



REPUBLIC OF KENYA



KENYA LAW
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**Awal Limited v Malonza & another (Civil Miscellaneous 699 of 2019)
[2025] KEHC 4745 (KLR) (Civ) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS 699 OF 2019

TW CHERERE, J

MARCH 20, 2025

BETWEEN

AWAL LIMITED APPLICANT

AND

MUTUKU MALONZA 1ST RESPONDENT

JOSEPH NZAMALU MUTUNGI T/A HIGH SPEED TYRES .. 2ND RESPONDENT

RULING

Introduction

1. By notice of motion dated 30th September 2019 brought under sections 1A, 1B, 3A, 63 (e) and 79G of the *Civil Procedure Act* and Order 42 rule 11 and Order 51 rule 1 of the Civil Procedure Rules, the Applicant seeks an order for enlargement of time to file a memorandum of appeal against the judgment delivered on 25th February 2019 in Milimani CMCC 427 OF 2009.
2. The application is based on the grounds that:
 1. The Applicant only became aware of the judgment on 28th of February 2019, although the judgment was delivered on the 25th of February 2019.
 2. The Applicant was unable to obtain a certified copy of the judgment until the 04th of April 2019, which was beyond the limitation period for filing the appeal.
 3. The delay in obtaining the certified copy of the judgment was not due to the Applicant's fault, and the Applicant has acted without undue delay once the judgment was obtained.
 4. Applicant is aggrieved by the judgment and wishes to appeal



3. The Applicant's case is supported by an affidavit sworn by Reynard Brian Ochieng, Advocate, on the 02nd of October 2019, in which the Applicant asserts that the delay in obtaining the certified copy of the judgment was not due to any fault on their part and that the Applicant acted without undue delay once the judgment was obtained.
4. The Respondents opposed the application through a replying affidavit sworn by Muema Kitulu advocate on 25th November 2019 in which it is asserted that:
 - a. The application has been brought with undue delay
 - b. That the suit in the lower court was filed in 2009 and ought to be brought to rest

Issues for Determination

5. I have considered the application and identified the following issues for determination:
 1. Whether the Applicant has provided sufficient reasons to warrant an extension of time to file an appeal.
 2. Whether the Applicant has met the legal threshold for the grant of a stay of execution pending appeal.

Analysis and Determination

6. The power to extend time for filing an appeal is discretionary and is guided by Section 79G of the *Civil Procedure Act*, which 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 such time as may be certified by the court as 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.”
7. The Supreme Court set out the guiding principles that a Court should consider in the exercise of discretion on extension of time in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral & Boundaries Commission & 7 others* SC (App) No. 16 of 2014; [2014] eKLR and stated as follows:
 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.



8. In the present case, the Applicant moved the court on 30th September 2019 which is 7 months from 28th of February 2019 when it became aware of the judgment and 5 months from 04th of April 2019 when it obtained a copy of the judgment.
9. The Supreme Court in *County Executive of Kisumu v. County Government of Kisumu & 8 Others* [2017] eKLR reaffirmed the principles in *Salat v. Independent Electoral & Boundaries Commission & 7 others* (supra) and emphasized that the whole period of delay should be declared and sufficiently explained.
10. The Applicant in this case has not offered a satisfactory explanation for the whole period between February and September 2019.
11. Notwithstanding the delay, I have considered the draft memorandum of appeal, and the Applicant is challenging the dismissal of its suit. I am mindful of the fact that an arguable appeal need not necessarily succeed but is one that deserves the Court's consideration. (See *Dennis Mogambi Mang'are vs. Attorney General & 3 others* [2012] eKLR).
12. From the foregoing, I find that the appeal is arguable and worthy of consideration by the court.
13. For the foregoing reasons, the court makes the following orders:
 1. The application for extension of time to file an appeal is allowed on condition that the appeal be filed within 14 days from today's date
 2. The record of appeal be filed and served within 30 days of filing the appeal
 3. Costs of this application shall be borne by the Applicant.

DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Applicant - Ms. Taib for Taib A.Taib Advocates

For Respondent - Mr. Kiamba for Muema Kitulu & Co. Advocates

