



**Ambaka v Ashitiba (Miscellaneous Succession Application
E010 of 2024) [2025] KEHC 4430 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS SUCCESSION APPLICATION E010 OF 2024**

AC BETT, J

APRIL 4, 2025

BETWEEN

GEOFFREY ASHITIBA AMBAKA APPLICANT

AND

MUHIKA VIOLET ASHITIBA RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion dated 19th August 2024, by which the Applicant seeks the following orders:
 - a) Spent.
 - b) That this Honourable court be pleased to grant the applicant leave to appeal out of time against the judgment delivered on 21st May, 2024, by Hon. Edwin Nyongesa (SPM) in Butere SPMC Divorce Cause No E003 of 2023.
 - c) That this Honourable court be pleased to extend the time of filing the appeal against the judgment delivered on 21st May 2024 by the Hon. Edwin Nyongesa (SPM) in Butere SPMC Divorce Cause No E003 of 2023
 - d) That the costs and incidental to this application are subject to the result of the appeal
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn on the same day by the applicant, where he states that vide a petition dated 8th June 2024, he moved the trial court seeking an order for dissolution of the marriage, and the court, after hearing both parties, dismissed the petition for lack of merit.
3. He asserts that the delay was inadvertent and excusable, and further that he has demonstrated good and sufficient cause why he delayed in filing the appeal within the required time.



4. He claims that the 3-month delay was not inordinate and the appeal was brought without any delay.
5. The respondent filed their replying affidavit dated 16th October 2024, where they opposed the application by denying the claim that the applicant fell into depression after the judgment was delivered.
6. She claimed that the applicant has been an absentee father to their children and that the application was brought in bad faith, as the applicant was abusive and refused to take care of their children.
7. The application was canvassed by way of written submissions.

Applicant's Submissions

8. In his submissions dated 16th December 2024, the applicant submitted on one issue for determination, being whether he had demonstrated sufficient cause to be granted leave to file the appeal out of time.
9. According to the applicant, he was utterly shocked and dissatisfied with the trial court's judgment, and he fell into depression and was not in a proper mental state to appeal within the 30-day prescribed time. He quoted section 79 G of the *Civil Procedure Act* and the case of *Omar Shurie vs. Marian Rashe Yafar* (Civil Application No 107 of 2020) UR on the principles the court ought to observe before extension of time.
10. On the first ground as to the length of time, he stated that the judgment was delivered on 21st May 2024, and the appeal should have been filed by 21st June 2024. The application was made on 13th September 2024, three months later, which, according to him, was not an inordinate delay.
11. On the reasons for the delay, he claimed that he was shocked by the outcome of the judgment, and fell into severe depression and it took time for him to recover through extensive counselling. He prayed that the court grants him a chance to be heard and rely on the case of *Stecol Corporation Limited vs. Susan Awour Mudemb* (2021) eKLR.
12. He averred that he has an arguable appeal as demonstrated by the annexed copies of the Memorandum of Appeal. He relied on the case of *Athuman Nusura Juma vs. Afwa Mobammed Ramadban* (2016) eKLR and argued that his intended appeal has merit.
13. He finally submitted that the respondent would not be prejudiced if he is granted leave to file the appeal out of time and maintained that he has demonstrated sufficient cause for the court to allow him a chance to file the appeal out of time.

Respondent's Submissions

14. In her submissions dated 12th February 2025, the respondent opposed the application and contested the allegations that the applicant fell into depression after the judgment was delivered. She asserted that she has been providing for their children while the applicant has been an absentee father. She claimed that the marriage broke down since the applicant was abusive and absconded from his paternal duty, leaving her to struggle and take care of the children's needs.

Analysis and Determination

15. I have carefully considered the application before this court, the reply filed thereto, as well as the written submissions filed by both parties. The only issue for determination is whether this court should allow the applicant to file his appeal out of time.



16. Section 79G of the *Civil Procedure Act*, Cap 21, provides as follows:

“79G. Every appeal from a subordinate court to the High Court shall be filed within thirty (30) days from the date of the decree or order appealed against, excluding from such period anytime 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.”

17. The Court of Appeal in the case of *Thuita Mwangi v. Kenya Airways Ltd.* [2003] eKLR discussed some of the factors that aid courts in exercising discretion whether to extend time to file an appeal out of time, which include the following:

- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice that could be suffered by the Respondent if the extension is granted; the importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect, if any, on the administration of justice or public interest, if any, is involved.

18. It is not disputed that the learned magistrate delivered the judgment on 21st May 2024. The applicant had 30 days to file his appeal.

19. The draft memorandum of appeal indicates that it was filed on 19th August 2024, which was three (3) months later; the reason being that the applicant says that he was shocked by the outcome of the judgment and that he went into depression which took him time to recover.

20. In essence, the question I ask myself is whether the applicant has placed before the court sufficient material for leave to appeal against the judgment. It is undoubtedly clear from the case law that the court has wide discretion, more significantly under the *Civil Procedure Rules*, to grant leave to appeal.

21. The discretion of the court is unfettered; a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of *Telkom Kenya Limited v. John Ochanda and 996 Others* [2015] eKLR that:-

“In instances where there is a delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of the delay. The design and objective of the Supreme Court Rules are to ensure accessibility, fairness, and efficiency in this Court. Parties should comply with the procedure, rather than look to the Court’s discretion in curing the pleadings before it. This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place.... It is this Court’s position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course.”



22. There is no evidence on record to show that the Applicant suffered any mental breakdown and was affected by the judgment. However, I am inclined to allow the Applicant leave to file his intended appeal, noting that a three (3) months delay is not inordinate. In the interest of justice, I note that the appeal cannot be heard until time is enlarged.
23. I will allow the application dated 19th August 2024 in the following terms:-
- a) Leave is granted to the Applicant to file an appeal out of time against the judgment delivered in Butere SPMC Divorce Cause No E003 of 2023.
 - b) The Applicant is to file and serve his Memorandum of Appeal within fourteen (14) days hereof.
 - c) The costs of the application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 4TH DAY OF APRIL 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Ayata for Applicant

Respondent present in person

Court Assistant: Polycap

