



**Njuguna v Neo Mpya Co Limited & another (Miscellaneous Civil Application
E185 of 2024) [2025] KEHC 12602 (KLR) (9 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL APPLICATION E185 OF 2024
FN MUCHEMI, J
SEPTEMBER 9, 2025**

BETWEEN

PETER KIRAGU NJUGUNA APPLICANT

AND

NEO MPYA CO LIMITED 1ST RESPONDENT

JULIE BEATRICE WAMBUI 2ND RESPONDENT

RULING

Brief facts

1. The application dated 13th December 2024 seeks for orders of leave to file an appeal out of time against the ruling in Thika CMCC No. 550 of 2016 delivered on 3rd July 2024.
2. The 2nd respondent filed a Replying Affidavit dated 20th March 2025 in opposition to the application.

Applicant's Case

3. The applicant states that the ruling in Thika CMCC No. 550 of 2016 was delivered on 3rd July 2024 whereby the trial court dismissed his application dated 7/2/2024 seeking to reinstate the suit. 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 matter was slated for hearing of the main suit on 7th February 2024 but his counsel was unable to log in following network issues. The applicant further states that he left the office and headed to court although it took some considerable time. The applicant avers that despite his mobility challenges caused by injuries suffered from the accident, he has made every effort to avail himself and prosecute his case.



The 2nd Respondent's Case

5. The 2nd respondent states that the ruling that the applicant seeks to appeal can only be appealed from with the leave of the court which issued the ruling. The 2nd respondent further states that the application has been filed by an advocate who is not properly on record and who has not sought leave of the court or the consent of the previous advocate to come on record after the conclusion and determination of the suit as envisaged under Order 9 Rule 9 of the [Civil Procedure Rules](#). Thus, the same ought to be struck out.
6. The 2nd respondent states that the suit before the lower court which was filed almost 10 years ago, has been dismissed twice for want of prosecution. Upon the trial court dismissing the suit twice, the applicant sought to have the suit once again reinstated. Evidently, the trial court in declining to reinstate the suit considered the long slumber and the prejudice occasioned by such slumber. The 2nd respondent argues that allowing the continued proceedings in the instant suit is highly prejudicial to her who has on two occasions known that the case was behind her back only to be dragged back to court.
7. The 2nd respondent states that the application is belated and shows that the applicant is not keen on prosecuting the instant matter. Further, the applicant's excuse is unjustifiable and a lame attempt to mislead the court to revive the suit which was dismissed through the indolence on his part.
8. This court gave directions to the parties to file submissions. The record shows the applicant filed his submissions but the respondent did not comply with the directions.

The Applicant's Submissions

9. The applicant submits that there is a consent for change of advocates dated 15th October 2024 and a Notice of Change dated 4th November 2024 which was rightly served upon the respondent as required under Order 9 Rule 9 of the [Civil Procedure Rules](#). The applicant further relies on the cases of [Stanley Mugambi & Another v John Kiraithe](#) [2005] KEHC 2046; [Kenya Pipeline Company Limited v Lucy Njoki Njuru](#) (Civil Appeal 44 of 2013) [2014] KEHC 5103 (KLR); [Martin Mutisya Kiiro & Another v Benson Muendo Kasyali](#) (Machakos HC. Misc. Application No. 107 of 2013); [Tobias M. Wafubwa v Ben Butali](#) [2017] KECA 142 (KLR); [Boniface Kiragu Waweru v James K. Mulinge & Another](#) [2015] KECA 657 (KLR) and [Nicholas Kiptoo arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others](#) [2014] KECA 782 (KLR) and submits that an appeal is fresh proceedings which can be initiated by any other firm of advocates without due regard to the previous advocates who acted in the trial court.
10. The applicant relies on the cases of [Salat v Independent Electoral and Boundaries Commission & 7 Others](#) [2014] KESC 12 (KLR) and [Paul Wanjobi Mathenge v Duncan Gichane Mathenge](#) [2013] KECA 199 (KLR) and submits that the decision to grant leave is discretionary.
11. Relying on the cases of [Muringa Company Limited v Archdiocese of Nairobi Registered Trustees](#) [2020] KECA 761 (KLR); [Muya v Tribunal Appointed to investigate the conduct of Justice Martin Muya, Judge of the High Court](#) (Petition 4 of 2020) [2022] KESC 16 (KLR); [Kiluwa Limited & Another v Business Liaison Company Limited & 3 Others](#) (Petition 14 of 2017) [2021] KESC 37 (KLR); [Karani v Judicial Service Commission](#) (Petition 3 of 2021) [2022] KESC 37 (KLR), the applicant submits that the impugned ruling was delivered on 3rd July 2024 and he filed the instant application on 16th December 2024, which is six months after the delivery of the ruling and thus the application has been filed timeously.



