



**MSA v KMKA (Civil Application E123 of 2024)  
[2024] KECA 1222 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1222 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E123 OF 2024  
GV ODUNGA, JA  
SEPTEMBER 20, 2024**

**BETWEEN**

**MSA ..... APPLICANT**

**AND**

**KMKA ..... RESPONDENT**

*(Application for extension of time to file a Notice and Record of Appeal out of time in an intended appeal from the judgment of the Family Division of the High Court at Nairobi (Ali-Aroni, J) delivered on 17th October 2019 in Divorce Cause No 2 of 2016)*

**RULING**

1. The applicant, MSA, moved this court by a Motion on Notice dated 29<sup>th</sup> February 2024 seeking leave to extend the time to file and serve a new Notice of Appeal and Record of Appeal out of time and for directions that the Notice of Appeal and the Draft Memorandum of Appeal, and Record of Appeal annexed and filed herewith be allowed and deemed as having been filed and served.
2. The Applicant, is aggrieved by judgment of Hon. Lady Justice Ali-Aroni delivered at the Family Division of the High Court in Nairobi on 17<sup>th</sup> October 2019. In a Divorce Cause No. 2 of 2016, the applicant sought dissolution of his marriage to the respondent and the learned Judge, while dissolving the marriage, ordered the applicant to pay the respondent Kshs. 12,000,000 as alimony within the next 90 days from the date of the judgment.
3. According to the applicant, he lodged his Notice of Appeal dated 28<sup>th</sup> October 2019 on time on 4<sup>th</sup> November 2019 and applied for typed copies of the proceedings on 30<sup>th</sup> October 2019; that there was a delay in furnishing him with the typed proceedings by the court; that the delay in filing the Record of Appeal within the prescribed time was not intentional but was as a result of the aforementioned circumstances which should not be visited on him as a litigant; that no prejudice will be suffered by the respondent who abandoned all responsibilities towards the children with him and he is solely bearing



the burden; that his application is filed together with the Record of Appeal thus his prayer for extension of time to accord him an opportunity to ventilate his dissatisfaction with the judgment that he believes condemned him unfairly; that the delay between 31<sup>st</sup> January, 2024 when the Certificate of Delay was issued to the 18<sup>th</sup> March, 2024 was due to his father's serious illness that required his attention and thereafter he was taken ill for arthritis that also led to the extended delay; and that although the delay is unfortunate, it is explainable and reasonable to warrant this Court exercising its discretionary power to extend the time.

4. The applicant also filed his written submissions in support of the application which was unopposed.
5. I have considered the application, affidavit in support of the application and the submissions.
6. 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 now well settled. The starting point is that the Court has unfettered discretion when considering such an application. 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 matters that the Court would look into as guiding principles. These are first the period of the delay must be considered. Second the Court has to consider the reasons for such a delay. Thirdly, the Court would consider whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal. Fourthly, the Court is required to consider if the respondent will be unduly prejudiced if the application were to be granted. 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.
7. 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 v Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi v Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina (No 4)* [1982] KLR 38.”

8. 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 respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.



9. In this case, the factual averments are not disputed. 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.”

10. 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.
11. According to the applicant, he filed his Notice of Appeal within time on 4<sup>th</sup> November 2019. The decision sought to be appealed from was delivered on 17<sup>th</sup> October 2019. He ought to have filed his Notice of Appeal by 31<sup>st</sup> October 2019. Clearly, his Notice of Appeal was filed out of time. The present application is dated 29<sup>th</sup> February 2024, some four months later. Four months delay, without satisfactory explanation, would obviously amount to inordinate delay.
12. As regards the reasons for the delay, the applicant’s position is that the delay was occasioned party by his father’s ill health and his own ill health. While no document was exhibited to prove these facts, his averments on oath have not been challenged. Il health of one’s parent or oneself, in my view, may constitute a satisfactory reason for the delay in taking a step in the proceedings.
13. As regards the issue of prejudice, none has been alluded to by the respondents. 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.
14. 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 disintitling 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].

15. 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.”

16. 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.
17. 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 Punjabbhai Bugerere Tea Estates Ltd* [1971] EA 188.
18. 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 Motion dated 29<sup>th</sup> February 2024. I extend the time limited for the filing of a Notice of Appeal and the record of appeal against the judgment and decree of the the Family Division of the High Court at Nairobi (Ali-Aroni, J, as she then was) delivered on 17<sup>th</sup> October 2019 in Divorce Cause No 2 of 2016. Let the Notice of Appeal be filed and served within 7 days while the Record of Appeal be filed and Served within 14 days from the date of service of the Notice of Appeal.
19. There will be no order as to the costs of this application.
20. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> 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**

