Kamau v Gachogo & 2 others (Miscellaneous Application E135 of 2024) [2025] KEHC 10994 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10994 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

MISCELLANEOUS APPLICATION E135 OF 2024

TW OUYA, J

JULY 24, 2025

BETWEEN

EVAN MUTHAKA KAMAU ..... APPLICANT

AND

EVANS GACHOGO ..... 1ST RESPONDENT

JOSEPH KABUL ..... 2ND RESPONDENT

2NK COOPERATIVE & CREDIT SOCIETY LIMITED ..... 3RD RESPONDENT

RULING

1. The Applicant has moved this honourable Court *vide* Notice of Motion dated 23rd October 2024 seeking to be granted leave to appeal out of time the judgment of Hon. S. Agade in *Kigumo E056 of 2021* delivered on 19th June 2024. The Applicant also seeks to have the draft memorandum of appeal dated 23rd October 2024 be deemed as duly filed and served.

2. The Application is brought under grounds on the face of the Application that it has been brought without undue delay. The Applicant urges that the reason for the delay is that he was under the mistaken belief that the case had been determined in his favour as there was a power outage on the day that the judgment was delivered by the trial court. As a result, he did not manage to access the final orders of the court. It is only when he went to extract the decree of the court for purposes of execution that he realized that the suit had been dismissed. The Applicant contends that he stands to suffer an injustice if his claim is dismissed in its entirety. Moreover, he urges his intended appeal would be rendered nugatory if this application is not allowed.

3. The Application is also supported by the Affidavit of Evan Muthaka Kamau on grounds that the Respondents were served with a Plaint dated 8th March 2021 together with summons to enter appearance dated 15th March 2021. However, the Respondents failed to enter appearance, thus causing

the Applicant to file for request for judgment in default pursuant to Order 10 Rule 6 & 10 of the *Civil Procedure Rules*.

4. The Applicant further averred that the suit, *Kigumo E056 of 2021*, was fixed for formal proof and the hearing proceeded on 6th March 2024. Consequently, judgment was delivered on 19th June 2024 whereby the suit was dismissed on the basis that the Respondents had not been properly served.

5. It is further averred that although the period for lodging an appeal has lapsed, the Applicant has an arguable appeal that raises pertinent points of law with an overwhelming chance of success. Furthermore, no prejudice would be occasioned on the Respondents should this application be allowed. Also, the Application has been made without inordinate delay.

6. The Applicant further avers that the delay in lodging the appeal within time was occasioned by an honest mistake by his advocates on record.

7. The application is undefended. The Respondents have neither entered appearance nor filed any response to the Application.

8. The court directed that the Application be canvassed through written submissions.

9. The main issue that commends itself for determination upon considering the application and the supporting affidavit is whether the Applicant should be granted leave to appeal out of time.

10. As regards the issue of leave to appeal out of time. Section 79G of the *Civil Procedure Act* provides that:

> Every appeal from a subordinate court to the High Court shall be filed within 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 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.

11. It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion. This judicial discretion must be exercised on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the Applcant.

12. The applicant must satisfy the Court that he has a good cause for doing so, since as was held in *Feroz Begum Qureshi and Another v Maganbhai Patel and Other*s [1964] EA 633, it was held that:

> " there is no difference between the words "sufficient cause" and "good cause".

13. In *Daphne Parry v Murray Alexander Carson* [1963] EA 546 that:

> " Though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being

led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."

14. As to the principles to be considered in exercising the discretion whether or not to enlarge time in *First American Bank of Kenya Ltd v Gulab P Shah & 2 Others* Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65 the Court set out the factors to be considered in deciding whether or not to grant such an application and these are:

    i. the length of the delay;

    ii. the explanation if any for the delay;

    iii. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

    iv. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

15. This position was reiterated in *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR, where the Court of Appeal set out the principles undergirding an application for leave to file an appeal out of as follows:

> "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 the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others..."

16. Regarding the question on what amounts to an arguable appeal, the court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR held that:

> "...On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous..."

17. I also associate myself with the decision of the Supreme Court in Civil Application No. 3 of 2016 - *County Executive of Kisumu v County Government of Kisumu & 7* Others at page 5 where the said Court said:

> "... 23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the NICHOLAS SALAT case ... the court delineated the following as:- "the underlying principles that a court should consider in exercise of such discretion:
>
> 1) 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;
>
> 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
>
> 3) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

5) ..."

18. In this case the Applicant contended that the delay in filing the appeal was due to the mistaken belief by his advocates that the case had been determined in his favour. This was further compounded by the power outage that prevented his advocates from logging into court when the judgment was delivered. In summary, the applicant contends that the delay in lodging the appeal was occasioned by the mistake of his advocates on record.