12. The applicant argues that the delay in filing the appeal was caused by the inaction or mistake of his counsels, which constitute sufficient cause for extending time. To support his contentions, the applicant relies on the cases of *Belinda Murai & 9 Others v Amos Wainaina* [1979] KECA 25 (KLR) and *Philip Keipto Chemwolo & Another v Augustine Kubende* [1986] KECA 87 (KLR). The applicant further argues that his counsel joined the virtual court but unfortunately his call dropped right before the matter was called out on the cause list. Thus the loss of internet connectivity was unanticipated and beyond his control or his counsel and therefore excusable. To support his contentions, the applicant refers to the cases of *Esther Wamaita Njibia & 2 Others v Safaricom Limited* [2014] KEHC 6699 (KLR) and *Wachira Karani v Bildad Wachira* [2016] KEHC 6334 (KLR).
13. Relying on the cases of *Richard Ncharpi v Independent Electoral Boundaries Commission & 2 Others* [2013] KECA 282 (KLR) and *Ivita v Kyumbu* [1975] KEHC 4 (KLR), the applicant submits that burden lies on the respondent to show actual prejudice beyond the mere fact of delay. In the absence of such evidence, no prejudice arises.
14. The applicant refers to the cases of *Wachira Karani v Bildad Wachira* [2016] KEHC 6334 (KLR); *CMC Holdings Ltd v James Mumo Nzioki* [2004] KECA 143 (KLR) and *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] KEHC 1805 (KLR) and submits that the respondent will still have an opportunity to give her evidence and cross examine his case in the event the court allows the application.

The Law

Whether counsel for the applicant is properly on record.

15. Order 9 Rule 9 of the *Civil Procedure Rules* provides:-

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

- a. Upon an application with notice to all the parties; or
- b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

16. I have perused the court record and noted that there is no consent for the change of advocate dated 15th October 2024, neither is there a Notice of Change dated 4th November 2024 as alleged by the applicant. In that regard, counsel for the applicant cannot be said to be properly on record. In the interests of justice, it is my considered view that counsel for the applicant do regularize his position by availing copies of the said consent dated 15th October 2024 and the notice of change dated 4th November 2024.

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

17. 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.

18. 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 v 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.
19. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v 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.”

20. Similarly in the case of *Paul Musili Wambua v 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.”

21. It is noted that the ruling in Thika CMCC No. 550 of 2016 was delivered on 3rd July 2024 and the applicant filed the current application on 13th December 2024. This is approximately five (5) months outside the time allowed for filing an appeal. The applicant has attributed the delay in filing his appeal to the inaction by his counsel who logged into court virtually but was experiencing internet issues.
22. 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 v 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.

23. Further in the case of *Rajesh Rughani v 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.

24. The record is clear that it is the applicant who instituted the suit in Thika CMCC No. 550 of 2016 and therefore he has a duty as the plaintiff to proactively pursue his case. Furthermore, upon further perusal of the record, the trial suit was instituted on 30th May 2016. The applicant did not take any action until the suit was dismissed on 28th July 2021. Two years later, the applicant sought to have the suit reinstated vide his application dated 20th February 2023 and the lower court allowed the application. The suit was dismissed for the 2nd time for similar reasons. The applicant in his application dated 7/2/2024 sought reinstatement of the suit. The court in its ruling delivered on 3/07/2024 noted that the applicant has been indolent in prosecuting his suit. In the instant application, the applicant has brought the present application five months after the impugned ruling. It is thus evident that the applicant is truly indolent and seems to take the court for granted as shown by his conduct. It is my considered view that the delay of 5 months is inordinate and inexcusable and further the reasons given for the delay are not sufficient to warrant the court to exercise its discretion in favour of the applicant.

25. The *Civil Procedure Rules* require that an applicant seek the leave of the court that delivered the ruling to leading to filing an appeal. The applicant has been challenged by the respondent in that regard but has not demonstrated that he has complied with the law.

26. On the perusal of the intended Memorandum of Appeal, the intended appeal does not raise arguable points of law or fact. I have perused a copy of the ruling to appreciate the lower court's reasoning. Thus, without delving to the merits of the appeal, the chances of the appeal succeeding in the instant application, are limited. In the circumstances it is my considered view that the applicant has not established to the satisfaction of the court why time should be enlarged to enable him file his appeal.

27. It is thus my considered view that the application dated 13th December 2024 lacks merit and is hereby dismissed with costs to the 2nd respondent.

28. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9TH DAY OF SEPTEMBER 2025.

F. MUCHEMI

JUDGE

