



**Anztese v Chanan Agricultural Contractors (Civil Appeal
E166 of 2024) [2025] KEHC 9609 (KLR) (2 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E166 OF 2024**

S MBUNGI, J

JULY 2, 2025

BETWEEN

ABUBAKAR KWANGOTO ANZETSE APPLICANT

AND

CHANAN AGRICULTURAL CONTRACTORS RESPONDENT

RULING

1. By a notice of motion dated 16th October, 2024, pursuant to section 1 A, 1B, 79G and 95 of the *Civil Procedure Act* cap 21, order 50 Rule 6 of the Civil Procedure Rules, 2010, the applicant seeks the following orders;
 - a. That the application be certified as urgent and be heard on a priority basis
 - b. That the honorable court be pleased to extend the time for filing of appeal from the ruling delivered on 18/07/24 in Kakamega HC. MISC APP. NO. 17 of 2023 and or admit the Appeal filed herewith out of time.
 - c. That the Costs of this Application be in the cause.
2. The application is premised on the following grounds;
 - a. The appellant, being aggrieved by the judgment delivered by Hon. Akee R.M on 14/06/2022, has filed an appeal there from out of time.
 - b. The appellant filed miscellaneous applications Kakamega High Court for the extension of time.
 - c. That the court delivered its ruling in Kakamega HC Misc. No. 17 of 2023 in the absence of the parties.



- d. That the applicant's counsel continued to inquire from the court the date for the ruling, and subsequent dates were always given.
 - e. That on 26 /09/2024, upon checking on CTS, the outcomes indicated that the application had been dismissed and closed.
 - f. That on 14/10/2024, the ruling was uploaded and sent to the applicant's email address.
 - g. That upon reading the ruling, it became clear that the application had been allowed and the applicant granted 10 days to file an appeal.
 - h. That the 10 days' leave had lapsed way back on 28/07/2024 without knowledge of the applicant and his advocates.
 - i. That the delay in complying with the ruling of the court was not intentional.
 - j. That the application herein has been filed without due delay upon receipt of the ruling.
 - k. That it is imperative and in the interest of justice that the orders sought are granted.
 - l. That the appeal herein has a high chance of success.
 - m. That in the event that the appeal is not admitted out of time, the appellant shall be prejudiced by being denied a chance to exercise his right of appeal on the ground of a default not of his making.
3. The Application is supported by the supporting affidavit sworn on the same date, where the appellant deposed that the court delivered its judgment in Kakamega HC Misc. No. 17 of 2023 in the absence of the parties.
 4. He avers that they kept inquiring about the ruling, and on 26/09/2024, when they checked the CTS, it indicated that the application was dismissed and the file closed.
 5. He avers that on 14/10/2024, the ruling was uploaded and sent to his counsel's email address, and he had been given 10 days to file the appeal, which lapsed on 28/07/2024.
 6. He claimed that the delay was not intentional and that the application was filed without due delay upon receipt of the ruling.
 7. He asserts that the application should be allowed in the interest of justice, and the appeal had a high chance of success.
 8. On 17th January 2025, the respondent filed their grounds of opposition, claiming that the application was misconceived and frivolous and an abuse of the court's process.
 9. They hold that the applicants failed to exercise due diligence as required by the law and had not submitted sufficient reason for the extension of the time.

Appellant's submissions

10. Vide their submission dated 17th March,2025, the applicant raised one issue, being whether the application is merited and relied on section 79 g of the [Civil Procedure Act](#) Cap 21.
11. They admitted that their appeal had been filed out of time and relied on the case of Gerald M'Limbine vs. Joseph Kangangi (2009), where the court opined that a party should obtain leave to file an appeal out of time.



12. The appellate claimed that the ruling in Kakamega HC Misc. No. 17 of 2023 was delivered in the absence of the parties despite his advocate continuously inquiring from the trial court for the dates for the ruling.
13. He asserts that he continued being diligent and on 26/09/2024, he was informed that the application was dismissed and the file was closed, and they were issued 10 days' leave to appeal, which lapsed without their knowledge.
14. They finally submitted that the reason given was plausible and that the extension of time should be granted

