



**PMM v AWM (Being Sued as Next of Kin and Friend of EWM a Minor) & another (Miscellaneous Civil Application E043 of 2023) [2025] KEHC 553 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 553 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
MISCELLANEOUS CIVIL APPLICATION E043 OF 2023  
FN MUCHEMI, J  
JANUARY 23, 2025**

**BETWEEN**

**PMM ..... APPELLANT**

**AND**

**AWM (BEING SUED AS NEXT OF KIN AND FRIEND OF EWM A  
MINOR) ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Brief facts**

1. The application dated 30<sup>th</sup> October 2023 seeks for orders of leave to file an appeal out of time against the judgment in Gatundu SPMCC No. 195 of 2020 delivered on 13<sup>th</sup> September 2023.
2. It is noted that the 1<sup>st</sup> respondents did not put any response in opposition to the application.

**Appellant/Applicant's Case**

3. The applicant states that on 13<sup>th</sup> September 2023, the trial court in Gatundu SPMCC No. 195 of 2020 dismissed his case with no orders as to costs. Being aggrieved by the decision of the trial court, the applicant states that he instructed his advocates to lodge an appeal however the statutory period within which to file the appeal had lapsed.
4. The applicant states that the judgment in the lower court was delivered in his absence and that of his advocates. Upon following up of the judgment at the registry, the applicant's counsels obtained a copy of the judgment. The applicant thereafter instructed his advocates to lodge an appeal but they did not do so forcing him to instruct new advocates to represent and file the appeal.



5. The applicant argues that the delay occasioned of about 18 days is not so inordinate as to be inexcusable. The applicant further states that the respondents will not suffer any prejudice if the application is allowed.
6. Directions were issued that the application be canvassed by way of written submissions. However, the record shows that the applicant and 2<sup>nd</sup> respondent complied with the directions. Their submissions were filed on 30<sup>th</sup> November 2024 and 17<sup>th</sup> July 2024 respectively.

### **The Applicant's Submissions**

7. The applicant relies on Section 79G of the *Civil Procedure Act* and the case of Mugo & Others vs Wanjiru & Another [1970] EA 482 and submits that he filed his memorandum of appeal together with the instant application and urges the court to admit the appeal out of time and deem it as properly filed.
8. The applicant submits that the delay in filing the appeal was not intentional but was caused by his previous advocates who failed to follow instructions to file the appeal and also became uncooperative. The applicant argues that the delay was as a result of his advocates' mistake and should not be visited on him. The applicant further argues that his intended appeal is arguable and meritorious and will therefore be rendered nugatory if not granted.
9. The applicant relies on Articles 48 and 50(1) of *the Constitution* and submits that he should be allowed to ventilate his case and should not be locked out.
10. The applicant further relies on the case of Hamam Singh & Others vs Mistri [1971] EA 122 and submits that the delay of 17 days was not inordinate. Furthermore, the applicant argues that upon realizing that his former advocates did not lodge an appeal, he instructed new advocates to file the appeal. The applicant argues that the respondents shall not suffer any prejudice if the orders sought are granted.
11. The applicant relies on the cases of Thuita Mwangi vs Kenya Airways Ltd [2003] eKLR and Edith Gichungu Koine vs Stephen Njagi Thoithi [2014] eKLR and submits that he has met the threshold to warrant the court to exercise its discretion in his favour and grant him leave to file his appeal out of time.

### **The 2<sup>nd</sup> Respondent's Submissions**

12. The 2<sup>nd</sup> respondent relies on Section 79G of the *Civil Procedure Act* and the cases of Nicholas Kiptoo arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR and Mwangi S. Kimenyi vs Attorney General & Another [2014] eKLR and submit the allegation by the applicant that he and his advocate were unaware of the judgment is not a valid excuse for delay. It is the responsibility of litigants to be vigilant and proactive in following up on their cases. The 2<sup>nd</sup> respondent further submits that the modern judicial system has provided litigants with mechanisms to track their cases diligently and thus a party's absence does not absolve him/her of that duty. As such, the applicant's absence during the delivery of the judgment is insufficient cause for the delay in filing the appeal.
13. Relying on the cases of Habo Agencies Limited vs Wilfred Odhiambo Musingo [2015] eKLR and Rajesh Rughani vs Fifty Investments Ltd & Another [2016] eKLR, the 2<sup>nd</sup> respondent submits that the applicant's reliance on the advocate's promise to follow up with the court registry does not constitute good and sufficient cause. The advocate's failure to act does not absolve the applicant of the responsibility to ensure his case is diligently being prosecuted.



