



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Hospital Association t/a Nairobi Hospital v GWN (Civil Application  
E236 of 2023) [2023] KECA 1292 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1292 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E236 OF 2023  
PM GACHOKA, JA  
OCTOBER 27, 2023**

**BETWEEN**

**KENYA HOSPITAL ASSOCIATION T/A NAIROBI HOSPITAL ..... APPLICANT**

**AND**

**GWN ..... RESPONDENT**

*(High Court of Kenya at Nairobi (Civil Division) Civil Suit  
No. 56 of 2016 (C. Meoli, J.) delivered on 6th April, 2023)*

**RULING**

1. By a notice of motion dated June 5, 2023 made under section 3, 3A and 3B of the [Appellate Jurisdiction Act](#) and rule 4 of the [Court of Appeal Rules, 2022](#) the applicant, Kenya Hospital Association t/a Nairobi Hospital seeks extension of time within which to file and serve the notice of appeal, and letter requesting proceedings from the judgment of the High Court delivered on April 6, 2023, (Justice C. Meoli) out of time. It also requests that the notice of appeal, and letter requesting proceedings be extended by 14 days from the order being given. It seeks extension of time within which the applicant ought to file and serve the record of appeal by sixty days from the date of filing the notice of appeal.
2. The intended appeal arises from the judgment and decree of the High Court of Kenya at Nairobi (Civil Division) Civil Suit No. 56 of 2016 (C. Meoli, J.) delivered on April 6, 2023.
3. The application is supported by the affidavit sworn by Maxwell Maina, the senior legal officer of the applicant on June 5, 2023, and is made on 8 grounds set out on the face of the motion, which I need not recite here, save to observe that they contain the applicant's explanation for the delay in lodging his intended appeal. A summary of those grounds, which are also deposed in the supporting affidavit,



suffice to guide the exercise of my discretion in determining the application. I will quote the grounds verbatim as stated in the application;

- a. Judgment was scheduled for delivery on February 16, 2023. It was not delivered on this date as the learned judge informed the parties that it was not ready and would be delivered on notice;
  - b. On May 11, 2023, the applicant's advocate was informed by respondent's advocate that judgment had been delivered on April 6, 2023. Upon confirming with the judiciary portal, it was confirmed that judgment had been delivered on 6<sup>th</sup> April 2023;
  - c. Neither of the parties had been notified that judgment was to be delivered on April 6, 2023. The applicant's advocate wrote to the court on May 12, 2023 and collected a copy of the judgment on May 17, 2023;
  - d. The delay in making this application is not inordinate and the intended appeal is arguable, and no prejudice will be suffered by the respondent if the application is allowed.”
4. Learned counsel for the applicant and learned counsel for the respondents were duly served with a hearing notice by way of email on September 29, 2023. The respondent has not filed an affidavit in reply to the applicant's Motion. Further, only counsel for the applicant has filed written submissions dated 10<sup>th</sup> August 2023. Though presumably unopposed, the application must nonetheless meet the requirements of Rule 4 for extension of time to lodge an appeal out of time, and the need to comply with the requirements of rules 75, 77(1) and 82 of the [Court of Appeal Rules](#).
5. In [Imperial Bank Ltd \(in receivership\) and another v Alnasir Popat and 18 others](#) [2018] eKLR, this Court stated that:

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”
6. Rule 4 of the [Rules of this Court](#) gives the Court unfettered discretion to “... 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 ...,” on such terms as it thinks just.



7. In its decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2015] eKLR, the Supreme Court held that:

“it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”
8. In addition to the foregoing, I have considered the decision in *Potbiwalla v Kidogo Basi Housing Cooperative Society Ltd and 31 others* [2005] eKLR where the Court called to mind the criteria applied by the Court in exercise of its unfettered discretion in determination of an application under Rule 4, a criteria more succinctly settled in *Wasike v Swala* [1984] KLR where this Court stated:

“As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors: a. that there is merit in his appeal; b. that the extension of time to institute and file the appeal will not cause undue prejudice to the respondent; and c. that the delay has not been inordinate.”
9. Rule 75(1) and (2) of the *Court of Appeal Rules* requires “any person who desires to appeal to the Court” to “... give notice in writing within 14 days of the date of the decision against which it is desired to appeal.” Rule 77(1) requires that the notice be served on the respondent within 7 days. The applicant’s position is that it was not able to comply with the timelines due to no fault of their own, the reason being that they were not notified of the judgment date of April 6, 2023 and only managed to collect a copy of the judgment on 17<sup>th</sup> May, 2023. It now seeks extension of time to file and serve the notice of appeal and letter requesting proceedings.
10. On the question of the arguability of the appeal, this Court in *Muchungi Kiragu v James Muchungi Kiragu and another* [1998] eKLR, held:

“This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it.”
11. The question that I need to answer now is whether the applicant has given satisfactory reasons for the delay and whether the delay is unreasonable. The assertion that the judgement was delivered without notice to the applicant is not contested. It is also clear that as soon as the applicant was notified by advocate for the respondent that the judgment had been delivered, it immediately uploaded it from the e-filing portal. The applicant moved with speed and without any delay. I am satisfied that applicant was expeditious and the delay in lodging a notice of appeal on time has been satisfactorily explained. I have also perused the proposed memorandum of appeal and the grounds raised are not frivolous but as to whether they will succeed will be determined by the bench that will hear the appeal.
12. I am of the considered view that allowing time for the applicant to pursue its’ desire to pursue the intended appeal would not unduly prejudice the respondents.
13. Accordingly, I allow the application and order that the applicant shall file the notice of appeal within 7 days and the appeal within 60 days after the filing of the notice of the appeal. The costs of this application shall abide the appeal. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023.**



**M. GACHOKA CIArb, FCIArb**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

