



**Wanjiku v David & another (Miscellaneous Application
E004 of 2025) [2025] KEHC 5595 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS APPLICATION E004 OF 2025
JK NG'ARNG'AR, J
MAY 6, 2025**

BETWEEN

JOSEPH ANGATIA WANJIKU APPLICANT

AND

ATANDI DAVID 1ST RESPONDENT

BERNARD KIPRONO KORIR 2ND RESPONDENT

RULING

1. The Applicant/Intended Appellant have moved the court by the Notice of Motion dated 5th February, 2025. The application is premised on the provisions of Order 51 rule 1 of the [Civil Procedure Rules](#), Section 1A, 1B 3a and 79G of the [Civil Procedure Act](#) they seek the following orders:
 - a. spent
 - b. That this honorable court be pleased to extend time within which to lodge an appeal from the Judgment/Decree of the trial court in Bomet CMCC No E118 of 2022.
2. The application is supported by an affidavit of Joseph Ngatia Wanjiku sworn on 5th February, 2025. The respondents' reply is not deducible on record, both physically and electronically.

Issue for determination

The main issues for determination herein is Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;



3. The Law on Whether the court should exercise its discretion to grant the applicant leave to file the appeal out of time;

Section 79(g) of the *Civil Procedure Act* states: -

“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 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.”

4. I find that it is clear from the wording of section 79(g) of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
5. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-
6. The underlying principles a court should consider in exercise of such discretion should include: -
 - a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
 - f. Whether the application has been brought without undue delay.
7. Also Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”
8. The Respondents filed no response despite being aware of this application.



9. Applying the above principles to the present case, the judgment herein was delivered on 18th October, 2024 and the applicant filed the current application on 5th February, 2025. This is about 90 days outside the time limited for filing an appeal.
10. Considering 90 days, that cannot be said to be inordinate delay, because the reasons for the delay have been satisfactorily explained to the court as required by the law. In my view, the applicant has a plausible reason for the delay in filing the appeal upon annexing an abstract of attempt to electronically file dated 26th October, 2024. I note that they have also annexed in their application also an intended Memorandum of appeal.
11. As such, the appeal can be said to be arguable. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that
- i. Substantial loss may result to him/her unless the order is made;
 - ii. That the application has been made without unreasonable delay; and
 - iii. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
12. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-
- “No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
13. Accordingly, it is my considered view that the application dated 5th February, 2025 has merit and is hereby allowed with costs being in the cause.

It is hereby so ordered.

DATED AND DELIVERED AT BOMET THIS 6TH DAY OF MAY, 2025

JUDGE

J. K. NG'ARNG'AR

Court of Assistant: Siele

N/A for the Applicants.

N/A for the Respondents

