



**Nitunga v Marus (Miscellaneous Civil Application E160 of 2025)  
[2025] KEHC 15514 (KLR) (31 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15514 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CIVIL APPLICATION E160 OF 2025  
JRA WANANDA, J  
OCTOBER 31, 2025**

**BETWEEN**

**YVES NITUNGA ..... APPLICANT**

**AND**

**LILIAN MARUS ..... RESPONDENT**

**RULING**

1. The Application the subject of this Ruling is the Notice of Motion dated 3/06/2025 filed through Messrs Ngeno, Ondieki & Co. Advocates, seeking orders as follows:
  - i. [.....] spent
  - ii. That leave be granted to the Appellant to file an appeal against the Judgment and Decree in Small Claims Court at Eldoret in the Commercial Case No. E1381 of 2024, before Hon. T.W. Mbugua RM/Adjudicator, delivered on 25/04/2025 notwithstanding the statutory period for filing the appeal has lapsed.
  - iii. That the time for filing the Memorandum of Appeal be extended by such period as the Honourable Court may deem just and expedient.
  - iv. [.....] spent.
  - v. That the committal warrants issued on 3/06/2025, be set aside pending the hearing and determination of this application and appeal.
  - vi. That costs of this Application be in the cause.
2. The Grounds of the Application are as set out on the face thereof, and the same is supported by the Affidavit sworn by the Applicant, Yves Nitunga.



3. In the Affidavit, the Applicant deponed that Judgment was delivered in Eldoret Small Claims Court Commercial Case No. E1381 of 2024 on 25/04/2025 ordering him to pay Kshs 270,000/- plus costs and interest, that he is aggrieved by the Judgment and intends to appeal against it and the warrants indicate that he is supposed to pay a sum of Kshs 370,000/-. He deponed that he was unable to file the appeal within the statutory period because he had travelled to Kakuma Refugee Camp to take care of his sick mother who is a refugee in the said camp. He then contended that he has a strong and arguable case with a probability of success, and thus urged that the draft Memorandum and Record of Appeal attached be deemed as filed. He deponed that if the Application is not granted, he will suffer irreparable prejudice as his right to appeal will be denied and he will be forced to pay a substantial sum of money based on Judgment he believes is erroneous.
4. In response, the Respondent filed the Preliminary Objection dated 9/06/2025, premised on the following grounds:
  - i. That the Honourable Court cannot issue orders in vain and the orders sought are not tenable for the following reasons;
  - ii. The Application dated 3/06/2025, is fatally defective since the intended appeal has been filed out of time and the intended appeal is not based on a point of law as stipulated by Section 38 of the *Small Claims Court Act*. The said appeal only raises matters that disagree with fact and we shall pray that the same should be dismissed with costs.
5. The Respondent also filed the Replying Affidavit sworn on the same 9/06/2025 in which she deponed that she gave the Applicant a friendly loan of Kshs 370,000/- which was to be paid back within a month together with an agreed interest of Kshs 30,000/-, but that despite several demands and/or reminders in regard to the debt owed to her, the Applicant failed to make good his part of the agreement necessitating filing of the suit. He urged further that the Applicant is guilty of material non-disclosure, is being economical with the truth, and has not produced any evidence to prove that he had a sick mother. He contended that in any event, the intended appeal is not based on a point of law as stipulated under Section 38 of the *Small Claims Court Act*, and that it only raises matters that disagree with facts.
6. Although I gave the parties the opportunity to file written Submissions, Mr. Ndombi, Counsel for the Respondent told the Court that he would not be filing any Submissions. On his part, Mr. Ondieki, Counsel for the Applicant filed the Submissions dated 8/07/2025.
7. The Applicant's Counsel, in his Submissions, recited the matters already stated in the Supporting Affidavit as recounted above, and cited several authorities. However, very strangely, he then proceeded to substantially argue the entire Appeal yet the Applicant has not even obtained leave to Appeal. I will therefore ignore that whole portion of the Submissions.

### **Determination**

8. It is clear that the issue that arises for determination herein is “whether the Applicant should be granted leave to file an appeal out of time to challenge the Judgment of the Small Claims Court”.
9. On the issue of matters that are appealable from the decisions of the Small Claims Court, as correctly stated by the Respondent in her Notice of Preliminary Objection, Section 38(1) and (2) of the *Small Claims Court Act* No. 2 of 2016 are premised as follows:
  38. Appeals
    - (1) A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law.



(2) An appeal from any decision or order referred to in subsection (1) shall be final.

