



**Eri Kenya Limited v Muluku & another (Miscellaneous Civil Application  
E005 of 2024) [2025] KEHC 5096 (KLR) (12 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 5096 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
MISCELLANEOUS CIVIL APPLICATION E005 OF 2024  
AN ONGERI, J  
MARCH 12, 2025**

**BETWEEN**

**ERI KENYA LIMITED ..... APPLICANT**

**AND**

**FREDRICK FRANCIS MUTETI MULUKU ..... 1<sup>ST</sup> RESPONDENT**

**MULTIPLE HAULIERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application coming up for consideration is the one dated 26<sup>th</sup> February 2024 brought under Sections 1A, 1B, 3A, 79G of the *Civil Procedure Act*; Order 50, Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010) which seeks the following orders:-
  - i. This court be pleased to grant the applicant leave to appeal out of time against Judgment and Decree of the Chief Magistrate Hon. A. M. Obura (CM) in Voi SPMCC Civil Suit No. 160 of 2016: Fredrick Francis Muteti Muluku & Eri Kenya Limited & Another delivered on 28<sup>th</sup> August 2023.
  - ii. Voi HCCA No. E054 of 2023: Eri Kenya Limited =versus= Fredrick Francis Muteti Muluku & Another be deemed as duly filed and served:
  - iii. Costs of this application be provided for.
2. The application is based on the following grounds:-
  - i. On 28<sup>th</sup> August 2023 Hon. A. M. Obura (CM) delivered judgment in VOI SPMCC No. 160 of 2016 in the presence of Counsel for the 1<sup>st</sup> defendant and 2<sup>nd</sup> Defendant therein.
  - ii. The firm of Messrs. Muturi Gakuo & Kibara Copnay Advocates was on record for the 1<sup>st</sup> Defendant and the Applicant therein.



- iii. Advocate associate – Yusto Isabel who was in conduct of the matter and took the judgment unexpectedly left the law firm shortly thereafter.
  - iv. Due to her sudden departure there was no handover of the files in her conduct including Voi SPMCC Civil Suit No. 160 Of 2016.
  - v. It was only upon receipt of the 1<sup>st</sup> Respondent’s tabulation dated 25<sup>th</sup> September 2023 and the office file being traced on 28<sup>th</sup> September 2023 that the firm of Messrs. Muturi Gakuo & Kibara Company Advocates was able to prepare and file the Memorandum of Appeal.
  - vi. The Memorandum of Appeal dated 28<sup>th</sup> September 2023 and the Applicant’s letter requesting certified copies of typed proceedings, judgment and decree were delivered to the Voi Law Courts’ registry on 28<sup>th</sup> September 2023.
  - vii. The Applicant herein only received a stamped copy of the Memorandum of Appeal in respect of Voi HCCA NO. E054 of 2023: Eri Kenya Limited =versus= Fredrick Francis Muteti Muluku & Another on 29<sup>th</sup> September 2023.
  - viii. The Applicant’s Counsel have now discovered through the Court Tracking System that the matter has been slated for mention before the Honorable Judge on 27<sup>th</sup> February 2024.
  - ix. The application has been brought without inordinate delay.
  - x. The Applicant has an arguable appeal with a high chance of success since the learned trial Magistrate misdirected herself when she found the Applicant solely liable, disregarding the facts on the ownership of the subject motor vehicle.
  - xi. There will be no prejudice suffered upon the Respondents herein if the Applicant this Honourable Court is pleased to extend the time for filing the Applicant’s Appeal.
  - xii. It is in the interest of justice that the orders sought herein be granted so as to not drive the Applicant from the seat of justice for no fault of its own.
3. The application is supported by the affidavit of Naomi Kinuva which is a retaliation of the grounds above.
4. The 2<sup>nd</sup> Respondent filed grounds of opposition as follows:-
- i. On 28<sup>th</sup> August 2023 Hon. A. M. Obura (CM) delivered judgment in Voi SPMCC No. 160 of 2016 in the presence of Counsel for the 1<sup>st</sup> defendant and 2<sup>nd</sup> Defendant therein.
  - ii. The firm of Messrs. Muturi Gakuo & Kibara Company Advocates was on record for the 1<sup>st</sup> Defendant and the Applicant therein.
  - iii. at that Advocate associate – Yusto Isabel who was in conduct of the matter and took the judgment unexpectedly left the law firm shortly thereafter.
  - iv. Due to her sudden departure there was no handover of the files in her conduct including Voi SPMCC Civil Suit No. 160 OF 2016.
  - v. It was only upon receipt of the 1<sup>st</sup> Respondent’s tabulation dated 25<sup>th</sup> September 2023 and the office file being traced on 28<sup>th</sup> September 2023 that the firm of Messrs. Muturi Gakuo & Kibara Company Advocates was able to prepare and file the Memorandum of Appeal.



