



**Nyamatari v Lagat & another (Civil Miscellaneous Application
E009 of 2023) [2023] KEHC 17930 (KLR) (24 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL MISCELLANEOUS APPLICATION E009 OF 2023**

F GIKONYO, J

MAY 24, 2023

BETWEEN

ALBERT MAGARE NYAMATARI APPLICANT

AND

NANCY JEPTENKINY LAGAT 1ST RESPONDENT

HARUN KAMAU MACHARIA 2ND RESPONDENT

*(Being an appeal from the Ruling of Hon. A.N. Sisenda (R.M)
Delivered on 24th October 2022 in Narok CMCC No. E021 of 2021)*

RULING

1. The notice of motion dated March 13, 2023, seeks the following orders.
 - i. Spent.
 - ii. That this honourable court do grant the applicants herein leave to lodge appeal against the said judgment delivered in the absence of parties on the October 24, 2022 and decree out of time.
 - iii. Costs of this application be in the cause.
2. The application is premised upon the grounds set out in the application and supporting affidavit sworn by Albert Magare Nyamatari.
3. According to the applicant, the delay in lodging the appeal was purely inadvertent and is excusable. The reasons given are; that the judgment subject of this application was delivered in the absence of the applicant without notice. That it took time to trace the file. That the applicant was a passenger in one of the defendant's vehicles and hence they could not have contributed to the occurrence of the accident. That the delay to lodge the appeal is not inordinate. That the intended appeal has merit and has high chances of success. That unless the application is granted leave out of time the applicants shall



suffer irreparable loss. That the applicants are ready and willing to abide by any reasonable terms as this honourable court may deem just to order.

4. The Respondents did not file any responses to the application despite being served with the said application.
5. I have perused the affidavit of service on record sworn by Douglas Musa Machage on March 27, 2023 confirming service to the firm of the respondents.
6. Mr Machage reiterated the grounds of the application and added that he became aware of the judgment in November 2022. They got in touch with their client who later gave them instructions to file appeal. Time of appeal had already lapsed.

Analysis And Determination

7. Under the proviso to section 79G of the [Civil Procedure Act](#):

‘...an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.’
8. I have perused the file and noted that the applicant did file his memorandum of appeal together with the present application dated March 13, 2023. Nevertheless, the decision to grant leave to appeal out of time or to admit appeal out of time is in exercise of discretion by the court in accordance with the law. The appellant must satisfy the court that he had good and sufficient cause for not filing the appeal in time.
9. Relevant matters for consideration is such application were discussed by the Court of Appeal in [Thuita Mwangi vs. Kenya Airways Ltd](#) [2003] eKLR to include:
 - i) The period of delay;
 - ii) The reason for the delay;
 - iii) The arguability of the appeal;
 - iv) The degree of prejudice which could be suffered by the if respondent the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest if any is involved.
10. The judgment was delivered on October 24, 2022 while the present application was filed on March 17, 2023- about three (3) months after the lapse of the 30 days stay of execution granted by the trial court. The applicant has submitted that the delay was occasioned by the fact that the judgment subject of appeal was delivered in their absence. In the absence of proof of applicant’s indolence in pursuing his rights, I am inclined to give effect and promote the applicant’s right of appeal by granting leave to file his intended appeal.
11. Accordingly, I do allow the application dated March 13, 2023 in the following terms: -
 - a. Leave is granted to the applicant to file appeal out of time against the judgment delivered in Narok CMCC E021 of 2021.
 - b. The applicant to file and serve his Memorandum of Appeal within fourteen (14) days hereof.

Dated, signed and delivered at Narok through teams application, this 24th day of May, 2023



F. GIKONYO M.

JUDGE

IN THE PRESENCE OF:

PARA 1.

Mr. Kasaso – CA

PARA 2.

Karanja for Respondent

PARA 3.

Musa Machage for appellant

NAROK HC MISC. APP. NO. E009 OF 2023 Page 2 of 2.