10. What the above means is basically that under Section 38 of the *Small Claims Court Act*, 2016, the High Court, while handling an appeal from the Small Claims Court is not permitted to substitute that Court's decision with its own conclusions based on its own analysis and appreciation of the facts, unless perhaps where the findings are so perverse that no reasonable tribunal would have arrived at them.
11. In respect to drafting of a Memorandum of Appeal in an Appeal arising from the Small Claims Court, D. Kizito Magare J, in the case of *Mwangi v Kihui* (Civil Appeal 16 of 2023) [2023] KEHC 18643 (KLR) (28 April 2023) (Judgment), stated as follows:

“ Even on the normal legal lingua, a point of law must clearly arise out of the pleadings. In case of appeal, it should arise out of the memorandum of appeal vis-à-vis the pleadings in the court below .....”
12. Applying the above principles to the facts of this case, I note that the genesis of the suit before the Small Claims Court was an alleged friendly loan which the Respondent claimed to have advanced to the Applicant, and/or money advanced by the Respondent for purchase of mushroom for her farming purposes. According to the Applicant however, the advance was in respect to a joint mushrooming farming venture entered into by the parties. There is no dispute that whatever arrangement it was, there same was never reduced into writing or a formal Agreement. The trial Court, on its part, found that the Respondent gave the Applicant a sum of Kshs 370,000/- out of which the Applicant refunded a sum of Kshs 100,000/- when their deal apparently aborted, and was to pay the balance. Perusing the draft Memorandum of Appeal presented by the Applicant herein, it is clear that in the intended Appeal, the Applicant intends to ask this Appellate Court to review the trial Court's finding that the money given by the Respondent was meant for purchase of material and to start off the business, and not payment to the Applicant. There is no doubt that for this Court to determine the above grievances, it will have to make determinations on pure matters of fact. There is, in fact, no single point of law that has been disclosed by the Applicant as being subject of the intended Appeal.
13. It is clear that the Memorandum of Appeal, as framed, would fit well in an ordinary appeal where the appellate Court is obligated to re-evaluate the evidence afresh and reach its own independent findings. The same cannot be said where, as herein, the law has expressly limited the right to appeal to only points of law. Drafting of grounds of appeal in such appeals requires a little bit more finesse, care and caution. While grounds of appeal contained in a Memorandum of Appeal should not include or consist of arguments, where the right to appeal is limited to only matters of law, the Memorandum ought to clearly bring out the exact matter of law that is being appealed against since an Appeal from the Small Claims Court cannot challenge that Court's findings of fact. What this means is basically that the High Court, while handling an appeal from the Small Claims Court, cannot substitute the decision of that Court on findings of fact with its own conclusions in the manner that the Applicant wishes this Court to do. Evidently therefore, the intended Appeal fails to meet the threshold set in Section 38 above.
14. Further, a reading of Section 32 of the Small Claims Act expressly stipulates that the Small Claims Court shall not be bound wholly by Rules of evidence. The grievances raised by the Applicant will therefore also have to contend with this second hurdle. The Section is premised as follows:

“ 32. Exclusion of strict Rules of evidence

1. The Court shall not be bound wholly by the Rules of evidence.



2. Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.”

15. The nature of the Small Claims Court is such that it is intended to ensure that “small claims” are dealt with efficiently without the burden of strict rules and at a minimum cost to the parties. In making the Rules, the Chief Justice is guided by the Section 3 of the Act which provides as follows:

“Section 3 - Guiding principles

- (1) In exercise of its jurisdiction under this Act, the Court shall be guided by the principles of judicial authority prescribed under Article 159(2) of *the Constitution*.
- (2) .....
- (3) Without prejudice to the generality of subsection
  - (1) the Court shall adopt such procedures as the Court deems appropriate to ensure—
    - (a) the timely disposal of all proceedings before the Court using the least expensive method;  
.....;
    - (d) simplicity of procedure.”

16. It must therefore be always recalled that the proceedings before the Small Claims Court are expected to adhere to the principle of “timely disposal, use of the “least expensive method” and “simplicity of procedure”. Litigants should therefore never lose sight of the spirit, aspirations, intentions and purpose of the *Small Claims Court Act*. The Act was enacted to address a genuine concern and it is the duty of the Courts to ensure that focus is not lost on such concern and that the mischief that the Act sought to cure remains within sight. This is evidently also one of the reasons why an Appeal from the Small Claims Court to the High Court is final.

17. I thus associate myself fully with the sentiments of E.K. Ogola J made in the case of Mombasa Law Society v Attorney General & another [2021] eKLR in which he stated that:

“one of the objectives of the *Small Claims Court Act* is to see that small claims are disposed of using the least expensive method. This is probably because the small claims, as the name suggests, are claims whose subject is of a much lower value. Most likely for that reason, the law makers felt that the cost of Appeal to the High Court then to the Court of Appeal would be much higher than the small claim.”