- vi. The Memorandum of Appeal dated 28<sup>th</sup> September 2023 and the Applicant's letter requesting certified copies of typed proceedings, judgment and decree were delivered to the Voi Law Courts' registry on 28<sup>th</sup> September 2023.
  - vii. The Applicant herein only received a stamped copy of the Memorandum of Appeal in respect of Voi HCCA NO. E054 OF 2023: ERI Kenya Limited =versus= Fredrick Francis Muteti Muluku & Another on 29<sup>th</sup> September 2023.
  - viii. The Applicant's Counsel have now discovered through the Court Tracking System that the matter has been slated for mention before the Honorable Judge on 27<sup>th</sup> February 2024.
  - ix. The application has been brought without inordinate delay.
  - x. The Applicant has an arguable appeal with a high chance of success since the learned trial Magistrate misdirected herself when she found the Applicant solely liable, disregarding the facts on the ownership of the subject motor vehicle.
  - xi. There will be no prejudice suffered upon the Respondents herein if the Applicant this Honourable Court is pleased to extend the time for filing the Applicant's Appeal.
  - xii. It is in the interest of justice that the orders sought herein be granted so as to not drive the Applicant from the seat of justice for no fault of its own.
5. The parties filed written submissions as follows:-

**The Applicant's submissions**

- 6. The Applicant submitted that on 28<sup>th</sup> August 2023 a judgment was delivered in SPMCC No. 166/2016 in the presence of Counsel for the Applicant and also Counsel for the 2<sup>nd</sup> Respondent.
- 7. That the Counsel who took the judgment thereafter unexpectedly left the firm that was having conduct of the matter without any handover of files.
- 8. That it was not until 28<sup>th</sup> September 2023 that the letter requesting for proceedings and typed proceedings was delivered at Voi Law Courts registry.
- 9. The Applicant submitted that the Applicant has met the legal threshold for leave to appeal out of time.
- 10. That the application has been filed without delay. The Applicant relied on the case of Nicholas Kiptoo Arap Korir Salat =versus= Iebc & 7 OtherS (2014) eKLR where the Supreme Court set the following principles to govern discretion in applications for extension of time.
- 11. The Applicant also relied on the cases of Stecol Corporation Ltd =versus= Susan Awuor Mv Demb (2021) Eklr And Kiu & Another =versus= Khaemba & 3 Others Civil Appeal (application) E270 of 2021 KECA 318 (KLR).
- 12. The Applicant further submitted that he has an arguable appeal and that no prejudice will be suffered by the Respondents.
- 13. The Respondent did not file submissions but filed grounds of opposition as follows:-
  - i. That the Memorandum of Appeal sought to be deemed as duly filed is an abuse of the court process because leave to file it out of time was not sought and or obtained.
  - ii. That the crucial fact of the date when the said Advocate left the firm of Muturi Gakuo & Kibara Company Advocates is not disclosed.



- iii. That the supporting affidavit of Naomi H. Kinuva does not prove that the Applicant had a good and or sufficient cause for not filing the Appeal within the stipulated timeline.
  - iv. That considering the undisputed circumstances of the accident, the Applicant does not have an arguable appeal with any chances of success and or at all.
  - v. That the application is made in bad faith and is grossly incompetent.
  - vi. That the application as filed and prayers sought therein are unmeritorious and ought to be dismissed with costs to the 2<sup>nd</sup> Respondent.
14. The sole issue for determination in this application is whether the Applicant should be granted leave to appeal out of time.
15. The governing provision for leave to appeal out of time is Section 79G which states as follows:-
- “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 to the appellant 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.
16. The court has a wide discretion to grant leave to appeal out of time on certain conditions.
17. The Supreme Court stated the principles for extension of time in the case of Nicholas Kiptoo arap Korir Salat v. Independent Electoral and Boundaries Commission and 7 Others, Sup. Ct Application No. 16 of 2014 as follows;
- “In an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. The underlying principles that a Court should consider in exercise of the discretion to extend time are:
- i. 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;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - iii. The Court’s exercise of its discretion to extend time, is a consideration to be made on a case to case basis;
  - iv. Where there is a sensible reason for the delay, the delay should be explained to the satisfaction of the Court;
  - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
18. It is not in dispute that the Counsel who was conducting the matter left the law firm unexpectedly.



19. The mistake of counsel should not be visited on the Applicant.
20. I grant the Applicant leave to appeal out of time.
21. The Applicant to bear the costs of the application assessed at Kshs. 10,000/=.
22. This file is accordingly marked as closed.

**DATED, SIGNED AND DELIVERED THIS 12<sup>TH</sup> DAY OF MARCH 2025 IN OPEN COURT AT VOI.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-

Court Assistants: Maina/Millicent