19. It is now an established principle of law that a party need not be punished for the mistakes of his advocate. However, the same is not a blanket excuse to cover litigants who in one way or the other fail to abide by court timeline son account of their advocates. The Supreme Court in *Karinga Gaciani & 11 Others v Ndege Kabibi Kimanga & Agnes Wangechi* App. No. E004 of 2023 observed that:

> "Whereas mistakes of an advocate ought not to be visited upon a litigant, there must be cogent and credible evidence, the applicants have not demonstrated any efforts or due diligence, through evidence or correspondence of the follow up with the Advocates or to pursue their rights as we found in *George Kang'ethe Waruhiu v Esther Nyamweru Munene & another* Civil Application No.18 of 2020 [2021] eKLR. It is not enough for a party to simply blame the advocates on record for all manner of transgressions. Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not."

20. There is no doubt that an advocate's mistake may, on some occasions, constitute a ground for extending time. In *Mwangi v Mwangi* [1999] 2 EA 234, it was held, while citing *Njoroge "B" And Others v Chege* [1997] LLR 614 B (CAK); *Macfoy v United Africa Company Ltd* [1962] AC 152; *Pantin v Wood* [1962] 1 QB 594 that:

> "Rules of procedure are said to be good servants but bad masters. This is not to say that they can be flouted with impunity. All rules have their specific purpose(s) but a rule of procedure should not drive a litigant out of judgement seat if other rule(s) allow such a litigant to come back to Court. The tendency of the court of last resort ought to give a chance to the litigant to be heard on merits as far as possible. Our rules of procedure have had their origin in England and the tendency in England is to move away from form to substance...Simple inaction by a lawyer coupled with client's careless attitude may be enough to say: 'I am not going to exercise my discretion' but when the litigant himself shows that he is doing his best the Court ought to exercise its discretion which is wide enough, subject only to the requirement of justice to both sides. Procedural requirements are designed to further the interests of justice and any consequences which would achieve a result contrary to those interests should be treated with considerable reservation."

21. The Court of Appeal in *Virginia Wambui Chege v Nyamo Waitathu* Civil Application No. Nai. 77 of 1998 (UR), expressed itself as follows:

> "Since the applicant's advocates had been notified of the fact of the proceedings and judgement being ready which information was conveyed to them by the Superior Court's letter dated 19 th February, 1998, the position therefore, procedurally at least, was that they

could have lodged the record of appeal within say 60 days of 18 th February, 1998 provided they had lodged a notice of appeal and provided they had copied their letter bespeaking copies of proceedings and judgement to the respondent's advocates. They did not obviously act in the interests of their client. The client, however, could not possibly have been aware of the fact of non-lodging of the notice of appeal and the non-copying of the said letter. She would assume that her lawyers would follow the relevant procedure...Whilst the learned single judge was absolutely right in saying that the lodging of notice of appeal is, per se, a simple act, we are of the view that had he considered the applicant's problems, as alluded to by the court, he would have exercised his discretion, which he undoubtedly has, to allow the application. We are of the view that the advocates for the applicant did not argue their client's application before the single judge at length and in the peculiar circumstances of the case reference allowed."

22. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR set out the parameters to guide discretion while considering an application for leave to appeal out of time. The court remarked thus:

> "... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.... we derive the following as the underlying principles that a Court should consider in exercising such discretion:
>
> 1. 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;
> 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
> 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to-case basis;
> 4. where there is a reasonable cause for the delay, the same should be expressed to the satisfaction of the Court;
> 5. whether there will be any prejudice suffered by the respondents, if extension is granted;
> 6. whether the application has been brought without undue delay; and 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time"

23. Although the delay in the instant case has not been satisfactorily explained. Waki, JA, while citing *Grindlays Bank International (K) & Another v George Barbour* Civil Application No. Nai. 257 of 1995 and *Gichuhi Kimira v Samuel Ngunu Kimotho & Another* Civil Application No.Nai. 243 of 1995 in *Janet Ngendo Kamau v Mary Wangari Mwangi* Civil Application No. Nai. 338 of 2002 held that:

> "Unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court's discretion, the Court should in so far as it may be reasonable prefer, in the wider interest of justice, to have a case decided on its merits... The consideration that one case should not hang over the heads of parties indefinitely must

be weighed against the wider interests of justice, namely that where possible cases must be brought to a close after a hearing on the merits."

24. Having scrutinized the annexed draft memorandum of appeal, it is evident that the applicant is aggrieved by the decision of the trial court to dismiss the suit on grounds that service was not properly effected. Unquestionably, this, among other issues raise arguable grounds of appeal.

25. Accordingly, I grant leave to the applicants to file the appeal out of time. Let the Memorandum of Appeal be filed and served within 30 days from the date hereof. In default the application shall stand dismissed.

26. The costs of this application will be in the intended appeal.

27. Final Orders:

    i. The application is allowed

    ii. Leave to file the appeal out of time granted

    iii. Memorandum of Appeal be filed and served within 30 days from the date hereof.

    iv. Failure to comply with iii above will lead to automatic dismissal

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH JULY, 2025.

HON. T. W. OUYA

JUDGE

For Applicant.....Ms Kandie HB Mr Wanjohi for Applicant

For Respondent.....No Appearance

Court Assistant.....Brian