18. For the said reasons, the High Court has to be careful and firm in admitting appeals from the Small Claims Court. The High Court is under obligation to sieve through such appeals and ensure that only those that are compliant and well-deserving see the light of day. The High Court must therefore interrogate Appeals from the Small Claims Court and admit only those that raise matters of law only, not facts.



19. The upshot of my findings above is that I uphold the Preliminary Objection raised by the Respondent.
20. Despite finding as above, I will nonetheless still also interrogate the prayer for extension of time to file the Appeal out of time. In respect thereto, timelines for filing Appeals to the High Court is governed by Section 79G of the Civil Procedure Act, which provides as follows:

“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 a good and sufficient cause for not filing the appeal in time.” [Emphasis added].”

21. In the case of *Edith Gichungu Koine Vs Stephen Njagi Thoithi* [2014] eKLR, the Court of Appeal guided that in an application for extension of time, the Court ought to take into account several factors as observed by Odek JJA as follows:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

22. It is therefore the position that where the delay by a litigant is well explained and the matter sought to be appealed out of time raises triable issues or arguable points, the Court will be reluctant to punish such litigant by declining to grant him enlargement of time. On this point, the Court of Appeal, in the case of *Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others* [2015] eKLR, in declining to strike out a Notice of Appeal filed one day out of time, stated as follows:

“40. It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld. For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”



23. Similarly, in the case of Charles Karanja Kiiru – versus- Charles Githinji Muigwa [2017] eKLR, the Court of Appeal upheld the following statements made by the trial Judge (P.J. Otieno J) in the suit giving rise to the Appeal before it:
- “It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint .....”
24. On its part, the Supreme Court, in the case of Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR, guided as follows:
- “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.”
25. It is therefore clear that grant of leave to file an appeal out of time is a discretionary power and not a matter of course. The Applicant is therefore under an obligation to satisfactorily demonstrate that there was good cause why the Appeal was not filed in time. Such good cause must be demonstrated and established by the Applicant himself and it is not the Court’s initiative to try to infer or imply the same. It is entirely the Applicant’s duty to satisfy the Court.
26. The question now is whether the delay herein has been well explained by the Applicant.
27. In this matter, the Judgment sought to be appealed against was delivered on 25/04/2025. The 30 days’ timeline for filing an Appeal therefore expired about 25/05/2025. This instant Application was then filed on 4/06/2025, about 1 month and 2 weeks after the Judgment. Although the period of delay may appear minimal in ordinary circumstances, considering the spirit and intention of the *Small Claims Court Act* of “speedy” and “timely disposal” of disputes as already set out, it is not exactly a minimal period for the purposes of determining “reasonableness” of the delay. The *Small Claims Court Act* therefore elevates speed as one of its basic tenets, and this explains why under Section 34(1) thereof, the decisions of the Small Claims Court are to be delivered within the short period of 60 days from the date filing of the action.
28. In this case, the Applicant simply claims that he delayed to Appeal in time because he had gone to visit his sick mother at Kakuma Refugee Camp. He does not at all however explain how this visit derailed his filing of the Appeal since he does not allege that his Advocate was not right here in Eldoret. He does not state that he could not reach the Advocate for purposes of giving instructions on phone or via any other communication channel. The matters under contention before the Small Claims Court were, in my view, quite simple and straightforward. What therefore was so difficult for him to give instructions to file the Appeal? Why does he think that he had to physically present in Eldoret to give instructions to his Advocate for the Appeal to be filed? Unfortunately, the Applicant does not address these questions.
29. Considering these facts, the instant Application reeks of a pure afterthought conjured only because committal warrants have been issued against him by the Small Claims Court. This Court will not allow itself to be misused to avoid or escape lawful Judgments when no justifiable grounds have been demonstrated.
30. In view of the foregoing, the Applicant, apart from failing the “point of law” test set for Appeals emanating from the Small Claims Court, he has also, in my view, failed to discharge his obligation to convincingly explain the reasons for his delay to file the Appeal within the 30 days’ statutory timeline. The Application cannot therefore succeed.



31. Regarding the issue that the Decree indicates a sum of Kshs 370,000/- as the principal amount payable as per the Judgment, instead of Kshs 270,000/-, that is a matter to be placed before the trial Court for clarification, review or correction, not necessarily a matter for an Appellate Court.

**Final Orders**

32. In the end, the Applicant’s Notice of Motion dated 3/06/2025 fails, and the same is accordingly dismissed with costs to the Respondent.

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

.....

**WANANDA JOHN R. ANURO**

**JUDGE**

Delivered in the presence of:

N/A for the Applicant

N/A for the Respondent

C/A: Brian Kimathi

