



**Mwangome v Daniel (Civil Appeal E095 of 2022)  
[2023] KEHC 17684 (KLR) (22 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17684 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL E095 OF 2022  
SM GITHINJI, J  
MAY 22, 2023**

**BETWEEN**

**WYCLIFFE MWANGOME ..... APPELLANT**

**AND**

**WILLIAM MUENDO DANIEL ..... RESPONDENT**

*(Being an appeal from the Judgment of the Learned Honourable Magistrate S.D.Sitati dated 3rd October, 2022 in the Senior Resident Magistrate at Kilifi Case No.293 of 2012)*

**RULING**

**CORAM:** Hon. Justice S. M. Githinji

Kamunda Nture Advocates for the Appellant

Mr Kinaro Advocate for the Respondents

1. For determination is the respondent's Notice of motion dated March 13, 2022 seeking the following orders;
2. That the appeal be struck out for being filed out of time
3. The costs of this application be provided for.

The application is based on the grounds set out on the face of the application and the supporting affidavit of William Muendo Daniel the respondent who deposed that the Judgment in Kilifi SPMCC No. 293 of 2022 was delivered by the honourable court on 3<sup>rd</sup> October 2022 and the 30 days within which to file an appeal lapsed on 1/11/2022 while the appeal herein was filed on 3/11/2022 out of time without leave of the court and thus should be struck out.



4. The appellant did not file a response to the instant application nor submissions. The respondent filed their submissions which I have considered. The sole issue for determination is whether the appeal herein should be struck out for having been filed out of time and without leave of the court.

Section 79G of the *Civil Procedure Act* provides:

“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.”

5. The supreme court of Kenya sitting at Kisumu in the case of *County Executive of Kisumu v County Government of Kisumu & others* (2017) eKLR while relying on its decision in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* Application No 16 of 2014 (2014) eKLR the Hon. Judges reiterated the considerations to be made in such a case 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 a 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 respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

6. I have considered the date the Memorandum of Appeal was filed. The delay was only for two days. That in my view is not inordinate. However, the appellant did not seek the leave of this court to have the appeal filed out of time. In addition, the appellant did not file any response to the instant application and their submissions. As it stands, the application is unopposed. In the circumstance, I am inclined to allow the application dated March 13, 2022. The respondent may have given up on this application and the appeal. The appeal is therefore struck out with costs to the respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 22<sup>ND</sup> DAY OF MAY, 2023.**

.....

**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**



1. Kinaro for the Respondent
2. Kamunda Njue and Co for the Appellant (absent)

