



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kimitei & 2 others v Kamarkan (Civil Appeal E095 of 2025)
[2025] KEHC 14183 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL E095 OF 2025
RB NGETICH, J
OCTOBER 9, 2025**

BETWEEN

PATRICK KIPLAGAT KIMITEI 1ST APPELLANT

AMOS KIPYEGO BORE 2ND APPELLANT

MICAH KIPTOO KOSGEI 3RD APPELLANT

AND

JOSHUA KAMUTIT KAMARKAN RESPONDENT

RULING

1. The applicants filed their application dated 3rd April 2025, seeking leave to file appeal out of time against the judgement delivered on 13th August 2024 by Hon. Mulochi in Kabarnet CMCC No. E017 of 2023. Grounds on the face of the application are that the applicant was not served with pleadings and were not therefore aware of the pending case before the magistrate in Kabarnet CMCC No.E017 of 2023 and the judgment was delivered in their absence and they came to learn of existence of the matter when their driver informed them that an auctioneer had taken the vehicle.
2. The Respondent opposed the application by filing a replying affidavit dated 16th June 2025 and, in a rejoinder, the Applicant filed a further affidavit dated 15th July 2025. The court directed the parties to file their submissions.

Applicants' Submissions

3. The Applicants submit that they were never served with pleadings in Kabarnet CMCC No. E017 of 2023 — Joshua Kamutit Kamarkan v. Patrick Kiplagat Kimitei, Amos Kipyego Bore & Micah Kiptoo Kosgei.



4. They state that they only became aware of the case when they were served with warrants and a proclamation of attachment on 22nd March 2025, dated 8th and 7th March 2025 respectively.
5. Upon learning of the matter, they filed an application dated 26th March 2025 seeking stay of execution. However, before the hearing, the Respondent informed the court that the application had been overtaken by events since the motor vehicle had already been auctioned on 1st April 2025.
6. Aggrieved by the sale, the Applicants filed the instant application dated 3rd April 2025 seeking stay of execution and leave to file an appeal out of time.
7. The application was filed under certificate of urgency on 3rd April 2025 and orders were issued on 7th May 2025. By then, execution had already taken place and the Applicants had been dispossessed of their motor vehicle.
8. The main issue for determination, therefore, is whether the court should exercise its discretion to grant the Applicants leave to file an appeal out of time.
9. Section 79G of the *Civil Procedure Act* provides that every appeal from a subordinate court shall be filed within 30 days from the date of decree or order, but an appeal may be admitted out of time if the appellant satisfies the court that there was good and sufficient cause for the delay.
10. The Applicants rely on *Diplack Kenya Limited v. William Muthama Kitonyi* [2018] eKLR, where it was held that an applicant seeking enlargement of time must show good cause.
11. They also cite *Nicholas Kiptoo Korir arap Salat v. IEBC & 7 Others* [2014] eKLR, where the Supreme Court held that extension of time is discretionary and depends on, among other factors, the reason for delay, the length of delay, prejudice to the respondent, and whether the application was brought without undue delay.
12. The Court of Appeal in *Paul Musili Wambua v. Attorney General & 2 Others* [2015] eKLR emphasized that although discretion to extend time is unfettered, it must be exercised judiciously based on reason and the length and reason for delay, the chances of the appeal succeeding, and the degree of prejudice to the respondent.
13. Applying the above principles, the Applicants submit that they only learnt of the judgment upon service of the proclamation and warrant of attachment on 22nd March 2025, and immediately filed the lower court application on 26th March 2025 and, thereafter, the instant application.
14. They rely on *Njoroge v. Kimani (Civil Application No. E049 of 2022)* [2022] KECA 1188 (KLR), where the Court of Appeal defined excusable delay as that which is unforeseeable and beyond the control of the party.
15. They submit that despite the delay, they have demonstrated excusable reasons as they were unaware of the proceedings until execution commenced.
16. On costs, they rely on Section 27 of the *Civil Procedure Act* and *Party of Independent Candidate of Kenya & Another v. Mutula Kilonzo & 2 Others* [2013] eKLR, citing *Levben Products v. Alexander Films (SA) (Pty) Ltd* [1957] (4) SA 225, which held that costs are discretionary but generally follow the event. They pray that costs be awarded to the Applicants.

Respondent's Submissions

17. The Respondent opposes the application through a Replying Affidavit sworn on 16th June 2025 and filed on 17th June 2025, relying entirely on the affidavit and annexures.



18. The Respondent argues that the application is defective as the Applicants have already filed an appeal without leave of the Court, contrary to Section 79G of the *Civil Procedure Act*. Relying on Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others [2014] eKLR, he submits that an appeal filed out of time without leave is a nullity.
19. He contends that the Applicants were properly served with pleadings both physically and via WhatsApp, as confirmed by the process server's affidavit, which remains unchallenged. The Respondent relies on Shadrack Arap Baiywo v. Bodi Bach [1987] eKLR, where the Court of Appeal held that a process server's affidavit is prima facie evidence of service unless the process server is cross-examined.
20. He further submits that the Applicants and their insurer were served with a demand letter and statutory notice, and that the subject motor vehicle has since been sold by public auction. The Respondent argues that the proceedings are therefore overtaken by events.
21. He further relies on Murunga Barasa (Civil Appeal E069 of 2022) [2024] KEHC 676 (KLR) and Nyariki Mogusii Farmers Group Co. Ltd v. Hezron Getuma Onsongo [2023] KEHC 23116 (KLR), where the courts held that once a vehicle has been sold and no stay was in place, further proceedings become academic exercise.
22. The Respondent therefore prays that the application dated 3rd April 2025 be dismissed with costs.

