



**Maingi alias James Nguriki Maingi v Murimi (Civil Miscellaneous  
E012 of 2022) [2024] KEHC 6329 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6329 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL MISCELLANEOUS E012 OF 2022  
MA ODERO, J  
JUNE 3, 2024**

**BETWEEN**

**JAMES NGORIKI MAINGI ALIAS JAMES NGURIKI MAINGI ..... PLAINTIFF**

**AND**

**JEREMIAH WILSON MURIMI ..... RESPONDENT**

**RULING**

1. Before this court for determination is the Notice of Motion dated 15<sup>th</sup> April, 2022 by which the Applicant James Nguriki Maingi alias James Nguriki Maingi seeks the following orders:-
  1. That the Honourable court be pleased to extend the time in which the Applicant may file and serve his memorandum of Appeal out of time.
  2. That the costs of this application be in the appeal.
2. The application which was premised upon Sections 79 G and 95 of the *Civil procedure Act* Cap 21 laws of Kenya, order 50 rule 6 of the *Civil Procedure Rules* and all other enabling provisions of the law was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent Jeremiah Wilson Murimi did not file any Reply to the Application.
4. The court directed that the matter be canvassed by way of written submissions. The Applicant filed the written submissions dated 1<sup>st</sup> November, 2023. The Respondent despite being given adequate time and opportunity to do so, did not file any written submissions.

**Background**

5. The Applicant was aggrieved by the judgment delivered by Hon. Nelly Kariuki, Principal Magistrate in Nyeri Civil Case No. E040/2020 and purposed to file an appeal against the same.



6. However the Memorandum of Appeal was not filed within the thirty (30) day period provided for in law. The Applicant now seeks leave to file her appeal out of time.

### **Analysis And Determination**

7. I have carefully considered the application as well as the written submissions filed by the Applicant.

8. Section 79 G of the [Civil Procedure Act](#) provides as follows:-

“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 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 sufficient cause for not filing the appeal in time.” [Own emphasis]

9. The Applicant in this case explained that although he had instructed his advocate to file an appeal, the said Appeal was not filed within the thirty (30) day period as the Advocates clerk failed to file the Memorandum of Appeal and instead filed it away in the office registry. The application therefore pleads that the failure to file the appeal in time was inadvertent.

10. The courts have the discretion on whether or not to grant leave to file an appeal out of time. The factors to be considered in determining whether or not to grant such leave were set out in the case of [Thuita Mwangi v Kenya Airways Ltd](#) [2003] eKLR as follows:-

- “(i) The period of the delay
- ii. The reason for the delay
- iii. The arguability of the appeal
- iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted.
- v. The importance of compliance with time limits to the particular litigation or issue;- and
- vi. The effect if any on the administration of justice or public interest if any is involved.

11. Similarly in [Nicholas Kiptoo Arap Korir Salatt v IEBC & 7 others](#) [2013] the Supreme Court of Kenya set out the considerations to be made by a court exercising the discretion to grant leave to file appeal out of time as follows:-

- “(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 reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
- (5) Whether there will be any prejudice suffered by the respondent of the extension is granted.



- (6) Whether the application has been brought without undue delay; and
- (7) Whether in certain cases, like election petition, public interests should be a consideration for extending time.”
12. The impugned judgements was delivered on 17<sup>th</sup> February, 2022. The present application was filed on 15<sup>th</sup> April, 2022 which was roughly one (1) month after the statutory thirty (30) day period had elapsed. I find that this does not amount to inordinate delay and I thus find that the application was filed in a timely manner.
13. The Applicant has explained the reason for the delay in filing his appeal being inadvertence on the part of the clerk at his Advocates office, who instead of filing the Memorandum of Appeal placed the same in a drawer in the Advocates office.
14. It is a general rule that a litigant who instructs counsel to act on his behalf has a duty to follow up and ensure that the required action is taken by the Advocate. It will not do to blame the Advocate for all omissions to act as required.
15. In this case it was alleged that some confusion arose in the Advocates office. Obviously a litigant cannot be expected to have intimate knowledge of how the staff in his Advocates office operate and he cannot be blamed for errors/omissions on the part of said staff.
16. In the case of *Philip Chemwolo & Another v Augustine Kubebe* [1982-88] KLR 103, Hon APALO J/A (as he then was) stated that:-
- “Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merit” [Own emphasis]
16. On the question of whether the Applicant has an arguable appeal it is not the duty of this court at the point to delve into the merits or otherwise of the appeal. Suffice to say I have perused the Memorandum of Appeal and finds that it raises triable issues.
17. I do not find that the Respondent would stand to suffer great prejudice if the leave sought in the application is granted. The Respondent will have an opportunity to oppose the appeal. Further I note that the application was not opposed.
18. Finally I do allow this application and I direct as follows;-
- (i) The Applicant is granted an extension of twenty one (21) days within which to file and serve his Memorandum of Appeal.
- (ii) No orders on costs.

**DATED IN NYERI THIS 3<sup>RD</sup> DAY OF JUNE, 2024.**

**MAUREEN A. ODERO**

**JUDGE**

