



Motor Mania Body Builders Ltd v Gakumo Kihoro & Sons Ltd (Environment and Land Miscellaneous Application E268 of 2024) [2025] KEELC 4279 (KLR) (30 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4279 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E268 OF 2024**

TW MURIGI, J

MAY 30, 2025

BETWEEN

MOTOR MANIA BODY BUILDERS LTD APPLICANT

AND

GAKUMO KIHORO & SONS LTD RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 12th November, 2024 in which the Applicant seeks the following orders:-
 - a. Spent.
 - b. THAT the Honourable Court be pleased to extend time and grant leave to file an Appeal out of time against the Judgment delivered on 31st January 2022 by Hon H.M Nyaberi Chief Magistrate in Milimani Chief Magistrate Commercial Court Civil Case No. 6498 of 2010 Moto Mania Body Builders vs Gakumo Kihoro and Sons Limited.
 - c. That this Honourable Court be pleased to issue any other orders that it may deem fit, just and expedient in the interest of justice.
 - d. That costs of this application be in the cause.
2. The Application is premised on the grounds appearing on its face together with the supporting affidavit of Anthony Gikaria Advocate sworn on even date.

THE APPLICANT'S CASE.

3. The deponent averred that judgment in Milimani Chief Magistrate's Court Civil Case No. 6498 of 2010 was delivered on 31st January 2022 against the Applicant.



4. That being aggrieved, the Applicant filed Appeal No. E084 of 2022 at the High Court against the decision. That vide a judgment delivered on 31st October 2024, Hon. Justice Mwamuye found that the High Court lacked jurisdiction to hear and determine the appeal.
5. The deponent contends that the Applicant's right of appeal has not been extinguished since the Appeal was not determined on its merit. He further contended that the delay in filing the appeal was not deliberate on the part of the Applicant

RESPONDENTS CASE.

6. In opposing the application, the Respondent filed a replying affidavit of Henry Omino Advocate dated 8th January 2025 and grounds of opposition of even date.
7. The deponent averred that the delay in filing the appeal is inordinate and inexcusable. He further averred that the Applicant's right of appeal was automatically extinguished after the High Court dismissed the appeal for want of jurisdiction. According to the deponent, ignorance of the law is not an excuse. He argued that reopening the matter will prejudice the Respondent.
8. It was further argued that the application was fatally defective and an abuse of the court process.
9. The Respondent also filed a preliminary objection raising the following grounds:-
 - a)) The present application has been initiated by way of a Notice of Motion Application.
 - b) A Notice of Motion is not a legally recognized mode of originating process and can only be filed in an existing suit.
 - c) The entire Notice of Motion application is fatally defective and is for dismissal for costs to the Respondent
10. The application was canvassed by way of written submissions.
11. The Applicant filed its submissions dated 5th March 2025 which I have duly considered.
12. As at the time of writing this ruling, the Respondent had not filed its submissions as directed.

ANALYSIS AND DETERMINATION.

13. Having considered the application, the respective affidavits, the grounds of opposition and the submissions by the Applicant, the only issue that arises for determination is whether the Applicant should be granted leave to appeal out of time.
14. The statutory provisions that deal with the requisite period for filing of appeals from the Subordinate Courts to the High Court is Section 79G of the [Civil Procedure Act](#) which provides that;

Every appeal from a subordinate court to the high court shall be filed within a period of thirty days from the date of the decree or order appealed against excluding from such period any time the lower court may certify as having been requisite for the preparation and delivery to the Appellant a copy of the decree or order: provided that 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.



15. In *First American Bank of Kenya Ltd Vs Gulab P Shah & 2 Others*, Nairobi (Milimani) HCCC No 2255 of 2000 (2002) I EA 65 the court set out the factors to be considered in deciding whether or not to grant such an application as follows;
- i. The explanation if any for the delay;
 - ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is frivolous one which would only result in the delay of the course of justice;
 - iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant.
16. The court has wide unfettered discretion in granting leave to file an appeal out of time. However, in exercising its discretion to grant extension of time, the court must consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the application is granted.
17. The Applicant contends that the delay was occasioned by the fact that the Appeal was filed at the High Court which in its judgment found that it lacked jurisdiction to determine the Appeal.
18. Having considered the circumstances of this case, this court finds and holds that even though the delay is inordinate, the Applicant has given plausible reasons for the same.
19. In the end, I find that the application dated 12th November 2024 is merited and the same is hereby allowed in the following terms;
- a. Leave is hereby granted for the applicant to file and serve her appeal within 14 days from the date of delivery of this ruling.
 - b. In default of order (a) above, the leave granted shall lapse automatically.
 - c. Costs to abide with out of the Appeal.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF MAY, 2025.

.....

HON. T. MURIGI

JUDGE

IN THE PRESENCE OF:

Court assistant – Ahmed

Gikaria for the Applicant