14. The 2<sup>nd</sup> respondent further argues that the law places an onus on the litigant to ensure that their case is properly managed. Therefore delegating responsibility to an advocate without follow up does not meet the threshold for good and sufficient cause.
15. The 2<sup>nd</sup> respondent further submits that the applicant's decision to change advocates to prevent further delay does not justify the lateness of the appeal. The responsibility to manage the appeal timelines rests with the applicant and switching counsels does not provide a valid excuse for failing to meet the deadline.
16. The 2<sup>nd</sup> respondent relies on the cases of Julius Kamau Kithaka vs Waruguru Kithaka Nyaga & 2 Others [2013] eKLR and Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR and submits that any delay must be justified with a substantive reason. The absence of inordinate delay does not in itself suffice to grant an extension without a cogent explanation. The 2<sup>nd</sup> respondent argues that even though the delay is not deemed excessive, it must be justified with a valid reason. The 2<sup>nd</sup> respondent submits that the applicant has failed to provide a compelling explanation for the delay. Mere assertions without substantive justification do not meet the legal standards for extending time.
17. The 2<sup>nd</sup> respondent further relies on the cases of Nicholas Kiptoo arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR and Feroz Begum Qureshi & Another vs Maganbhai Patel & Others [1964] EA 633 and submits that while the merits of the appeal and potential prejudice to the respondent are considerations, they are secondary to the requirement of a justified delay. The 2<sup>nd</sup> respondent argues that since the applicant has not given sufficient cause for his delay, the aforesaid factors do not override the need for adherence to procedural timelines. The integrity of the judicial process relies on adherence to prescribed timelines and granting leave to appeal out of time without a substantial justification would undermine the fundamental principle.

**The Law Whether the court should exercise its discretion to grant the applicant leave to file its appeal out of time;**

18. Section 79G of the [Civil Procedure Act](#) states:-

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 which the lower court may certify as having been requisite for the preparation and delivery of 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.

19. It is clear from the wording of section 79G of the [Civil Procedure Act](#) that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of Diplack Kenya Limited vs William Muthama Kitonyi [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
20. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-



- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
  - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
  - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
  - f. Whether the application has been brought without undue delay.
21. Similarly, in the case of Paul Musili Wambua vs Attorney General & 2 Others [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-
- “.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”
22. In this matter judgment was delivered on 13<sup>th</sup> September 2023 and the applicant filed the current application on 6<sup>th</sup> November 2023. This is approximately twenty-four (24) days outside the time limited for filing an appeal. The applicant has stated in his affidavit that the delay was caused by his previous advocates failing to lodge an appeal despite being given express instructions to do so.
23. On perusal of the record, the applicant has not annexed the express instructions to appeal he claims to have given his former advocates. However, this court takes judicial notice that instructions to advocates could be verbal most of the times. It is the responsibility of the litigant to be vigilant and proactive in following up on their cases. Furthermore, the applicant was the plaintiff in the suit SPMCC No. 195 of 2020 and therefore he has a duty to proactively pursue his case. It is evident that a litigant ought to pursue his claim even when he is represented by counsel. However, this court is not limited to the applicant’s failure to pursue his case. The court may consider other factors that may have contributed to the delay. The also ought to be considered alongside other relevant factors.
24. Despite the foregoing the court considers that the applicant was late with only 24 days which period cannot be considered inordinate in normal circumstances. The fact that the applicant hired a new advocate to file the appeal points towards existence of some disagreement with his former advocate which would have caused delay. The delay could have been caused by factors beyond the applicant’s control.
25. I have perused the draft memorandum of appeal and noted that the applicant raises issues of both fact and law which he alleges were not considered in the judgment of the learned Magistrate. In my view, the applicant ought to be given a chance to ventilate his appeal.



26. Consequently, I find that this application is merited and allow it accordingly.
27. The applicant shall meet the costs of this application in mitigation for the delay.
28. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 23<sup>RD</sup> DAY OF JANUARY 2025.**

**F. MUCHEMI**

**JUDGE**

