



St. John of God Hospital Tigania v Michubu (Suing as the Legal Representative of the Estate of Agnes Kawira) (Civil Application E052 of 2024) [2024] KECA 1259 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1259 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E052 OF 2024
J MOHAMMED, JA
SEPTEMBER 20, 2024**

BETWEEN

ST. JOHN OF GOD HOSPITAL TIGANIA APPLICANT

AND

JACKSON MICHUBU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF AGNES KAWIRA) RESPONDENT

(An application for leave to file the Record of Appeal out of time against the decision of the High Court of Kenya at Meru (T. W Cherere J.) dated 29th February 2024 in HCC Case No. E024 of 2021)

RULING

Background

1. Before me is an application dated 7th June, 2024 brought by St. John of God Hospital Tigania (the applicant) expressed to be brought under Section 3, 3A and 3B of the *Appellate Jurisdiction Act*, and Rules 4 and 44 of the *Court of Appeal Rules, 2022* (this Court's Rules). The applicant seeks for orders in the main:
 1. That the applicant be granted leave to file the memorandum and record of appeal out of time against the judgment of the High Court (Cherere, J.) delivered on 29th February, 2024;
 2. That this Court be pleased to extend, and/or, enlarge the time within which to file and serve the memorandum and record of appeal against the judgment of the High Court (Cherere J.);
 3. That the memorandum and record of appeal be deemed as duly filed and served upon the payment of the requisite court filing fees;



4. That this Court do specify the period and/or terms to be complied with as the Court may deem just; and
 5. That the costs of this application abide with the result of the intended appeal Jackson Michubu (suing as the legal representative of the estate of Agnes Kawira) is the respondent herein.
2. The application is premised on the grounds on the face thereof to wit: that the applicant is dissatisfied with the High Court's finding on the issue of liability and the principles relied on by the learned Judge in awarding and computing general damages under the *Fatal Accidents Act*; that the notice of appeal was filed and served within time; that the application was filed within 24 days from the date within which the record of appeal ought to have been filed and served; that the applicant's failure to comply within time was occasioned by events and facts outside its control; and that the delay in obtaining the proceedings and decree was occasioned by the fact that the High Court's file was inaccessible to the Court Registry's typing staff and the applicant's advocates between 27th March, 2024 to 2nd May, 2024 as there was a pending application filed by the applicant for stay of execution in respect of which a ruling was delivered on 2nd May, 2024.
 3. Further, that there was delay in communication and response to inquiries by the Court Registry as the application by the applicant's advocate was filed through the e-filing platform but the response was given through the counter at the Court Registry. The applicant further contends that the applicant's advocates were based in Nairobi and it had to send a clerk to Meru for regular updates from the registry; that no prejudice will be suffered by the respondent as the record of appeal is ready for filing; that the applicant has offered security for the appeal and has avoided delaying the respondent's enjoyment of the fruits of his judgment by paying him Kshs.2,853,212.00; that the intended appeal has high chances of success as it raises serious legal issues which have not been addressed by this Court and lacks case law consensus in the High Court.
 4. The application is supported by an affidavit sworn by the applicant's advocate, Stanley T. Nduati (Mr. Nduati) who rehashed the grounds on the face of the application adding that the cause of action was a medical negligence claim where the High Court awarded the respondent Kshs.11,412,850.00 for general and special damages. Regarding the delay in filing the record of appeal, Mr. Nduati admitted that the applicant's letter requesting for typed proceeding was not served upon the respondent and the applicant is therefore not entitled to the exemptions under Rule 84(1) and (2) of this Court's Rules. Mr. Nduati attributed the said failure to the confusion due to the change of advocates from the applicant's erstwhile advocate to his law firm; that he was under mistaken belief that the request for proceedings was filed but found out that only the request for judgment and decree was made. According to Mr. Nduati, this was a procedural oversight by the applicant's erstwhile advocate which should not be visited upon the applicant.
 5. The application was opposed by the respondent through a replying affidavit sworn on 9th July, 2024. The respondent deponed that the notice of appeal was filed on 13th March, 2024 while the impugned judgment was delivered on 29th February, 2024. That the request for typed proceedings was not served on him within 30 days from the date of delivery of the impugned decision. The respondent denied the applicant's claim that the court file was not accessible stating that there was no written communication to that effect from the Court Registry. The respondent deponed that the delay in filing the memorandum and record of appeal was inordinate and no reason was given to warrant this Court to exercise its discretion in favour of the applicant. The respondent further deponed that leave should not be granted to the applicant, as the appeal is not arguable.



Submissions by Counsel

6. During the hearing of the application, the applicant was represented by the firm of Nduati & Co. Advocates while the respondent was represented by Ngunjiri Michael & Company Advocates. Both counsel had filed written submissions rehashing the application and affidavits. Determination

7. I have carefully considered the application, the grounds and affidavit in support thereof, the replying affidavit, written submissions, authorities cited and the law. The discretion that I am being called upon to exercise in this application is provided under Rule 4 of this [Court's Rules](#) which states that:

“The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

8. The principles governing the exercise of the discretion to extend time under Rule 4 of the [Court of Appeal Rules](#) were well stated in the case of *Leo Sila Mutiso v Rose Hellen Wangare Mwangi*, [1999] 2 EA 231 as

follows:

“It is now well stated that the decision whether or not to extend the 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.”

9. Rule 4 of this [Court's Rules](#) requires me to exercise my discretion judiciously. There has to be valid and clear reasons upon which discretion can be favourably exercised.

10. Rule 84 of the [Court of Appeal Rules, 2022](#) provides for institution of appeals as follows:

1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—

- a. a memorandum of appeal, in four copies;
- b. the record of appeal, in four copies;
- c. the prescribed fee; and
- d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule

2. within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.



11. Several reasons have been given for the delay in filing the memorandum and record of appeal including the mistakes of their erstwhile advocates.
12. The Supreme Court decision in *Fabim Yasin Twaha v Timamy Issa Abdalla & 2 others* [2015] eKLR laid down guidelines for exercise of discretion in extending time:
 - “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
 2. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 4. Where there is a reasonable (cause) for the delay, (the same should be expressed) to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.” (Emphasis supplied.)
13. The applicant admits that the record of appeal ought to have been filed by 14th May, 2024. The instant application seeking for extension of time was filed on 7th June, 2024, a delay of 24 days. The applicant attributed part of the delay to its erstwhile advocates in failing to apply for the proceedings on time. The applicant contends that that was an oversight which should not be visited upon it. This Court (Waki, JA) in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, held that:

“In this case, however, the erstwhile advocates are simply accused of inaction. In the case of *Rajesh Rughani v Fifty Investment Ltd. & Another* [2005] eKLR the Court of Appeal held, “It is not enough simply to accuse the Advocate of failure ... If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.
14. The other reason proffered for the delay is that the court file was not accessible as the file was with the trial court pending a ruling on stay. In response to this, the respondent submitted that there is no evidence attached to support this contention. In the circumstances, I find that the delay in filing the instant application is inordinate and the reasons given for the delay are not plausible and satisfactory to warrant the exercise of this Court’s discretion for extension of time.
15. As regards the success of the intended appeal, the applicant contends that the appeal has overwhelming chances of success. However, I am guided by the sentiments of this Court in *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR where this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court



has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

16. On 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 it an extension of time, against the prejudice to the respondent in granting an extension.
17. In the circumstances, I find that the applicant has failed to meet the threshold for extension of time. The application lacks merit and I order that it be and is hereby dismissed with costs to the respondent.

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

JAMILA MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

