



**Cvinar v Onkendi (Civil Appeal E276 of 2025)
[2025] KEHC 12180 (KLR) (Appeals) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12180 (KLR)

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

APPEALS

CIVIL APPEAL E276 OF 2025

TW CHERERE, J

MAY 8, 2025

BETWEEN

AMANDA ELIZABETH AWORUWA CVINAR APPLICANT

AND

KELVIN ONKENDI RESPONDENT

RULING

Discretion is the bridge between rules and justice—it must be anchored in reason, but guided by fairness.

1. By Notice of Motion dated 07th March 2025, the Applicant seeks leave to file an appeal out of time against the judgment delivered on 20th June 2024 in Milimani SCCOMM E9680 of 2023.
2. The application is expressed to be brought under Rules 4, 41, and 42 of the *Court of Appeal Rules, 2010*, and is supported by the Applicant’s affidavit sworn on even date. The Applicant asserts that she was out of the country when judgment was delivered and only instructed counsel upon her return.
3. When the matter came up for hearing on 24th April 2025, learned counsel Mr. Anyona appeared for the Respondent and informed the Court that a response had been filed. However, upon a search of the Court’s Electronic System (CTS), it emerged that neither a notice of appointment of advocate nor a response was on record.
4. At the outset, I must point out that the Applicant has invoked the *Court of Appeal Rules, 2010*, which govern proceedings before the Court of Appeal. This Court is seized of jurisdiction under Section 79G of the *Civil Procedure Act* in appeals from subordinate courts. The invocation of the *Court of Appeal Rules* was therefore erroneous. However, since the application is substantively one for extension of time to file an appeal under Section 79G of the *Civil Procedure Act*, I shall consider it on its merits.



5. Having considered the application in the light of the supporting affidavit and there being no response, the only issue for determination is whether the Applicant has demonstrated sufficient cause to warrant an extension of time to file an appeal.

Analysis and Determination

6. The Supreme Court settled the principles that guide in the exercise of discretion to extend time in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC* [2014] eKLR as follows:
 1. Extension of time is not a right to 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 extension of time has the burden of laying basis to the satisfaction of the court.
 3. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.
 4. Where there is 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 extension is granted.
 6. Whether the application has been brought without undue delay.
 7. Whether in certain cases public interest should be a consideration for extension of time.
7. Applying these principles, it is not disputed that the judgment was delivered on 20th June 2024, and the application was filed on 07th March 2025, a period of over eight months.
8. It is a fundamental principle of law that a party who alleges a fact must prove it. In the present case, the Applicant's assertion that she was outside the country remains unsubstantiated, as she has not tendered any evidence in support thereof. The burden lay squarely on the Applicant to present credible evidence to back her claim, as courts are not permitted to act on mere allegations devoid of proof. As emphasized in *George Kagwima Kariuki & 2 Others v George M. Gichimu & 2 Others* [2014] eKLR, evidence is the "key that unlocks the flow of judicial discretion," and a party who fails to provide sufficient evidence cannot expect the Court to exercise its discretion in their favour.
9. The foregoing notwithstanding, the right to be heard on appeal is a fundamental principle of justice which the Court must guard jealously, particularly where the intended appeal raises an arguable issue, even if only a single triable issue exists. (See *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR; *Jaber Mohsen Ali & Another v Priscillah Boit & Another* [2014] eKLR).
10. Even though the Applicant has not satisfactorily explained the inordinate delay of about eight (8) months, the Court is persuaded that the intended appeal raises an arguable point deserving consideration on appeal. In the circumstances, and in the interests of justice, the Court is inclined to exercise its discretion in favour of the Applicant.

Disposition

11. The Notice of Motion dated 07th March 2025 is thus determined in the following terms:
 1. Leave to file the appeal out of time is hereby allowed.
 2. The memorandum of appeal be filed and served within 14 days from today's date



3. This matter shall be mentioned before the Deputy Registrar on 10th June 2025 to confirm the filing of the record of appeal

DELIVERED AT NAIROBI THIS 08TH DAY OF MAY 2025

WAMAE T. W. CHERERE

JUDGE

Appearances

Court Assistant - Nyambala

For Applicant - Ms. Muriuki for Wanjiku Mwangi & Co. Advocates

For Respondent - Ms. Adhiambo for Moka Advocates.

