



**Miitua & another v Macheru (Miscellaneous Application
E001 of 2020) [2025] KEHC 4333 (KLR) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS APPLICATION E001 OF 2020
DKN MAGARE, J
MARCH 24, 2025**

BETWEEN

CECILIA MUTHONI MIITUA 1ST APPLICANT

JOSEPH GICHUHI KARIUKI 2ND APPLICANT

AND

TIMOTHY MUTAHI MACHERU RESPONDENT

RULING

1. This is a Ruling over an Application dated 28.9.2020 and filed on 30.9.2020. The prayers sought leave of court to appeal against the judgement and decree dated 24.7.2018 and delivered in Nyeri CMCC No. 835 of 2006.
2. The Application is grounded inter alia on the reasons on the face of it and the Affidavit of the 1st Applicant by which it was averred that the 1st Applicant was ailing at the time of the judgment and the period leading to the filing of the Application.
3. The Application was opposed by the Replying Affidavit dated 19.10.2020, sworn by the Respondent. It was deposed, inter alia, that the Applicants were represented in the lower court by various advocates, and the reason given is unjustifiable.

Submissions

4. In their submissions filed on 22.2.2022, the Applicants argued that under Sections 79G and 95 of the *Civil Procedure Act*, this court had discretion to extend the appeal time of 30 days. The Applicant also relied on *First American Bank of Kenya v Gulab P Shah & 2 Others* (2002)1 EA 65 to submit that the Application had exhausted the grounds upon which extension of time should be allowed as there was an explanation of the delay and an arguable appeal.



5. The Respondent filed submissions on 4.4.2022 and submitted that the delay was inordinate and the explanation unsatisfactory.

Analysis

6. The issue before me is whether the delay in lodging a Memorandum of Appeal has been satisfactorily explained. The factors to consider in dealing with such an application are: -
 - a. The length of delay.
 - b. The reason for delay.
 - c. The animus of the applicant.
 - d. The prejudice to the Respondent.

7. The discretion to extend time is unfettered. There are no limits to the number of factors the Court would consider so long as they are relevant; the period of delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits and the resources of the parties, Waki, JA in Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005 held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgment, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

8. The court has considered the reasons for the delay in the Application and the Supporting Affidavit. The Applicants stated that the delay was due to illness. It is imperative to note the Supreme Court of Kenya decision (M.K. Ibrahim & S.C. Wanjala SCJJ) in Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where the learned Judges held 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 reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
9. In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. This was stated in the case of *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Odunga J. observed that:-
- “In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman vs. Cumarasamy* [1964] 3 All ER 933; *Savill vs. Southend Health Authority* [1995] 1 WLR 1254 at 1259.
10. It follows therefore that the Applicants’ explanation for the delay is key in guiding the Court’s exercise of discretion on the issue of leave to appeal out of time.
11. It is self-evidence that the Judgment was available for the parties on the day of delivery on 24.7.2018 or soon thereafter. The Applicant did not seek copies. No letter was annexed seeking the judgment or paying for the same.
12. The Appeal to this Court should have been filed by 24.8.2018. This Application was filed on 30.9.2020. There is a delay of 2 years, 1 month, and 5 days after the delivery of the impugned Judgment. The Applicant was under a duty to show the reasons for the delay. However, short period of delay, the same must be explained. In *Alfred Iduvagwa Savatia vs Nandi Tea Estate & another* [2018] eKLR J. Mohammed JA. cited *Aganyanya, JA in Monica Malel & Another V. R, Eldoret Civil Application No. Nai 246 of 2008* it was stated:
- “When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”
13. An appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree Section 79 G of the [Civil Procedure Act](#) provides as doth: -
- “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.
14. This court has no jurisdiction to extend time without a valid reason. It is not manna to dish out. It is nothing but the exercise of discretion. Unless the court is moved correctly, it has no power to exercise discretion. It is not by whim but through judicious consideration that such an Application is considered.



15. The Applicant has not explained the delay. It is my considered opinion that the 4 factors above are sequential. Therefore, one must fulfil each as you move to the next. If the delay is inordinate, it may not be necessary to go to the reason for delay. When the delay is reasonable, there must be a real and genuine reason for delay.
16. Where there is doubt, either way, the court can then exercise discretion one way or another. The court cannot find that the delay is inexcusable, inordinate and no reason is given and then, out of sheer whims and fiat, extend time. That makes litigation unpredictable and unending.
17. In our court system, delay is usually documented. Without documentation, it never happened. For example, a lost file with no record of follow up, is not lost. When applying for proceedings, they must first be as of necessity, a letter bespeaking the proceedings and payment of deposit. Without such, proceedings were never requested. The *raison d'être* for payment enables the court to prioritize according to payment and only serious applicants for proceedings. Without payment, no proceedings were being sought. Further, proceedings must be formally sought, even where the same was requested for in court, the registry must be moved, and follow-ups be done.
18. In this matter, the reasons for the delay is doubtful and the length of delay is inordinate in the circumstances. The Applicants were represented and it has not been demonstrated how the alleged illness affected their ability to instruct their advocates or how the advocates could not act on their behalf owing to the illness.
19. Owing to the [prolonged delay, prejudice that may occur to the Respondent overrides prejudice to the Applicants if the Application were to be allowed. In *Harris Horn Senior, Harris Horn Junior vs. Vijay Morjaria Nyeri Civil Appeal No. 223 of 2007* when confronted with similar arguments, the Court made observations therein *inter alia* as follows:
 - (32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case.”
20. The Application is thus unmerited and I dismiss it with costs.
21. The issue of costs is governed by Section 27 of the [Civil Procedure Act](#), which provides as follows:
 - (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
22. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

“It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously



meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

23. Since this is a family matter, I find it prudent to determine that each party will bear its costs.

Determination

24. The upshot of the foregoing is that I make the following Orders:

- a. The Notice of Motion Application dated 28.9.2020 is dismissed for lack of merit.
- b. Each party to bear their own costs.
- c. The file is closed

DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI ON THIS 24TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ombongi for the Applicant

No appearance for the Respondent