Respondent's submission

15. In their submission dated 19th March 2025, the respondent raised one issue for determination, being whether the application had met the tests for the court to exercise its discretion in the applicant's favour. They held that extension of time is discretionary and that it ought to be confined to the rules of reason and justice. They relied on the Supreme Court decision in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others (2014) and the court of Appeal case of Paul Musili Wambua vs. Attorney General & 2 others (2015) Eklr.
16. The respondent opined that the applicant failed to provide the proper reason for filing the appeal out of time, despite the ruling delivered on 18/07/2024, where they were directed to file the appeal within 10 days.
17. They claimed that the applicant failed to adhere to the court's direction and filed a further application contrary to the direction issued by the court, and hence, this application was brought in bad faith.
18. The respondent quoted the case of Joseph Kangethe Kabogo & Benson Mburu Kangethe vs. Michael Kinvua Ngari (2012) Eklr and Njoroge vs. Kimani (Civil Application Nai E049 of 2022) KECE 1188 (klR) (28 October 2022) (Ruling).
19. According to the respondent, the applicants inquired on several occasions to the court on when the ruling was delivered and attached copies of their diaries, which was not sufficient.
20. They claim that though the mistake of the counsel should not be visited on the clients, the determination of whether the counsel had failed depended on the circumstances of the case, and that the discretion to grant leave was not automatic.
21. They opined that there had to be finality to litigation and both parties ought to be protected from wastage of time and resources in endless rounds of litigation and relied on the case of Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others (2007) eKLR.
22. In finality, they assert that extension of time is not a right but a remedy available to the deserving party at the court's discretion and request the court to dismiss the application since there was no satisfactory explanation to file the memorandum of appeal out of time.

Analysis and determination

23. I have considered the Application, the affidavits on record, and the submissions of the parties. The main issue for determination is whether this court should allow the Applicants to file the Appeal out of time.



24. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR stated as follows;

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek the courts to grant it.

25. The Supreme Court in the same case then set out the conditions for extension of time to file an appeal as follows;

- i. 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.
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

26. In regard to whether the delay was reasonable or excusable, the applicant submitted that the ruling was delivered on 18/07/2024 in the absence of the parties and on 26/09/2024, his advocate continued following up with the court and on 14/10/2024, the ruling was uploaded and sent to his advocate's email.

27. They admitted that they had passed the appeal time, but he was diligent in following up on the court's ruling that was filed in the absence of the parties.

28. 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.”

29. 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
 - v. The effect, if any, on the administration of justice or public interest, if any, is involved.
30. It is not disputed that on 18th July 2024, this court allowed the applicant to file their memorandum of appeal out of time after they had delayed in filing the appeal against the judgment, but Hon. Akee in Kakamega CMCC No. 242 of 2017 that was delivered on 14/06/2022.
 31. In his current application dated 16th October 2024, the applicant avers that they were unaware of this court's ruling stating that the court had given them 10 days to file the memorandum of Appeal however, the ruling was issued in the absence of the parties, and they were not aware of the dates.
 32. They claim that they checked the CTS on 26/09/2024, and they found out that the application had been dismissed and the file closed, and the ruling uploaded on 14/10/2024.
 33. The question I ask myself is whether the applicant has placed before the court sufficient material for leave to appeal against the judgment despite being granted numerous opportunities to file the Memorandum of appeal.
 34. 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.
 35. 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.”
 36. The applicant has attached an excerpt of his diaries, as evident that he had diarized the matter, and when it was coming up, however, he never provided evidence that he communicated with the court's registry to follow up on the date for the ruling or the outcome.
 37. I am inclined to decline the leave, seeing that this is the second time that the applicant is seeking leave to appeal out of time; however, in the interest of justice, I note that the appeal cannot be heard until time is enlarged.
 38. I will allow the application dated 16th October 2024 in the following terms:



- a. Leave is granted to the applicant to file an appeal out of time against the judgment delivered on 18/07/2024 in Kakamega Misc.AppNo. 17 of 2023
- b. The applicant is to file and serve his Memorandum of Appeal within fourteen (14) days hereof; and in default, the respondent shall be at liberty to execute.
- c. The applicant shall bear the cost of the application, and further, I award the Respondent a throw-away costs of Kshs. 15,000/=
- d. It is so ordered.
- e. Right of appeal 30 days.
- f. Mention 15.10.2025 for further direction on appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 2ND DAY OF JULY, 2025

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Elizabeth Agong’a

MR Otieno Njiya for the respondent present online.

Juma advocate online.

