



**Makokha v Barclays Bank of Kenya (Now Absa Bank of Kenya Plc) (Miscellaneous Civil Application E010 of 2025) [2025] KEHC 15555 (KLR) (31 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15555 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CIVIL APPLICATION E010 OF 2025  
AC BETT, J  
OCTOBER 31, 2025**

**BETWEEN**

**RASHID NANJIRA MAKOKHA ..... APPELLANT**

**AND**

**BARCLAYS BANK OF KENYA (NOW ABSA BANK OF KENYA  
PLC) ..... RESPONDENT**

**RULING**

1. Vide a Notice of Motion dated 13<sup>th</sup> February 2025, the Appellant/Applicant sought the following orders:
  1. That this Honourable Court be pleased to extend the time for filing an appeal against the judgment of Hon. T. A. Obutu, CM, delivered on 7<sup>th</sup> November 2024 in Mumias Senior Principal Magistrate's Court Civil Suit No. E016 of 2022.
  2. That the memorandum of appeal annexed to the application be deemed as duly filed upon payment of the requisite fees.
  3. That costs of the application be in the cause.
2. The Application is predicated on the grounds set out in the face of the Notice of Motion and is supported by the affidavit of RASHID NANJIRA MAKOKHA, the Appellant/Applicant.
3. In the response, the Respondent filed a Replying Affidavit dated 27<sup>th</sup> March 2025

**Background**

4. On 7<sup>th</sup> November 2024, the Mumias Senior Principal Magistrate's Court delivered judgement in Civil Suit No. E016 of 2022, dismissing the Applicant's claim for damages for alleged wrongful listing with the Credit Reference Bureau by the Respondent bank.



5. The Applicant's case before the subordinate court was premised on the contention that the listing was based on a loan which was never disbursed to him, a fact he avers was confirmed by the Respondent's witness during trial.
6. Following delivery of the judgment, the Applicant states that he immediately communicated his intention to appeal to his then advocate, who advised that she would seek guidance from her employer, one Mr. Namatsi, who was at the time the Speaker of the County Assembly of Kakamega and not in active legal practice.
7. The Applicant avers that despite several follow-ups; he was informed that Mr. Namatsi was out of the country on official duties and that they had to await his return.
8. The Applicant further avers that during this period, the offices of his then advocates closed for the Christmas holidays and only reopened on 13<sup>th</sup> January 2025. He depones that upon reopening, he was assured that the appeal process was underway, but no further details were provided.
9. Dissatisfied, he engaged new counsel, Ms. Omar, who advised him that the statutory thirty-day period for lodging an appeal in civil matters had lapsed. The Applicant attributes the delay in filing the appeal to a lack of legal knowledge and miscommunication with his former advocate, and contends that the delay was neither intentional nor inordinate.
10. The Respondent opposes the application, contending through the Replying Affidavit of Ms. Jael A. Onyango, learned counsel for the Respondent, that the judgment having been delivered on 7<sup>th</sup> November 2024, the statutory thirty-day period lapsed on 9<sup>th</sup> December 2024.
11. The instant application, filed on 13<sup>th</sup> February 2025, was lodged forty-two (42) days after expiry of the statutory period, even after excluding the Christmas recess from 21<sup>st</sup> December 2024 to 13<sup>th</sup> January 2025.
12. It is the Respondent's position that the reasons advanced for the delay are neither plausible nor sufficient to warrant the exercise of the Court's discretion under section 79G of the [Civil Procedure Act](#).
13. The Respondent disputes the Applicant's claims of miscommunication, noting that the Applicant was represented by counsel, and no affidavit has been filed by the unnamed advocate allegedly handling the matter to confirm the Applicant's account.
14. The Respondent further contends that the last documented communication between the Applicant and his former advocate on the appeal was on 28<sup>th</sup> November 2024, with no explanation given for the two-month gap before the present application was filed.
15. The Respondent further avers that the intended appeal, as disclosed in the draft memorandum of appeal, is misconceived, frivolous, and without reasonable prospects of success.
16. The Respondent states that the Applicant has not demonstrated any proactive steps taken to obtain typed and certified copies of proceedings and judgment from the subordinate court, and therefore it remains unclear when the intended appeal would be ready for directions.
17. The Respondent contends that the delay has prejudiced it, as it had been reasonably led to believe that the litigation had been concluded, prompting it to file a Bill of Costs dated 23<sup>rd</sup> January 2025, filed on 24<sup>th</sup> January 2025, and scheduled for mention for directions before the subordinate court on 6<sup>th</sup> May 2025.



