



**Thuo & another (Both suing as the administrators of the Estate of the Late Julius Mwangi Muchiri) v Gitari (Civil Appeal E074 of 2022) [2024] KEHC 10060 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10060 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E074 OF 2022  
RM MWONGO, J  
JULY 23, 2024**

**BETWEEN**

**HILDA WANGARI THUO ..... 1<sup>ST</sup> APPELLANT**

**STEPHEN MUCHIRI KAMUNYA ..... 2<sup>ND</sup> APPELLANT**

**BOTH SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE  
JULIUS MWANGI MUCHIRI**

**AND**

**EVERLYN KAWIRA GITARI ..... RESPONDENT**

*((Being an appeal from the judgment and decree dated 27th June 2022 by Hon. P.M Mugure (PM) in Wang'uru Magistrate Court's Civil Suit No. 7 of 2019))*

**RULING**

1. The applicants filed a notice of motion herein dated 29<sup>th</sup> August, 2022 seeks the following orders:
  1. That the Honourable Court be pleased to admit this Appeal which has been filed out of time.
  2. That in alternative to (1) above, the Honourable court be pleased to enlarge time to allow the Appellant/Applicant to file an Appeal out of time against the judgment and decree dated 27<sup>th</sup> June, 2022.
  3. Cost of the Application to abide by the appeal.
2. The application is premised on the following grounds that: the trial court delivered a judgment on 27<sup>th</sup> June, 2022 in absence of the Plaintiff's advocates; That subsequent attempts to trace and peruse the court file were unsuccessful for a while as the file was stated to be in chambers; That the appellant's advocate managed to obtain a copy of the judgment on 29<sup>th</sup> August, 2022; and that the court has jurisdiction to admit the Appeal out of time.



3. The applicant deposed to 14 paragraphs supporting affidavit with the following major averments:
  1. That the Appellants herein filed a suit at the Magistrate's court in Wanguru being Wanguru SPMCC 7 of 2019 (the "Lower Court matter") seeking damages under the *Fatal Accidents Act* and the *Law Reform Act* following the death of Julius Mwangi Muchiri in a road traffic accident.
  2. That the suit proceeded for hearing and was reserved for judgment on 27<sup>th</sup> June, 2022, but unfortunately, he was unable to attend court for the judgment.
  3. That he managed to peruse the judgment and obtain a copy thereof on 29<sup>th</sup> August, 2022.
  4. That he filed a Memorandum of Appeal and believes that Appeal is arguable and has high chances of success.
  5. That the Appellant failed to file the instant appeal due to the aforesaid factors.
4. The respondent on 3<sup>rd</sup> March, 2023 filed a replying affidavit with the following major averments:
  1. That the applicants' suit being an action founded on tort ought to have been filed within 3 years from the date of occurrence of the said accident but the suit was filed outside the said limitation period.
  2. That the applicants pleaded in their plaint that they had been granted leave to file the suit out of time in *Wang'uru Misc. Suit No.8 of 2014 (OS)* but the applicants did not produce the alleged court order in their evidence.
  3. That on 27/06/2022 the Magistrate's court delivered its judgment which was dated and signed in open court and the said judgment had 6(six)typed pages.
  4. That as deposed in his Supporting Affidavit sworn on 29/08/2022 the applicants Advocate was aware that the judgment was delivered on 27/06/2022.
  5. That the onus of producing in court the alleged leave for filing suit out of time lies with the applicants but not with the trial court.
  6. That the applicants' advocate has not provided any evidence in support of his alleged attempts made to obtain the court judgment.
5. The parties canvassed the application through oral submissions in court.
6. The applicants submit that counsel had an accident on his way to court to hear the delivery of the judgement. The file was not available immediately. They urge that Section 79 G of the *Civil Procedure Act* gives court discretion to admit appeal for sufficient cause. This explanation has not been shown to be untrue.
7. Further, the applicants assert that the memorandum of appeal shows that the grounds of appeal are arguable. They are ready to avail record of appeal without delay. That they seek for the application to be allowed.
8. The respondent submits that the applicant's suit was dismissed on 27<sup>th</sup> June, 2022, on the ground that the suit was filed out of time. The applicants were aware about the date for reading the judgement. When the judgement was delivered, it was typed, dated and delivered in open court. The respondent states that party should lay a basis for extension of time. Any delay should be explained to the court's satisfaction.



9. The only issue for determination is whether leave to appeal out of time should be granted.

### **Analysis and Determination**

10. The applicant's notice of motion seeks orders for enlargement of time for purposes of filing an appeal out of time.
11. The applicable law for enlargement of time is Section 95 of the *Civil Procedure Act* and order 50 rule 6 of the *Civil Procedure Rules*. In *Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2015] eKLR, the Supreme Court held that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.
12. The applicants depose that the delay in filing the said appeal was on account of the fact that counsel had an accident on his way to court to hear the delivery of the judgement. Thereafter, the file was not available immediately. These explanations have not been shown to be untrue.
13. It is not disputed that Section 79G of the *Civil Procedure Act* gives court discretion to admit appeal if of sufficient cause. In *Gerald M'limbine v Joseph Kangangi* [2008] eKLR, it was held concerning Section 79G as follows:
- “My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period.”
14. The respondents submit that the applicants were aware about the date for reading the judgement. When the judgement was delivered, it was typed, dated and delivered in open court. They failed to file and appeal against it and party should lay a basis for extension of time. Any delay should be explained to the court's satisfaction.
15. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the *Civil Procedure Act* provides that:
- “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 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.”
16. The applicant's explanation that counsel had an accident and that the file was thereafter not immediately available constitute sufficient reason. In my view the delay was not inordinate or excusable. Further, the applicants have an arguable appeal with a probability of success.
17. In the result I find that the applicants delay of 2 months in filing the appeal is justifiable.
18. Accordingly, I would exercise the courts discretion in favour of the applicant, and I hereby grant the applicant leave to file the appeal out of time.
19. The applicant shall file and serve their appeal within 14 days from the date hereof.



20. Orders accordingly.

**DATED AT KERUGOYA THIS 23<sup>RD</sup> DAY OF JULY, 2024.**

**R. MWONGO**

**JUDGE**

Delivered in the present of:

Mugo - for Applicant

Kitonga - for Respondent

Murage, Court Assistant

