



Kimani v Macharia (Suing as the Legal Representative of the Estate of Daniel Njuguna Kimani - Deceased) (Miscellaneous Civil Application E023 of 2025) [2025] KEHC 12611 (KLR) (10 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12611 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL APPLICATION E023 OF 2025
FN MUCHEMI, J
SEPTEMBER 10, 2025**

BETWEEN

EZEKIEL KINYANJUI KIMANI APPLICANT

AND

SARAH WARUGURU MACHARIA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DANIEL NJUGUNA KIMANI - DECEASED) RESPONDENT

RULING

Brief facts

1. The application dated 19th February 2025 seeks for orders of leave to file an appeal out of time against the judgment in Thika CMCC No. E696 of 2022 delivered on 10th December 2024.
2. The respondent filed a Replying Affidavit dated 13th May 2025 in opposition to the application.

Applicant's Case

3. The applicant states that the judgment in Thika CMCC No. E696 of 2022 was delivered on 10th December 2024 whereby the trial court awarded the respondent damages in the sum of Kshs. 1,376,712/- plus costs of the suit and interest from the date of judgment until payment in full. Being aggrieved with the said decision, the applicant states that he intends to lodge an appeal however the statutory time within which to do so has lapsed.
4. The applicant states that the delay in filing the appeal is genuine and not deliberate, neither is it inexcusable nor inordinate and is attributed to a mistake of an advocate as the said firm experienced a computer system technical hitch and was therefore unable to view the client's instructions on e-mail on



the date the firm was instructed to file the intended appeal and only learnt about the said instructions upon inquiry from the client on the matter.

5. The applicant states that the appeal raises serious and arguable issues and has high chances of success.

The Respondent's Case

6. The respondent argues that the excuse that the applicant's advocates had a computer system technical hitch thus they missed his instructions to appeal is neither here nor there. The respondent further argues that the instant application has been filed late as judgment was delivered on 10th December 2024 and the applicant was granted 45 days stay of execution upon request. Thus, within the 45 days, the advocates for the applicant must have communicated the outcome of the judgment with their client and deliberated on the way forward.
7. The respondent states that she should be allowed to enjoy the fruits of her judgment which the applicant is trying to delay. The respondent further states that she stands to be greatly prejudiced if the instant application is allowed noting that the deceased in the road traffic accident was the sole breadwinner of their family and she now has to fend for their four children by herself.
8. Parties put in written submissions.

The Applicant's Submissions

9. The applicant submits that the judgment was delivered on 10th December 2024 and the instant application was filed on 19th February 2025 and thus the delay is not inordinate, inexcusable and has been adequately explained. The applicant submits that his advocates had a technical hitch and were unable to view his instructions to lodge the intended appeal up until he called to inquire on the status of the appeal. The applicant argues that in the advent of technology there are bound to be technological challenges that sometimes interrupt the otherwise normal working of systems and law firms are not exempted.
10. The applicant further relies on the case of *Belinda Murai & Others vs Amos Wainaina* [1979] eKLR and *Manyara vs Teachers Service Commission (Civil Appeal E012 of 2022)* [2022] KECA 878 (KLR) and submits that the mistake of an advocate should not be visited upon an innocent litigant who is keen to lodge and prosecute his appeal.
11. The applicant refers to Order 50 Rule 4 of the Civil Procedure Rules and submits that in the computation of time the court ought not to factor in the duration between the twenty first day of December and the thirteenth day of January the next year.

The Respondent's Submissions

12. The respondent submits that the instructions to appeal were sent on 11th December 2024 and it is unbelievable that the advocates firm email was not working until 19th February 2025. Relying on the case of *Stecol Corporation Limited vs Susan Awuor Mudemb* [2021] eKLR, the respondent submits that a delay of 46 days is inordinate and inexcusable. In the event the court is inclined to allow the application, the respondent prays that the applicant should be condemned to pay throw away costs of Kshs. 50,000/-.



The Law

Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;

13. Section 79G 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.

14. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has 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.

15. 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:-

“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 by 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.

16. 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.”

17. Applying the above principles to the present case, the ruling in Thika CMCC No. E696 of 2022 was delivered on 10th December 2024 and the applicant filed the current application on 19th February 2025. Pursuant to Order 50 Rule 4 of the Civil Procedure Rules, this is approximately 16 days outside the time limited for filing an appeal. The applicant has attributed the delay in filing his appeal to his advocates experiencing a technical glitch and thus could not view the email with the instructions to lodge an appeal.
18. The law is clear that it is the responsibility of the litigant to be vigilant and proactive in following up on their cases. This principle was enunciated in the case of Habo Agencies Limited vs Wilfred Odhiambo Musingo (Civil Appeal Application 124 of 2004) [2015] KECA 987 (KLR) (16 January 2015) (Ruling) where the court held:-

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 emphasised that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.
19. Further in the case of Rajesh Rughani vs Fifty Investment Ltd & Another (2005) eKLR, the Court of Appeal held:-

It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction that is not excusable mistake which the court may consider with some sympathy.
20. From the record, the instructions to lodge the appeal were sent by the client on 11th December 2024. However, the applicant’s advocates contend that they did not see the email until the client called them to follow up on the progress of the appeal. The court shall give the applicant the benefit of the doubt considering the delay is approximately 16 days.
21. On the perusal of the intended Memorandum of Appeal, the intended appeal raises the normal points of law and fact. I have perused a copy of the lower court judgment and appreciated the trial court’s reasoning. Thus, the applicant shall be given a chance to ventilate his appeal.
22. Consequently, the application dated 19th February 2025 has merit and is hereby allowed.
23. The applicant to pay the respondents costs of Ksh.20,000/= for this application.
24. The appeal to be filed within 14 days.
25. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 10TH DAY OF SEPTEMBER 2025.

F. MUCHEMI

JUDGE

