



Rotich v Rutto & another (Miscellaneous Application E005 of 2025) [2025] KEHC 9705 (KLR) (7 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9705 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS APPLICATION E005 OF 2025
JK NG'ARNG'AR, J
JULY 7, 2025**

BETWEEN

LILIAN CHEPTOO ROTICH APPLICANT

AND

BERNARD RUTTO 1ST RESPONDENT

GARDEN HARDWARE 2ND RESPONDENT

RULING

1. The Applicant/Intended Appellant have moved the court by the Notice of Motion dated 1st 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 NoE215 of 2022.
2. The application is supported by an affidavit of Orina M sworn on 5th February, 2025 where they claim to have been aggrieved by the decision of the lower court in Bomet CMCC No. E215 of 2023 delivered on 27th November, 2024.
3. They claim that the delay was occasioned by the advocate's oversight in making payment promptly. That the invoice generated on 13th December, 2024 for payment which did not go through and it came to their attention when time had already lapsed for filing a memorandum of appeal. They aver that the instructions are not an afterthought since the Applicant's advocate have always been ready to prosecute the Appeal. They regret the delay and since the Applicant had nothing to do with it. The Applicant claims to believe that the mistake of counsel should not be visited to upon an innocent litigant. The applicant is preferring an Appeal against the Judgment of the trial court and in particular the award



on quantum as well as liability on costs. They therefore make the application for leave to file an appeal out of time and pray that the application be allowed in the interest of justice.

4. The respondents' filed a response vide a replying Affidavit sworn on 20th March, 2025 by Joseph N. Ngigi who is the advocate in conduct of the matter. He avers that the application is misconceived and abuse of court process and is full of falsehoods meant to derail and defeat the course of justice.
5. The Respondent that applicant has not laid any basis to grant the orders sought. They further state that they remitted Kshs. 440,440/- in full settlement of the judgment sum. They annexed an extract showing payment. They also assert that the Plaintiff now Applicant has not rejected or refunded the amount that was paid in full settlement of the claim but is already enjoying the fruits of the judgment and interest thereof from the date of payment. That in those premises the application is an afterthought and lacks merit and is an abuse of court process.
6. The Respondents further claim that the application is brought with undue delay and with no conceivable explanation. They claim that in the interest of justice and fairness the application be dismissed.

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;

7. 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.”

8. 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 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.
9. 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: -
10. 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.
11. 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.”

12. The Respondents filed no response despite being aware of this application.
13. Applying the above principles to the present case, the judgment herein was delivered on 27th November, 2024 and the applicant filed the current application on 6th February, 2025. This is about 60 days outside the time limited for filing an appeal.
14. Considering Two Months/60 days, that can be said to be inordinate delay, because the reasons for the delay have not been satisfactorily explained to the court as required by the law. In my view, the applicant has no plausible reason for the delay in filing the appeal. I note also that the Respondent had already paid the decretal sum in settlement of the Judgment delivered on 27th November, 2024 having annexed proof of remittance which has not been controverted or disputed by the Applicant they have also annexed in their application also an intended Memorandum of appeal.
15. As such, the appeal cannot be said to be arguable because no substantial reason has been given or specified. I cannot also deduce any substantial or irreparable loss that can be suffered by the applicant as the decretal sum was already remitted and no proof of refund or declination has been given. 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.
16. 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.

17. Accordingly, it is my considered view that the application dated 5th February, 2025 has no merit and is hereby dismissed with costs to the respondents.

It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 7TH DAY OF JULY, 2025.

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HON. JULIUS K. NG'ARNG'AR

JUDGE

Ruling delivered in the presence of Migiro for the 1st Respondent, No appearance for Applicant. Siele/Susan (Court Assistants)

