



REPUBLIC OF KENYA



**Mwangi v Mutua (Civil Suit E025 of 2021) [2025] KEHC 25 (KLR) (10 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 25 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL SUIT E025 OF 2021  
FR OLEL, J  
JANUARY 10, 2025**

**BETWEEN**

**BONFACE MWANGI ..... APPLICANT**

**AND**

**DR ALFRED MUTUA ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The application before the court for determination, is the Notice of Motion application dated 11<sup>th</sup> December 2023 brought pursuant to provisions of Section 1, 1A, 3, 3A & 95 of the *Civil Procedure Act*, Order 50 rule 6 of the *Civil Procedure Rules*, Section 7 *Appellate Jurisdiction Act* and all other enabling provision of law. The Defendant/Applicant seeks for orders that;
  - a. That leave be granted to the Applicant herein for an extension of time to file his notice of Appeal against the ruling of this honourable court delivered on 16 October 2023.
  - b. That leave be granted to the Applicant herein for an extension of time to file his notice of Appeal against the sentence of this honourable court issued on 1<sup>st</sup> November 2023 pursuant to the ruling of 16<sup>th</sup> October 2023.
  - c. That costs of this Application be provided for in the main Appeal.
2. The said application is supported by the ground stated on the face of the said application and the attached supporting affidavit dated 11<sup>th</sup> December 2023, sworn by the defendant/applicant who deponed that on 16.10.2023, this court had found him guilty of being in contempt and subsequently sentenced him to pay a fine of Kshs.300,000/= or 3 months in jail. He was granted leave to Appeal, but the time granted lapsed before the said notice of Appeal was filed and he attributed this lapse to the process of engaging new advocates and late handing over the suit file to the said advocate. He was keen to prosecute his appeal and urged the court to grant the orders sought.



3. The Respondent opposed this Application through his replying affidavit dated 15<sup>th</sup> January 2024, where he deponed that the delay in filing the notice of Appeal was unexplained thus disentitled the Defendant/Applicant from the discretionary intervention of this Honourable court. The applicant had moved court 56 days after being granted leave to Appeal, and no affidavit had been filed by his former advocate to explain the delay, which omission was fatal. Further, the applicant had explained in his affidavit that, “he had sought to appoint a new advocate to act” for him in this matter, but did not proffer the dates or period when he decided to change the said advocates. The respondent thus reiterated that there being no reasonable and/or satisfactory explanation given to explain the delay, no discretion could be exercised in favour of the applicant.
4. Further, the respondent did depone that Applicant had not clearly stated and/or demonstrated the grounds of Appeal proposed to be filed, and given the background of this matter and the Applicant’s refusal to purge the contempt, his appeal had no chance of success. The respondent thus urged the court to find that the application under consideration lacked merit and proceed to dismiss the same with costs to the respondent.

### **B. Analysis & Determination**

5. I have carefully considered the Application, its supporting affidavit, and the response filed in opposition thereto. The only issue that arises for determination is whether this court should exercise its discretion to grant the Defendant/Applicant leave to Appeal out of time against his conviction and sentence arising from the contempt proceedings earlier instituted by the plaintiff/respondent.
6. Order 50 rule 6 of the *civil procedure Rules* does provides that;  

“where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court, the court shall have powers to enlarge time upon such terms(if any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”
7. The principles of granting leave to file an appeal out of time were discussed by the Court of Appeal in the case of *Omar Shurie v Marian Rashe Yafar* (Civil Application No. 107 OF 2020) UR where it was held:  

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”
8. Similarly, The Court of Appeal in the case of *Thuita Mwangi V Kenya Airways Ltd* [2003] eKLR discussed some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time, they include the following:
  - 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.
9. Finally, the importance of giving a sufficient reason for the extension of time to appeal was discussed in the Court of Appeal case of *Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo* (2019) eKLR where it was held:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time were laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC* (2014) eKLR Supreme Court Application No 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if an extension is granted”.

10. Even though the respondent averred that no explanation was proffered as to why there was a delay in filing the notice of appeal, the said proposition is not true. The applicant explained that he opted to change his advocates, and his previous advocate on record handed over the file to his new advocate on 5<sup>th</sup> December 2023, a fact confirmed by the said advocate’s letter dated the instant date marked as BM1. The reason for delay as explained by the applicant is plausible and the court finds merit in the same.
11. Secondly the period of delay from the date of sentence is about 40 days and the same cannot be said to be inordinate, given the explanation proffered. Indeed, the firm of James Njeri & Co Advocates filed their notice of change of advocates on 7<sup>th</sup> December 2023 and subsequently filed the Application for extension of time on 11<sup>th</sup> December 2023.
12. Concerning the merits of the said Appeal, the same cannot be looked at from the prism of the Applicant’s conduct and or guilt finding by this court since he has an inherent right to be heard, which is not only constitutionally entrenched but it is also the cornerstone of the Rule of law, and its the violation would be considered to be a breach of rules of natural justice. See *Richard Nchapi Leiyagu vs. IEBC & 2 Others* [2013]eKLR; *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003
13. Finally on the issue of prejudice, it is my finding that the court has to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Applicant has already paid the fine imposed and his Appeal will not in any way delay the conclusion and/or hearing of the substantive suit herein. Thus leave if granted, will not prejudice the respondent.

### C. Disposition

14. I do find the Application dated 11<sup>th</sup> December 2023 has merit and the same is allowed in terms of prayer (1) and (2) respectively.



15. The Applicant is granted 14 days from the date of this ruling to file and serve their notice of Appeal against this court ruling dated 16.10.2023 and sentence dated 01.11.2024.
16. The costs of the said Application are awarded to the Respondent.
17. It is so Ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 10<sup>TH</sup> DAY OF JANUARY, 2025.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 10<sup>TH</sup> DAY OF JANUARY, 2025.**

In the presence of: -

No appearance for Plaintiff/Respondent

No appearance for Defendant/Applicant

Susan/Sam Court Assistant