18. The Respondent maintains that litigation ought to come to an end and prays that the application be dismissed with costs

### **Applicant's Submissions**

4. The Applicant contends that the delay of approximately forty-one (41) days is neither inordinate nor intentional, and that the intended appeal raises arguable issues with high chances of success.
5. Relying on *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, the applicant submits that extension of time is an equitable remedy, not a right, and is granted at the court's discretion upon proper explanation of the delay, consideration of prejudice, and prompt filing of the application.
6. The Applicant submits that the delay arose from his former Advocate's failure to act, despite his persistent follow-up. He argues, citing *Habo Agencies Ltd v Wilfred Odhiambo Musingo* [2015] eKLR, that while parties must remain vigilant, a litigant who has shown diligence should not be penalized for Counsel's omissions.
7. He maintains that the Respondent will suffer no prejudice beyond the inconvenience of further proceedings, which can be compensated by costs. Conversely, denying the application would unjustly curtail his constitutional right to access justice.
8. The Applicant argues that the appeal is not frivolous, as the trial court upheld the Respondent's listing of his name with the Credit Reference Bureau despite no evidence of loan disbursement.

### **Respondent's Submissions**

4. The Respondent submits that under Section 79G of the *Civil Procedure Act*, an appeal from the subordinate court to the High Court must be filed within 30 days from the date of judgement, with an extension only granted upon "good and sufficient cause."
5. The principles governing such discretion, as affirmed in *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR and *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014] eKLR, require a full, honest, and satisfactory explanation for the delay, consideration of prejudice to the other party, and that the application be brought without undue delay.
6. The Respondent relies on *Grindlays Bank International (K) Ltd v George Barbour Civil Appl. No. 275 of 1995*, citing *Ratman v Camarasamy* [1964] 3 All ER 933 (approved in *Ruaha Concrete Ltd v Middle East Bank Kenya Ltd* [2003] eKLR and *Patel v Waweru & 2 Others* [2003] eKLR), to stress that court rules must be obeyed and that extension of time is not an automatic right.
7. The Respondent contends that judgement was delivered on 7<sup>th</sup> November 2024, making the appeal deadline 9<sup>th</sup> December 2024. The application was filed 13<sup>th</sup> February 2025, 42 days late, even after accounting for the court's Christmas recess.
8. The Respondent contends that the Applicant's explanations alleged miscommunication with Counsel, unawareness of timelines, and office closure are unsubstantiated, disingenuous, and raised as an afterthought. No affidavit from the former Advocate has been provided, and the last recorded communication was on 28<sup>th</sup> November 2024, with no follow-up for over two months.
9. The Respondent argues that such prolonged inaction created a legitimate expectation that litigation had ended, and reopening it would be prejudicial. Furthermore, the draft memorandum of appeal



discloses no arguable issues and is unsupported by any request for typed proceedings, suggesting further delay.

10. The Respondent submits that the application falls short of the statutory and judicial thresholds for extension of time and should be dismissed with costs.

### **Analysis and Determination**

11. The issue that emerges from the pleadings and submissions is whether the Applicant has satisfied the court on the conditions for granting leave to appeal out of time which shall be canvassed in the following limbs.

- (i) Whether the Applicant has met the threshold for extension of time under Section 79G of the *Civil Procedure Act*;
- (ii) Whether the delay has been satisfactorily explained; and
- (iii) Whether the intended appeal is arguable and whether the Respondent will suffer prejudice.

12. The central question in this appeal concerns the proper interpretation and application of Section 79G of the *Civil Procedure Act*, and in particular, the scope and effect of the proviso thereto, which provides as follows:-

“Every appeal from a subordinate court to the High Court shall be filed within 30 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 of 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.”

13. This proviso is much to the effect that while the Legislature felt a need to give a strict thirty-day limitation for filing appeals from subordinate courts, it also recognized that the strictness of time could, in exceptional cases, generate an injustice.

14. Therefore, Parliament saw it fit to include this saving clause, allowing the court a discretion to admit an out-of-time appeal upon the Appellant showing a "good and sufficient cause" for his or her delay.

