



**Kiriga alias Ikev Ivooke v Republic (Miscellaneous Criminal Application  
E076 of 2023) [2023] KEHC 22889 (KLR) (2 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 22889 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CRIMINAL APPLICATION E076 OF 2023  
RN NYAKUNDI, J  
OCTOBER 2, 2023**

**BETWEEN**  
**KEVIN NDUNGU KIRIGA ALIAS IKEV IVOOKE ..... APPLICANT**  
**AND**  
**REPUBLIC ..... PROSECUTOR**

**RULING**

**Coram:** Before Hon. Justice R. Nyakundi

Losiamoi & Co. Advocates

Mr. Mugun for the State

1. The applicant Kevin Ndungu Kiriga Alias Ikev Ivooke lodged a Notice of Motion before this court on September 11, 2023 seeking extension of time to appeal against the decision of the trial court in Criminal Case No E076 of 2023. The application is premised on the following grounds:
  1. That: I failed to write the above mentioned matter within the stipulated period due to lack of court proceedings/ruling judgement
  2. That: I had relied on my parents/relatives to hire an advocate for the me but they failed to get money to pay advocates
  3. That while in prison, I requested the prison authority to allow me write the same
  4. That: What I deponed here above is truth and the truth alone. In support of the application he deposed as follows:
    1. That I am a male adult, Kenyan citizen and of sound mind and therefore capable to swear this affidavit



2. That: I stood trial in Criminal Case No E658 of 2022 in the Chief Magistrates Court at Eldoret on charges of Cyber harassment brought under the Computer Misuse and Cybercrime Act No 5 of 2018.
3. That: a full trial was conducted and judgement entered in favour of the Respondent herein on December 5, 2022. (Annexed and marked 'KNK1' is a true copy of the judgment of the judgement of the Chief Magistrates court at Eldoret delivered by Honourable B Kiptoo Senior Resident Magistrate, criminal case No E658 of 2022 dated December 5, 2022
4. That I informed the court, vide an application for typed proceedings and judgement on December 5, 2022 of my dissatisfaction with its decision and subsequent intention to appeal the judgement of the said court.
5. That the said application was received by the court on the same day it was made. (Annexed and marked LNK2' is a true copy of the Application as dated and received by the court on December 5, 2022.
6. That despite my constant follow ups and reminders, the court did not process the said certified copies until April 23, 2023 and the same were delivered to me vide courier service on April 28, 2023
7. That at the time of my receiving of the said certified copy, the statutory period of appeal had since lapsed hence I could not lodge an appeal on time
8. That considering I did not have representation of counsel at the time of receiving the certified copy, I was lost on the next step of action or recourse at law
9. That I was aggrieved by the whole of the trial court's decision and intend to prefer an appeal to this Honourable Court.
10. That my delay in bringing this application is not inordinate hence excusable.
11. That I was informed upon my perusing of provisions of law that I had a good and arguable Appeal that raised my fundamental issues of law and fact and which had high chances of success. (Annexed and marked as 'KNK 3' is a true copy of the Memorandum of Appeal.
12. That in the circumstance's is only fair and just that I be given the opportunity to file an appeal out of time
13. That I have brought this appeal in good faith.
14. That the Respondent shall not be prejudiced in any way in the event that this Application is allowed.
15. That this honourable court is vested with the unfettered discretion to grant the orders sought
16. That I swear this affidavit in support of this Applicant now before court

Apparently, from the record the application stands unopposed.



## Determination

2. The only issue for my determination is whether the applicant has been able to advance sufficient cause to warrant extension of time. Section 349 of the *Criminal Procedure Code* gives discretion powers to the court to enlarge time in favour of the applicant to file his or her appeal out of time. It states as follows:

' An appeal shall be entered within fourteen days of the date of the order or sentence appealed against provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days have elapsed and shall so admit the appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of appellant or his advocate to obtain a copy of the judgement or order appealed against and a copy of the record within a reasonable time of applying to the court thereof .

3. By the spirit of this provision, delay of even a single day has to be accounted for by the applicant to enable the court exercise discretion judiciously. The basis of it is to ensure there is compliance to the prescribed timelines within which an aggrieved party must approach the court for purpose of an appeal. The exercise of discretion is governed by the overriding objective of finality litigation and by the general principles underlying the appeal regime. In its exercise of discretion to extend time, or grant permission to file a memorandum of appeal out of time, it's the court's duty to take into consideration the special facts and circumstances of the case with an objective to achieve a just and fair outcome. The scrutiny should be on the length of delay, the reasons for the delay, the applicant's chances of success on appeal, and whether such an extension of time is likely to prejudice or occasion an injustice to the respondent. I observe from the record the applicant did not have the benefit of legal counsel as a constitutional imperative in terms of Article 50 (2) (g) & (h) of the *constitution*. The overriding concern is whether he was capable or had the knowledge to appreciate the strict procedural timelines of our appeal process. Correspondingly, this court has to bear in mind the challenges likely to be faced by self represented litigants or defendants for that matter in a criminal case. The present case, concerns the file of a memorandum of appeal to challenge the impugned judgement of the trial court. The test therefore, is whether the intended appeal is hopeless likely to be summarily dismissed. A glance of the record does not possess any such indicator at the moment to persuade this court to decline exercise of discretion in this application. In any event, I do not think this to be a threshold test for the applicant to meet. The quest for justice of our people entails a continuous interrogation and a need to balance both the procedural and substantive justice parameters. It is that interaction the Supreme Court profoundly enunciated the principles in the case of *Salat V Independent Electoral & Boundaries Commission & 7 Others (2014) KLR-SCK* the following guidelines are of significance as formulated to assist the court in exercising discretion to decline or grant the remedy on extension of time.

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 ought to 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, which ought to be explained to the satisfaction of the court.
5. Whether there would be any prejudice suffered by the respondents if the extension was granted.



6. Whether the application had been brought without undue delay, and
  7. whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.
4. What is critical in this application is to establish whether the applicant has established sufficient reasons for this court to extend time as stipulated under Section 349 of the CPC or any such criteria to achieve the constitutional right of appeal or for the interest of justice. The applicant on his part has stated in the affidavit that the delay was as a result of lack of the trial court record and the impugned judgement. In the first instance under Article 50 (2)(q) of the constitution, the applicant has a right once convicted to appeal to or apply for review by a higher court as prescribed by law. Further in sub Section 4(b) of the same Article the applicant has the right to a copy of the record of the proceedings within a reasonable period after they are concluded. In return for a reasonable fee as prescribed by law.
5. Having considered the application, the factors raised by the applicant constitute sufficient good cause for extending the time to facilitate him to secure the record and file his appeal out of time. Pursuant to Section 349 of the CPC the Memorandum of Appeal prepared necessary to meet the requirements of the right of appeal be deemed as duly filed within time. By dint of this ruling the Deputy Registrar to supply the Applicant with a copy of the trial court record and judgement within 30 days from today's date. Further mention on 30<sup>th</sup> of October for further directions on the appeal process.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 2<sup>ND</sup> DAY OF OCTOBER, 2023.**

**In the presence of:**

Applicant Present.

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**R. NYAKUNDI**

**JUDGE**