Analysis And Determination

23. The application before this Court seeks leave to file an appeal out of time against the judgment of Hon. Mulochi (SRM) delivered on 13th August 2024 in Kabarnet CMCC No. E017 of 2023. The applicable law is Section 79G of the *Civil Procedure Act*, which allows the Court to admit an appeal out of time if the appellant satisfies it that there was good and sufficient cause for not filing the appeal within the prescribed period.
24. The guiding principles were clearly set out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others [2014] eKLR and the Court of Appeal in Leo Sila Mutiso v. Rose Hellen Wangari Mwangi [1999] 2 EA 231 where the court held that extension of time is discretionary and not a right and the following must be satisfied:-
 - a. The applicant must lay a satisfactory basis for the delay;
 - b. The applicant have arguable appeal,
 - c. prejudice to the respondent and,
 - d. Each case must be decided on its own facts.
25. The Applicants contend that they were never served with pleadings in Kabarnet CMCC No. E017 of 2023 and only learnt of the suit upon service of a proclamation of attachment on 22nd March 2025, followed by sale of their motor vehicle on 1st April 2025.
26. They state that they promptly filed an application dated 26th March 2025 in the lower court seeking stay of execution, but by the time it was heard, the sale had already taken place. They thereafter filed the present application dated 3rd April 2025 under certificate of urgency seeking leave to appeal out of time and stay of execution.
27. The Applicants rely on Diplack Kenya Ltd v. William Muthama Kitonyi [2018] eKLR and Nicholas Kiptoo Korir Arap Salat (supra), urging that their delay was excusable as they had no notice of the



suit until execution commenced. They also cite *Njoroge v. Kimani* (Civil Application No. E049 of 2022) [2022] KECA 1188 (KLR), where the Court of Appeal defined excusable delay as one that is unforeseeable and beyond a party's control.

28. The applicants argue that they acted diligently and in good faith, and pray that the Court exercises its discretion to allow the application.
29. The Respondent, through a Replying Affidavit sworn on 16th June 2025, opposes the application, arguing that both the appeal and application were filed out of time without leave, contrary to Section 79G. He relies on *Nicholas Kiptoo Arap Korir Salat* (supra), where it was held that no appeal can be filed out of time without prior leave of the Court.
30. The Respondent further contends that the Applicants were duly served with pleadings both physically and through WhatsApp, as confirmed by the process server's affidavit, which has not been challenged and relied on the case of *Shadrack Arap Baiywo v. Bodi Bach* [1987] eKLR, where the Court of Appeal held that a process server's affidavit is prima facie evidence of service unless tested through cross-examination.
31. The Respondent further argue that the subject motor vehicle has already been sold through public auction, rendering the application moot, and relies on *Murunga Barasa* (Civil Appeal E069 of 2022) [2024] KEHC 676 (KLR) and *Nyariki Mogusii Farmers Group Co. Ltd v. Hezron Getuma Onsongo* [2023] KEHC 23116 (KLR), where the courts held that once property is sold in execution without a subsisting stay, subsequent proceedings become academic.
32. I have considered arguments by parties herein and authorities cited and find that the issue for determination is whether the Applicants have demonstrated good and sufficient cause to warrant extension of time to file an appeal out of time. In considering this, the Court must consider the following elements:-
 - a. The length and reason for the delay;
 - b. Whether the intended appeal is arguable; and
 - c. Whether the Respondent would suffer prejudice.

Length and Reason for Delay:

33. The impugned judgment was delivered on 13th August 2024, while the present application was filed on 3rd April 2025 a period of about eight months later. The Applicants attribute the delay to lack of service and were not aware of the proceedings until execution commenced in March 2025. The Respondent has exhibited affidavits of service which remained unchallenged through cross examination of the process server. Looking at the material before court, the dispute on service is unresolved and can be addressed appropriately at the hearing of the intended appeal.

Whether there is arguable appeal

34. The Applicants contend that the judgment was entered ex parte without service, raising questions of procedural fairness and the right to be heard the issues that are neither frivolous nor devoid of merit. The applicant therefore has demonstrated arguable appeal.



Prejudice to the Respondent

35. The Respondent asserts that execution has been completed and the vehicle sold, making the application moot. While this may affect the practical enforceability of certain reliefs, the Applicants' right to appeal against a default judgment remains protected under Article 50 of *the Constitution*.
36. From the foregoing, I am satisfied that the Applicants have demonstrated sufficient reason for not filing the appeal within time and the intended appeal raises arguable issues, and no substantial prejudice that the Respondent may suffer has been demonstrated.
37. Final Orders:-
 - a. The Appellant is granted leave to appeal out of time.
 - b. Memorandum of appeal already filed is hereby deemed as duly filed.
 - c. Record of appeal to be filed with 30 days from the date of this ruling.
 - d. Costs shall abide the outcome of the appeal.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 9TH DAY OF OCTOBER, 2025.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Mr Okara for Respondent.

Mr Cheruiyot for Applicant.

CA, Elvis.