15. Hence, the provision strikes a balance between the finality of litigation set against the demands of substantive justice and in so doing, ensures that those cases with merit are not closed out merely on technical grounds of time.

16. The Supreme Court in the case of *Nicholas Kiptoo arap Korir Salat vs IEBC & 7 Others*, SC Appl 16/2014 laid down the following as the underlying principles that a court should consider in the exercise of discretion to extend time:-

- (i) 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;
- (ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- (iii) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;



- (iv) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - (v) Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - (vi) Whether the application has been brought without undue delay;
  - (vii) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
17. These principles have been consistently applied by Courts under Section 79G, as seen in *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] KESC 16 (KLR), where the court emphasized that the explanation for delay must be full, frank, and verifiable
18. It would be unjust to anchor this reasoning on a single authority when the question has attracted a wealth of jurisprudence from our superior courts, each refining the scope of “good and sufficient cause” and the exercise of discretion.
19. In this regard, the Court of Appeal in *Paul Musili Wambua v Attorney General & 2 Others* [2015] KECA 471 (KLR), in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:
- “...it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”
20. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] KECA 701 (KLR), the Court of Appeal stated that:
- “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
21. Having stated the applicable legal principles, I now proceed to apply them to the circumstances of the present case. The judgement herein was delivered on 7<sup>th</sup> November 2024, with the statutory deadline for appeal expiring on 7<sup>th</sup> December 2024. The present Motion was filed on 13<sup>th</sup> February 2025.
22. After factoring in the court recess period under Order 50 Rule 4 of the Civil Procedure Rules, the delay is approximately 41 days. The Applicant attributes this delay to miscommunication and inadvertence on the part of his former Counsel, which led to the lapse in filing. On this I am guided by the Supreme Court’s decision, in *Karinga Gaciani & 11 others vs. Kimanga & another* (Application E004 of 2023) [2023] KESC 23 (KLR) (*Karinga Gaciani Case*) where the court held that:
- “Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not.”



23. In the present case, the Applicant has annexed a conversation with his counsel, which demonstrates that he was actively engaged with his legal representative during the relevant period.
24. This supports the assertion that he exercised due diligence in pursuing the matter and that the delay was neither deliberate nor due to indolence. The court notes that the explanation given, coupled with evidence of counsel engagement, satisfies the requirement of showing a bona fide effort to comply with statutory timelines.
25. The court finds that the Applicant has demonstrated good and sufficient cause for the delay, thereby meeting the threshold under Section 79G of the *Civil Procedure Act*.
26. The delay is not inordinate. The Applicant demonstrated that he made efforts to follow up with his advocate but, upon realizing the lapse, acted diligently to instruct new counsel and file the present motion. On balance, the Court is persuaded that the delay has been satisfactorily explained.
27. On the final limb, regarding the degree of prejudice to the Respondents, the court must strike a balance between the parties' competing interests weighing the potential injustice to the applicant if an extension of time is refused against the possible prejudice to the Respondent if such extension is granted.
28. In this case, the Applicant, dissatisfied with the judgment of the trial court, seeks to exercise his right of appeal, albeit beyond the prescribed period.
29. The draft Memorandum of Appeal raises grounds that the trial court erred in finding a loan of Kshs. 11,300 was disbursed, ignoring uncontroverted evidence and misapplying the standard of proof. These grounds, particularly the claim of no loan disbursement appear arguable and warrant appellate review.
30. The Respondent contends prejudice due to its Bill of Costs filed on 24<sup>th</sup> January 2025, scheduled for mention on 6<sup>th</sup> May 2025. However, the court does not deduce any prejudice arising from the taxation of the Bill of Costs.
31. The upshot is that the Court finds the applicant has shown good and sufficient cause for the delay, which was neither inordinate nor prejudicial to the Respondent, and that the intended appeal raises arguable issues. In the circumstances, and in deference to the Applicant's constitutional rights under Articles 48 and 50, the application dated 13<sup>th</sup> February 2025 is allowed, with leave granted to file and serve the appeal out of time within fourteen (14) days. Costs shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 31<sup>ST</sup> DAY OF OCTOBER 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Ms. Omara for the Applicant

No appearance for the Respondent

Court Assistant: Polycap

