



REPUBLIC OF KENYA



**KENYA LAW**  
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**Osugo v Timeless Courier Services (Civil Application  
31 of 2021) [2022] KECA 529 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 529 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION 31 OF 2021  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
MAY 27, 2022**

**BETWEEN**

**JAMES MOGENI OSUGO ..... APPLICANT**

**AND**

**TIMELESS COURIER SERVICES ..... RESPONDENT**

*(This was a reference under Rule 55 of the Court of Appeal Rules from the Ruling of A. Murgor, JA. dated 18th June, 2021 in an application for extension of time to file an appeal out of time against the judgment/order of the High Court of Kenya at Kisii (Lady Justice R.E. Ougo) dated February, 2020 in Civil Appeal No. 2 of 2019)*

**RULING**

1. In the letter from his Advocates, Ben. K. Gichana & Co. Advocates, dated 23<sup>rd</sup> June 2021, the applicant seeks a reference under Rule 55 of the [Court of Appeal Rules](#) to the full Court of the decision of a single Judge of this Court (A. Murgor, J.A.) dated June 18, 2021. The learned single Judge's ruling was made pursuant to a notice of motion application dated March 15, 2021 brought under Rule 4 of the [Court of Appeal Rules, 2021](#). In the said application, the applicant sought the leave of the Court to file an appeal out of time against the judgment and decree of the High Court of Kenya at Kisii (R.E Ougo J) dated February 13, 2020 in Civil Appeal No. 2 of 2019.
2. The basis of the application is that the 60 days period prescribed under Rule 82 of the [Court of Appeal Rules, 2010](#) within which his appeal should have been instituted has lapsed. He therefore asks this Court to grant him an extension of the time within which to file his appeal. Further, that the impugned judgment was delivered on February 13, 2020 and being aggrieved, he had filed a notice of appeal dated 2nd March 2020. The said notice was filed out of time but was allowed pursuant to the first appellate court's ruling dated March 12, 2021.



3. According to the applicant, he had written a letter dated March 2, 2020 bespeaking the typed proceedings. The proceedings were issued together with a certificate of delay dated March 2, 2021 giving the reasons for the delay. He was therefore unable to lodge his appeal within the period prescribed under Rule 82 of the *Court of Appeal Rules, 2010*.
4. The applicant contends that the delay in filing his appeal was occasioned by the High Court Registry, and his current application has been made in good faith and without undue delay. His intended appeal has high chances of success and he will suffer irreparable loss and damage should the orders sought not be granted. The respondent did not file a response to the application.
5. In her decision on the said application, the single judge of this Court concluded that the applicant had not placed material before the Court on the basis of which the Court could exercise discretion in his favour, and dismissed the application for extension of time, hence this reference. Further, since a complete copy of the judgment sought to be appealed from had not been annexed, the Court could not discern the possibility or otherwise of the appeal, or the prejudice likely to be suffered by the respondent should the application be granted.
6. The applicant did not file submissions on the reference, while the respondent opposed the reference through an affidavit sworn by Mr. C.K Kirui on 7<sup>th</sup> March 2022 and submissions of the same date. Mr. Kirui avers that the High Court delivered judgment in the matter on February 13, 2020, and that it reduced liability against the appellant from 100% to 50:50 against both parties. The respondent contends that the applicant does not explain the reasons for the delay of over one year in filing the appeal. The delay is inordinate, has not been explained and is therefore inexcusable. Further, the applicant had not exercised due diligence as the Notice of Appeal was filed out of time. There was also no indication that the applicant sent the letter dated March 2, 2021 bespeaking the proceedings as it was never served upon the respondent's advocates.
7. The respondent further avers that the applicant does not have an arguable appeal and is only intent on frustrating the respondent, yet the respondent has already met all its obligation in accordance with the order of the High Court. In any event, the Certificate of Delay filed by the applicant does not give reasons why the typing of proceedings took long. Even though the typed proceedings were ready on January 20, 2021, there is a further delay of 13 days from the date of the Certificate of Delay which the applicant has not explained.
8. We have considered the application, the ruling of the single judge, and the replying affidavit and submissions by the respondent. We are called upon to interfere with the exercise of discretion by a single judge of this Court in reaching the decision not to extend time under Rule 4 of the Rules of this Court. In determining whether such discretion was exercised judiciously, we bear in mind the words of this Court in *John Koyi Waluke v Moses Masika Wetangula & 2 others*, Civil Appeal (Application) No. 307 of 2009, [2010] eKLR in which this Court held that:

“Having considered all that has been urged before us in this reference we would say that we have stated time without number that in exercising the unfettered discretion under Rule 4 of this Court's Rules, a single judge of the Court is doing so on behalf of the whole Court, and the full bench of the Court would only be entitled to interfere with the exercise of discretion if it be shown that in the process of exercising the discretion the single Judge has taken into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account or that he misapprehended some aspect of the evidence and the law applicable or short of these, that his decision was plainly wrong and could not have been arrived at by a reasonable tribunal



properly directing itself to the evidence and the law. It is not enough, for example, to show the full Court that had it been sitting in place of the single Judge, it would have arrived at a different result.”

