



**Shah v Shah (Miscellaneous Application E250 of 2024)
[2025] KEHC 3551 (KLR) (Family) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E250 OF 2024
H NAMISI, J
MARCH 24, 2025**

BETWEEN

BHARTI PRASHIT SHAH APPLICANT

AND

PRASHIT JAYANTILAL SHAH RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated 14 October 2024 seeking the following orders:
 - i. (spent)
 - ii. That the Applicant be granted leave to appeal out of time against the Ruling of Hon. G. M. Gitonga (PM) delivered on 26 May 2023 dismissing the Applicant's prayer to be granted orders for payment of alimony by the Respondent;
 - iii. That the Memorandum of Appeal annexed hereto be deemed as duly filed and served;
 - iv. That the costs of this Application abide the outcome of the intended Appeal
2. The Application is supported by the Affidavit of June Mumbi, Advocate, and premised on the following grounds:
 - a. The lower court vide its ruling delivered on 26 May 2023 dismissed the intended Appellant's prayer for payment of alimony in the divorce petition dated 5 August 2021;
 - b. That being aggrieved by the Ruling, the intended Appellant wishes to file her Memorandum of Appeal against the said Ruling and order of the lower court on grounds stated in the annexed Memorandum of Appeal



- c. That the Applicant made an application to the lower court seeking leave to appeal out of time, which application was granted vide Order dated 22 August 2023 and she filed the Record of Appeal dated 15 November 2023;
 - d. That the Respondent thereafter filed an application in the High Court seeing to have the Applicant's appeal dismissed on the grounds that leave to appeal was not sought;
 - e. That the court delivered its Ruling on 26 September 2024 striking out the appeal on the ground that it lacked the jurisdiction to hear and determine the appeal;
 - f. That the Applicant seeks leave to appeal out of time against the Ruling of the lower court out of time as the appeal was not heard and determined on merit;
 - g. That the Respondent will not suffer any harm should this Application be allowed and the intended appeal heard and determined on merit;
 - h. In view of the foregoing, the Applicant's intended appeal is merited hence ought to be granted leave to appeal against the decision;
 - i. That the delay in filing the appeal was inadvertent and excusable as parties were canvassing an application dated 4 September 2023 filed by the Respondent;
 - j. This Application is made in good faith without undue delay since the delivery of the High Court's ruling issued on 26 September 2024;
 - k. It is in the interest of justice and fairness that this application be allowed;
 - l. The applicant stands to suffer substantial and irreparable loss and injustice if the appeal is not heard on its merits;
 - m. Unless this Application is allowed, the Applicant's intended appeal will be rendered nugatory;
 - n. The Applicant has a good arguable appeal which has high chances of success;
 - o. The Respondent will not suffer any prejudice or any damages that cannot be compensated by way of costs if this Application is allowed.
3. The Supporting Affidavit is a repetition of the grounds on the face of the Application.
 4. In a brief response to the Application, the Respondent averred that the Applicant has not established sufficient cause for grant of the orders sought. The Applicant has not adduced reason why they failed to file the appeal within time and, therefor, not satisfied the prerequisite condition to justify extension of time. The Respondent further averred that the Applicant is an indolent litigant and undeserving of the orders.
 5. Parties canvassed the Application by way of written submissions.
 6. The Applicant referred to the provisions of section 95 of the *Civil Procedure Act*, Cap 21 as well as Article 50 (1) of *The Constitution*. Reliance was placed on the Court of Appeal case of Mwangi v Kenya Airways Ltd [2003] KLR and the Supreme Court case of Nicholas Kiptoo arap Korir Salat v IEBC [2014] eKLR.
 7. The Respondent referred to section 79G of the *Civil Procedure Act* and placed reliance on the cases of Evans Kiptoo v Reihard Omwonyo Omwoyo [2021] eKLR and Gichuhi v Karuga (Miscellaneous Application E022 of 2022) [2024] KEHC 9703 (KLR).



8. In determining the Application, I have considered the grounds, the Supporting Affidavit, Replying Affidavit and the written submissions. The main issue for determination is whether the application has any merit and therefore whether the orders sought should be granted.
9. In the case of *Wanjiru Mwangi & Another* [2015] eKLR and *APA Insurance Co. Ltd v Michael Kinyanjui Muturi*[2016] eKLR, the Court of Appeal observed the factors to be taken into account whenever presented with an application for extension of time, as observed by Odek JJA in *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
10. Additionally, there is a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.
11. The impugned Ruling was delivered on 26 May 2023. The Applicant sought leave in the trial court to appeal out of time and the same was granted on 22 August 2023. The Record of Appeal was filed in the High Court on 15 November 2023, which prompted the Respondent to file an application to strike out the appeal. The Application was heard and allowed on 26 September 2024. The present application was filed 20 days later.
12. In *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015]eKLR, the Court of Appeal held that:

“It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of *the Constitution* which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of *the Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting *the Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”
13. The power to enlarge time is at the discretion of the court, which discretion must be exercised judiciously and not capriciously. Based on the material placed before me, I am satisfied that the delay in filing the present application was not inordinate or unreasonable. Therefore, failure to establish sufficient cause or reason, as submitted by the Respondent, is not a reason for this Court to fetter its discretion to lock the door of justice to the Applicant.



14. With respect to the second limb of this application, I am guided by the Court of Appeal decision in *Charles Karanja Kuru v Charles Gitbinji Muigwa, Case No 71 of 2016*, where the Court stated thus:

“Having expressed ourselves as herein above the other issues that falls for considered is whether the appeal filed out of time on 24th October 2014 could be deemed as being properly on record. There is a plethora of authorities from the High court which interpret the proviso to Section 79G of the *Civil Procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule J. in the *Gerald M’Limbine v Joseph Kangangi* [2009]eKLR stated that:

“my understanding of the proviso to Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the stipulated period to do so would actually be an abuse of the court’s process under Section 79B.”

15. For the above reasons, it is my considered view that the application for enlargement of time to file an appeal out of time is merited. Similarly, the prayer seeking to have the Memorandum of Appeal deemed as duly filed is merited. I, therefore, allow the Application as prayed. The Appellant shall file the Record of Appeal within 60 days of the date hereof. The costs shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 24 DAY OF MARCH 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Ms. Wangari h/b Ms. Gedionfor the Applicant

Mr. Mbatha h/b Mr. Burugu..... for the Respondent

Libertine Achieng.....Court Assistant

