



**Shitanda v Shitanda (Miscellaneous Application 88 of 2025)  
[2025] KEHC 10216 (KLR) (15 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10216 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS APPLICATION 88 OF 2025**

**S MBUNGI, J**

**JULY 15, 2025**

**BETWEEN**

**GRACE NAFULA SHITANDA ..... OBJECTOR**

**AND**

**JAMES MUYEKHO SHITANDA ..... PETITIONER**

**RULING**

1. Before this Court for determination is the Notice of Motion dated 30<sup>th</sup> April 2025, by which the Applicant seeks the following orders:
  - a. Spent.
  - b. THAT the Applicant be granted leave to file an appeal out of time as per the annexed Memorandum of Appeal
  - c. THAT the costs of this application be in the cause.
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn on the same day by the applicant. She avers that when the court made its pronouncement on 21/10/2022, her advocate on record had failed to inform her and was further delayed in filing the appeal.
3. He claimed that her case had a high chance of success and prayed that the court would grant her leave to file the appeal out of time.
4. The Respondent in opposing the application stated that the ruling was delivered on 21/10/2022 in the presence of all the parties.
5. They further claimed that the applicant never provided sufficient evidence to prove that she had instructed her advocate as she had alleged. They stated that the application had been filed with inordinate delay.



6. He avers that the succession process was already finalized, and the certificate of confirmation was enforced, and each of the beneficiaries was issued with their portion as per the grant.
7. They claim that the applicant's memorandum of appeal did not have a high chance of success as she had alleged, and prays that the application be dismissed with costs.

**Analysis and determination.**

8. I have carefully considered the application before this court, the Reply filed thereto.
9. The main issue for determination is whether this court should allow the applicant to file her appeal out of time.
10. 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.”

11. It is clear from the wording of section 79G 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.
12. The Court of Appeal in the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR, Odek JJA observed that the several facts which the court has to reckon with, when considering an application for extension of time, were that:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.” (emphasis mine)

13. 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:
  - a. The period of delay;
  - b. The reason for the delay.
  - c. The arguability of the appeal;
  - d. 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
  - e. The effect, if any, on the administration of justice or public interest, if any, is involved.
14. It is not disputed that the learned magistrate delivered the ruling on 21<sup>st</sup> October, 2022, and that the applicant had 30 days to file his appeal.



15. The ruling appeal against was delivered on 21<sup>st</sup> October, 2022, and this application was filed on 30<sup>th</sup> April 2025. This is a period of about 4 2 years and 6 months from the time the appeal ought to have been filed. In my view, and considering the circumstances of this case, it is my opinion that the delay is inordinate; however, the applicant avers that the delay was due to his advocates mistake of not informing her on the outcome.
16. Whereas it is true that mistakes of an advocate should not be visited on a litigant, it is also true that suits belong to the parties not their advocates. Thus where a litigant has instructed an advocate in a matter, he or she must follow up on instructions given to ensure that they were executed and executed in good time.
17. This principle was enunciated in the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2015) eKLR where the court stated: -

It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. 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.

18. In essence, the question I ask myself is whether the applicant has placed before the court sufficient material for leave to appeal against the ruling. 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.
19. In *Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others* [2015] eKLR, the Court of Appeal articulated that:

“It must be realized that courts exist to dispense justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of *the Constitution*, which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers and, consequently, are enjoined by Article 10 of *the Constitution* to adhere to national values and principles of governance, which require them, whenever applying or interpreting *the Constitution* or interpreting the law, to ensure, inter alia, that the rule of law, human dignity and human rights, and equity are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests), while others may transcend the interests of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court, in exercising its judicial authority, to ensure dispensation of justice, as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”

20. Article 48 of *the Constitution* guarantees every person access to justice. In addition, under Article 50(1) of *the Constitution*, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Article 50(2): Every person has a right to a fair trial.



21. The end goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out.
22. There is no evidence on record to show that the applicant tried reaching out to his advocate to know the progress of the case. However, I am inclined to allow the applicant leave to file his intended appeal, noting that two years and 6 months is inordinate delay . In the interest of justice, I note that the appeal cannot be heard until time is enlarged.
23. I will allow the application dated 30<sup>th</sup> April 2025, in the following terms:
  - a. Leave is hereby granted to the Appellant to file their Appeal out of time within the next 14 days.
  - b. The applicant is to file and serve his Memorandum of Appeal within fourteen (14) days hereof.
  - c. The said conditions are to be met within 14 days from the date of this ruling, and in default, the appeal shall be deemed to have been dismissed with costs.
  - d. The costs of this application will be borne by the applicant.
  - e. The Applicant shall pay the respondent throw away costs of Ksh.15,000/= before the expiry of 14 days.
  - f. Mention 25<sup>th</sup> September, 2025.
  - g. Right of Appeal 30 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 15<sup>TH</sup> DAY OF JULY, 2025.**

**S.N MBUNGI**

**JUDGE**

In the presence of:

Court Assistant – Elizabeth Angong’a

Appellant -absent.

Getanda for the respondent present online.