9. The principles to be considered in determining whether or not to extend time for the doing of any act under this Court’s Rules were set out in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231. The Court is required to consider the length of the delay, the reasons for the delay, (possibly the chances of success of the intended appeal, and the prejudice to be suffered by the respondent if the application is allowed.

10. In reaching her decision on the applicant’s application, the single Judge observed as follows:

“The judgment was delivered on 13<sup>th</sup> February, 2020. The applicant thereafter contends that he requested for the judgment and typed proceedings on March 2, 2020. A copy of the letter bespeaking the request was not attached to the motion for this Court’s benefit.... Also not attached was the Notice of appeal. What the applicant attached however was a Certificate of Delay which stated that it took the registry from March 2, 2020 upto January 20, 2021 to prepare and deliver the typed proceedings and judgment. The registry also admitted to having been the cause of this delay.

To begin with, though the applicant deponed that a Notice of Appeal was filed on March 3, 2020, no Notice was annexed. It is also distinctive that the Notice was filed out of time, that is 19 days after the judgment was delivered. Since there was no prayer for an order seeking for time to be extended to file and serve the Notice of appeal, it may well be that the intended appeal is incompetent ab initio.

Then, as stated above, the applicant did not annex a copy of the request for the typed proceedings so as to enable this Court ascertain whether the proviso to Rule 82 of this Court’s Rules would be applicable to the circumstances of the case.”

11. The single judge went on to note that Rule 82 requires that once the applicant has requested for proceedings and served the request on the respondent, the Registrar of the High Court should certify the time taken for the preparation and delivery of the proceedings to the appellant. Such period is then excluded when time with respect to the filing of the appeal is computed. The single judge noted that under Rule 82(2), the applicant is not entitled to rely on the proviso to sub rule (1) of Rule 82 unless the request for proceedings was in writing and had been served on the respondent.

12. From the documents placed before us, the judgment in this matter was delivered on February 13, 2020. The Notice of Appeal was filed on 2<sup>nd</sup> March 2020, out of time. However, pursuant to a consent order between the parties adopted as an order of the court on March 12, 2021, the Notice of Appeal was deemed as duly filed.

13. Under Rule 82(2) of this Court’s Rules, the applicant was required to request for the proceedings and serve a copy of the request on the respondent. We note that a copy of the letter bespeaking the proceedings was annexed to the application, contrary to the finding of the single Judge. However, there is no indication that the letter was served on the respondent as required by the Rules. The applicant had therefore not complied with the rule requiring that the letter be copied to the respondent. Indeed, the respondent expressly states that it was never served with the said letter.

14. In the circumstances, we find that the single Judge was correct in reaching the conclusion, albeit for a slightly different reason, that the appellant needed to explain the entire one-year delay between the



date of the judgment and the date of this application as he could not exclude the period of preparation of the proceedings set out in the Certificate of Delay to explain the delay in filing his appeal.

15. According to the Certificate of Delay annexed to the application, the proceedings were ready as at January 20, 2021. The applicant did not file this application until March 15, 2021, a further delay of at least another 55 days. No attempt has been made to explain this delay. In *Trade Bank Ltd (in liquidation) v L.Z Engineering Construction Ltd & another* Civil Application No. Nai 282/98, this Court stated that:

“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said, the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”

16. The applicant was under a duty to explain the further delay in filing the application for extension of time, but has not done so.
17. The final, one might say tentative, consideration in an application for extension of time postulated in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* is the chances of success of the appeal. We have noted the grounds of appeal contained in the Memorandum of Appeal dated 15<sup>th</sup> March 2021 annexed to the present application. The applicant impugns the decision of the first appellate court on the basis that it made a finding of liability on a 50:50 basis which was unsupported by evidence, disregarded the applicant’s submissions and relied on authorities which were not in tandem with the case; misinterpreted judicial precedents on the subject matter and disregarded the evidence of a traffic officer.
18. While the single Judge stated that it was not possible to gauge the possibility of success or otherwise of the intended appeal as the judgment before her was incomplete, we note that the complete judgment of the first appellate court is annexed to the application. However, observe that it is not the duty of the single judge, in an application for extension of time, to fully consider the success or otherwise of an intended appeal. As was held in *Atbuman Nusura Juma v Afwa Mohammed Ramadhani* [2016] eKLR:

“...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 consideration 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”.

19. In the circumstances, we find no basis for interfering with the exercise of discretion by the single judge. The reference is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF MAY, 2022.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

.....



**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR.**

