

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E117 OF 2023
WANANCHI GROUP (K)
LIMITED.....APPLICANT
VERSUS
DAVE LUNGAHO SIGANGA..
.....RESPONDENT

RULING

1. The Applicant’s Notice of Motion dated 16th August, 2024, is expressed to be brought under *Section 79G and 95 of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 43 Rule 2 of the Civil Procedure Rules* and seeks the following orders:

a. [Spent].

b. **THAT this Honourable Court be (sic) grant leave to extend time for filing an appeal (out of time) against the judgement of the Principal Magistrate’s Court at Kisumu of (sic) Hon. W.K. Onkunya delivered on June 29, 2023 in *Kisumu CMCC No. 154 of 2020.***

c. **THAT the Applicant be granted leave to lodge appeal out of time against the judgement of the Principal Magistrate’s Court at Kisumu of (sic) Hon. W.K. Onkunya delivered on June 29, 2023 in *Kisumu CMCC No. 154 of 2020.***

d. THAT the Memorandum of Cross Appeal annexed hereto be deemed as duly filed upon payment of the requisite fees.

e. THAT the costs of this application be in the proceedings.

2. The grounds upon which the application is premised are stated on its face and are in precis that the time within to lodge the cross appeal has since expired and that the Applicant gave instructions for a cross appeal to be filed but which were not followed through, upon the reinstatement of the appeal. The further grounds are that the Applicant has an arguable appeal and that the delay occasioned is not inordinate.
3. The application is supported by the affidavit sworn on 16th August, 2024 by **Francis Omondi**, Advocate in which the said deponent restates and expounds on the above grounds. The deponent states that his law firm was instructed by the Appellant to cross appeal but inadvertently failed to file the cross appeal when the appeal was reinstated.
4. The application is opposed by the Respondent (the Appellant in the appeal), who takes the position that the delay in bringing the application is not only inordinate but unexplained and that immense prejudiced will be occasioned upon the Respondent if the application is allowed. The Respondent further urges that the intended cross appeal has low chances of success.

5. This court directed that the application proceeds by way of written submissions and the parties herein filed their respective submissions.
6. I have perused and considered the application, the Applicant's affidavit in support thereof, the Respondent's response to the application, the submissions of the parties and the record in its entirety.
7. What is clear from the record is that the judgement and decree from which the Applicant intends to cross-appeal was delivered on 29th June, 2023. The application seeking for leave to cross-appeal out of time, subject of which this ruling is made, was filed on 16th August, 2024. The period within which to cross-appeal lapsed on or about the 29th July, 2024. There is therefore a delay of a period of about one year and one month.
8. What this court should then proceed to determine is:
 - a.** Whether the Applicant has met the prerequisites for the grant of leave to cross-appeal out of time.
 - b.** Subject to (a) above, whether the court should exercise its discretion to grant the Applicant leave to file its cross-appeal out of time.

9. *Section 79G of the Civil Procedure Act* provides as follows:

79G. 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.

10. It is clear from the text of the above provision of statute that before the court considers granting an order to allow an appeal or cross appeal to be filed out of time, the Applicant must demonstrate to the court that he has good and sufficient cause for filing the appeal or cross appeal out of time and the delay must be satisfactorily explained (see the cases of **Diplack Kenya Limited v William Muthama Kitonyi [2018] eKLR** and **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] eKLR**).

11. The Supreme Court in the case of **Salat** held *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; and

f. Whether the application has been brought without undue delay.”

12. On whether there is a reasonable ground for the delay, the Applicant states that the instructions to its counsel were not put into gear due to inadvertence on the part of the Advocate and that the mistake on the part of the Advocate should not be visited upon the Applicant.

13. Much as mistakes will always be made and reasonably excused, the delay by a lengthy period of more than one year, is not only inordinate, in the circumstances, but also remains unexplained in the supporting affidavit and is therefore inexcusable. In the absence of an explanation for the delay, this court can only reach the finding that there lacked diligence on the part of the Applicant and/or his counsel.
14. In the obtaining situation, I will agree with the Respondent that the Applicant did not file the application that seeks the permission of the court to cross appeal out of time, without unreasonable delay.
15. From the foregoing, I am not persuaded that the Applicant has met the prerequisites for leave to cross appeal out of time. Thus then, the court cannot judiciously exercise discretion to allow the Applicant's motion.
16. Having determined that the prayer for leave to cross-appeal out of time is not merited, the result I then reach, based on the reasons above, is that the Notice of Motion application dated 16th August, 2024 fails. I proceed to dismiss it with costs, which I assess at Ksh.3,000/-.
17. This file will be mentioned on 12th November, 2025 for further directions on the appeal.

DELIVERED (virtually), DATED & SIGNED this 18th day of September, 2025.

JOE M. OMIDO
JUDGE

FOR APPLICANT: **Mr. Gakunga.**

FOR RESPONDENT: **Ms. Ouma** for **Ms. Omondi.**

COURT ASSISTANTS: **Mr. Ngoge.**