coupled with client’s careless attitude may be enough to say: “I am not going to exercise my discretion” but when the litigant himself shows that he is doing his best the Court ought to exercise its discretion which is wide enough, subject only to the requirement of justice to both sides. Procedural requirements are designed to further the interests of justice and any consequences which would achieve a result contrary to those interests should be treated with considerable reservation.”

28. I am therefore satisfied that the reason given for the delay is in the circumstances of this case justifiable. Regarding the prospects of success of the reference, the consideration of this issue, however, does not apply in all cases. Dealing with that consideration, this Court in *Mwangi v Kenya Airways Ltd* [2003] KLR 486, where the court stated:

“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 r 9 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.’

29. 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: -

“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.”



30. In *Ramesh Shah v Kenbox Industries Limited* [2007] eKLR, this Court debunked the myth surrounding the arguability of the intended appeal in applications of this nature by observing that:

“The issue therefore arises as to whether the arguability of an intended appeal would outweigh all other relevant factors open for consideration in applications under rule 4. For our part we think, that except in very exceptional and limited circumstances, that proposition is not acceptable and is not borne out by authority. Indeed it is open to abuse. At its absurd best, it would mean that a party who for no or no sufficient reason sleeps over his right of appeal for ages, may one fine morning wake up and persuade the court that he had an arguable appeal after all and ought therefore to be allowed to appeal despite the delay.”

31. While in certain borderline cases the Court may consider the chances of success of the intended action, in my view, that condition plays a very peripheral role where the other conditions have been fulfilled particularly where the applicant has a right to take up the proceedings in question. In this case however, the issue the liability of advocates arising from professional undertakings is proposed to be canvassed before this Court. While it may not necessarily succeed, that however is not a determination that is within the province of a single Judge. An arguable process, it has been held, is one which ought to be argued fully before the court; one which is not frivolous. See *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008*.

32. As regards the issue of prejudice, it was averred by the respondent that since he filed his case on 20th March 2014 and the delivery of the said ruling on 2nd October 2020 in his favour, he has not been able to enjoy the fruits thereof due to an otherwise void appeal and this has caused him loss and damage. Lakha, JA in *Touring Cars (K) Ltd & Anor v Ashok Kumar N. Mankanji Civil Application No. 78 of 1998*, was of the view that rule 4 of the Court of Appeal Rules confers the widest measure of discretion in an application for extension of time and draws no distinction whatsoever between the various classes of cases and that the rule clearly requires the Court to look at the circumstances and recognises the overriding principle that justice must be done. He further held that prejudice or lack of it is a highly relevant matter in considering the justice; it may be an all-important one.

33. Waki, JA, while citing *Grindlays Bank International (K) & Another v George Barbour Civil Application No. Nai. 257 of 1995* and *Gichuhi Kimira v Samuel Ngunu Kimotho & Another Civil Application No. Nai. 243 of 1995* in *Janet Ngendo Kamau v Mary Wangari Mwangi Civil Application No. Nai. 338 of 2002* held that:

“Unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court’s discretion, the Court should in so far as it may be reasonable prefer, in the wider interest of justice, to have a case decided on its merits... The consideration that one case should not hang over the heads of parties indefinitely must be weighed against the wider interests of justice, namely that where possible cases must be brought to a close after a hearing on the merits.” [Emphasis mine].

34. Regarding the issue that the applicant’s application was a reaction to the respondent’s application for striking out, it is now appreciated that the broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the



conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. In *Chemwolo and Another v Kubende* [1986] KLR 492; [1986-1989] EA 74, it was held that:

“Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs since the Courts exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

35. Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure. In this case, I did not hear the respondent contend that if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs.
36. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See *Waljee’s (Uganda) Ltd v Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.
37. Regarding the issue of the striking out of the Notice of Appeal, the full bench of this Court in its ruling dated 31st March, 2023 issued the following Orders
 - a. The Notice of Appeal dated 5th October 2020 be and is hereby struck out.
 - b. The order in (1) above is suspended pending the outcome of the application pending before this Court for extension of time dated 19th October 2020.
 - c. The respondent will have the costs of this application in any event.
38. What I understand the Court to have been saying is that although it found that the Notice of Appeal was not validly served, its declaration of the invalidity was suspended pending the hearing and determination of this application. In the event that the applicant lost in her quest to have time extended for the service of the Notice of Appeal, the declaration of invalidity and hence the order striking out the Notice of Appeal would take effect. On the other hand, upon the success of this application, the Notice of Appeal in question would be deemed to have been served in time.
39. It is also noteworthy that what the Court struck out was the Notice of Appeal as opposed to the appeal itself which would have required another step to be taken in order to strike out the Record of Appeal. Before that is done, it is my view that nothing bars this Court from salvaging the situation where a cause is shown to its satisfaction.
40. In the circumstances of this case, I find that this is a just and proper case to exercise discretion in favour of the applicant. I accordingly allow the Notice of Motion dated 28th January 2021. I extend the time limited for service by the applicant on the respondent with the Notice of Appeal dated 5th October 2020 and direct that the said Notice of Appeal served on 29th November 2020 be and is hereby deemed to have been duly served upon the respondent within such an extended time.
41. The costs of this application are awarded to the respondent.
42. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

