



**Tungwa & another v Pandya Memorial Hospital (Civil Application  
27 of 2021) [2021] KECA 278 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 278 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION 27 OF 2021  
P NYAMWEYA, JA  
DECEMBER 3, 2021**

**BETWEEN**

**MLONGO TUNGWA ..... 1<sup>ST</sup> APPLICANT**

**LEWA NGUTA LEWA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PANDYA MEMORIAL HOSPITAL ..... RESPONDENT**

*(An application for leave to file a Notice of Appeal out of time against the judgment of the High Court at Mombasa (P.J. Otieno J.) dated 26th October 2020 in Civil Appeal No. 217 of 2019)*

**RULING**

1. The application herein by way of a Notice of Motion dated 19<sup>th</sup> March 2021 is brought by the Applicants pursuant to Rule 4 of the Court of Appeal Rules, and is seeking extension of time for filing of the Notice of Appeal herein. The application is supported by an affidavit sworn by the Applicant on 19<sup>th</sup> March 2021 by Benedict Wambua Kenzi, the Applicants' advocate. The firm of B.W. Kenzi & Company Advocates in addition filed written submissions thereon dated 16<sup>th</sup> September 2021, on behalf of the Applicants. The Respondents did not file any pleadings in response to the application. This Court thereupon proceeded to hear the application by way of written submissions, in the absence of the parties.
2. The grounds set forth by the Applicants are that that judgment was scheduled for 26th October 2020 and was not ready and stood over until 30th October 2020.
3. On the said date, the Court was not sitting because the judge was on transfer, and that on 22nd January 2021, the Advocate's clerk was told while at the trial court's registry that the judgment was delivered virtually on 17th November 2020. The Applicants contend that the Court records showed that the judgment was delivered on 17th November 2020 and not earlier, and that their Advocate's law firm



was not notified of the judgment delivery. They pointed out that they filed and served a Notice of Appeal immediately they became aware of the judgment. Further, that they have an arguable appeal on the issue of liability, and have already applied for certified copies of the proceedings and judgment with a view to prefer the appeal to this Court.

4. The power to extend time is provided in Rule 4 of the *Court of Appeal Rules*, and under Rule 53(1) of the Rules, this power may be exercised by a single Judge of this Court. While the Court has wide unfettered discretion in this regard, it should act judiciously and according to the principles set out in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi*, (1999) 2 EA 231. This Court set out guidelines for the exercise of the court discretion under rule 4 of the Rules therein as being first, the length of delay; second, the reason for delay; third (possibly), the chances of the appeal succeeding if the application is granted; and, fourth, the degree of prejudice to the respondent if the application is granted.
5. I have considered the arguments by the Applicants, and the background to their application, which arises from an appeal lodged by the Respondent in the trial Court against an award of general damages made to the Applicants in respect of a fatal accident. The trial Court allowed the appeal in the judgment of 20th October 2020, on the ground that the Respondent's liability was never proved. Rule 75(2) of the Court of Appeal Rules in this respect requires that a Notice of Appeal is lodged within fourteen days of the decision intended to be appealed against, which in the circumstances of the present application ought to have been by 3<sup>rd</sup> November 2020.
6. The instant application was lodged on 13<sup>th</sup> April 2021 over five (5) months later. The Applicant's advocate averred that he was not aware of the delivery of the judgment until 21<sup>st</sup> January 2021, but has not explained the delay between 21<sup>st</sup> January 2021 and when he filed the application for extension of time. I however note that the Applicants annexed a Notice of Appeal lodged on 28<sup>th</sup> January 2021, and a letter dated 22<sup>nd</sup> January 2021 to the trial Court requesting for the certified proceedings and judgment. I therefore find that the Applicants promptly acted to mitigate the delay, and to this extent the said delay is not inordinate.
7. A perusal of the draft memorandum of appeal reveals that the Applicants have stated the errors they allege were made by the trial Court in its finding on the Respondent's liability, which will require consideration. Any prejudice the Respondent will suffer in this regard can adequately be addressed by way of costs.
8. I therefore find that arising from the above stated factors, the Applicants merit the exercise of this Court's discretion in its favour. I accordingly allow the Applicant's application by way of the Notice of Motion dated 19<sup>th</sup> March 2021 to the extent of the following orders:
9. The Applicants herein is granted leave to file and serve a notice of appeal out of time, and the Notice of Appeal dated 21<sup>st</sup> January 2021 and lodged on 28<sup>th</sup> January 2021 is hereby admitted to the record.
10. The Applicants shall file and serve their appeal within 60 days from the date of this ruling.
11. There shall be no order as to the costs of the application dated 19<sup>th</sup> March 2021.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 3<sup>RD</sup> DAY OF DECEMBER 2021.**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

