



Walubengo v Cypriano Agencies & another (Miscellaneous Application E126 of 2024) [2025] KEHC 15734 (KLR) (5 November 2025) (Ruling)

Neutral citation: [2025] KEHC 15734 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS APPLICATION E126 OF 2024
S MBUNGI, J
NOVEMBER 5, 2025**

BETWEEN

JACOB WALUBENGO PLAINTIFF

AND

CYPRIANO AGENCIES 1ST DEFENDANT

BUTALI SUGAR MILLS LTD 2ND DEFENDANT

RULING

1. The applicant moved this Court vide a Notice of Motion dated 12th August 2024 seeking enlargement of time to file and serve a memorandum and record of appeal out of time against the judgment and decree rendered on 2nd July 2024 in Butali SRMCC No. 74 of 2018
2. The application is supported by the affidavit of Roselyne Atuvukha, learned counsel for the applicant, who avers that the judgment was delivered electronically and that counsel was directed to obtain a copy from the Judiciary's e-filing system. She attributes the delay in appealing to technical hitches in accessing the judgment, contending that they managed to retrieve the same on 5th August 2024 and promptly filed this application. It is her case that the delay was neither deliberate nor inordinate, and that the intended appeal raises arguable issues warranting consideration on the merits.
3. They contend that they obtained a copy of the judgment on 05/08/2024 and filed the application timeously and claim that their appeal has merit and would be in the interest of justice that time be enlarged to allow them to file the appeal out of time and that they would suffer irreparable loss and damage if they are not allowed to file the appeal out of time, since the delay was unintentional and or inordinate, as the application was brought in good faith, since the defendant had demonstrated the will to expeditiously conclude the matter. They would be adversely aggrieved if the application is not allowed.



4. The applicant filed a further supplementary affidavit where they assert that they filed the application seeking extension of time to file appeal immediately after the delay stating that it showed their good faith and that the plaintiff had followed up with the advocates on record on the status of the appeal showing their intention was Honourable and that this court had the power to grant leave or extension of time to appeal out of time and prays that in the interest of justice the application be allowed.
5. The respondent filed a replying affidavit dated 11th June 2025 through their counsel, where they opposed the application, stating that the application is incompetent and an abuse of the court's process.
6. They claimed that the application and the order were served on them on 9/6/2025, which was three days before the hearing of the application, and further that the impugned judgment was delivered on 2/7/2024. The application was served several months later, and further that the allegations they raised were far-fetched and unsubstantiated and do not warrant the court to exercise its discretion as the appealed judgment was marked as settled before the lower court, and as such, the application was a mere afterthought.
7. They aver that the appeal had no grounds of appeal and there was no chance of success, and they would suffer prejudice as they would be subjected to a trial over a matter that had already been settled and in the interest of justice, pray that the application be dismissed in its entirety with costs.
8. The respondent filed their submissions dated 24th October 2025 quoted section 79G of the [Civil Procedure Act](#) on the designated time for filing an appeal stating that the impugned judgment was delivered on 2/7/2024 although the applicant's advocate states that she received a copy of the judgment on 5/8/2024 which they claim was contrary to the applicant's allegations which they claim was uploaded on 2/7/2024 stating that the applicant did not adduce any evidence to prove the reasons of the delay or any document requesting the court for the judgment that they claim was delayed.
9. They referred to the respondent's replying affidavit, which stated that the matter was marked settled by consent, and if indeed they intended to appeal, they would not have stated that the matter was settled by consent.
10. They quoted the case of Edith Gichugu Koine vs. Stephen Njagi Thoithi (2014) KECE 485 (KLR) on the court of appeal decision of lodging an appeal out of time.
11. They further claim that the allegation that the suit was made in good faith was not rightful since the applicant waited to be paid in full including costs and later move to court claiming that they were not satisfied with the trial court's decision further claiming that since the matter was conclusively settled, this court becomes functus officio and the orders sought cannot be sustained.
12. They pray that the application be dismissed as the applicant has not given a satisfactory reason to appeal out of time, and further, no appeal has been filed claiming that their case was full of misrepresentation and non-disclosure of material evidence, as they waited to be paid in full until they appealed.

Analysis and determination

13. The main issue for determination is whether the applicant has laid a sufficient basis to warrant the enlargement of time to appeal out of time as provided under Section 79G of the [Civil Procedure Act](#).
14. The discretion of the Court to enlarge time under Section 79G is not automatic but is discretionary, and it must be exercised judiciously and upon sufficient cause being shown. The burden lies squarely on the applicant to demonstrate such cause to the satisfaction of the Court.



15. In *Mwangi v Kenya Airways Ltd* [2003] KLR 486, the Court of Appeal outlined the factors to consider when dealing with applications for extension of time, namely:
 - a. The length of the delay;
 - b. The reason for the delay;
 - c. The chances of the appeal succeeding if the application is granted; and
 - d. The degree of prejudice to the respondent if the application is allowed.
16. In *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR, the Court restated that mere assertion of difficulties in accessing documents or legal advice is not sufficient cause unless accompanied by clear, cogent, and verifiable evidence.
17. In addition, the court is guided by the overarching principle in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, where the Supreme Court underscored that extension of time is not a right but an equitable remedy available only to a deserving party who demonstrates that the delay was not inordinate and that the intended appeal is arguable.
18. In the present case, judgment was delivered on 2nd July 2024, while the instant application was filed on 12th August 2024. The delay is therefore approximately forty days beyond the statutory timeline. The Court must determine whether this delay is inordinate and whether the explanation given is satisfactory.
19. The applicant’s counsel has attributed the delay to technical challenges in retrieving the judgment from the Judiciary’s electronic filing system. This explanation is plausible and consistent with the realities of the e-filing platform, which, as has been observed by various courts, occasionally experiences technical hitches.
20. In *Belinda Murai & Others v Amos Wainaina* [1978] eKLR, Madan JA (as he then was) stated that “a mistake is a mistake. It is no less a mistake because it is made by counsel... the door of justice is not closed because a mistake has been made by a person of experience.” I entirely agree. Where a party has acted with reasonable promptness after discovering the error or obstacle, the Court should incline towards sustaining rather than stifling the right of appeal and their appeal to be heard on merit in the interest of justice.
21. Further, the delay herein is not inordinate. The applicant acted within a reasonable time upon obtaining the judgment. In *Philip Keipto Chemwolo & Another v Augustine Kubende* [1986] eKLR, the Court of Appeal held that the broad equity underlying judicial discretion is that “blunders will continue to be made, but it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case determined on the merits.
22. The respondents have argued that the matter before the lower court was settled by consent. However, no consent order or recorded proceedings have been annexed to support that contention. It would therefore be premature for this Court to make a definitive finding on that point at this interlocutory stage. The appropriate forum for that issue is the appellate process itself, where the record of the trial court will be properly examined.
23. It is trite that where there is doubt, courts should lean in favour of granting a party an opportunity to be heard. In *Sammy Ndungu Waity v Independent Electoral and Boundaries Commission & 3*



Others [2019] eKLR, the Supreme Court emphasised that procedural technicalities should not defeat substantive justice and that the right to be heard is one of the cornerstones of a fair judicial system.

24. I also bear in mind that the respondents have not demonstrated any specific prejudice they stand to suffer if the applicant is allowed to file the appeal. Mere inconvenience or the prospect of having to defend an appeal does not amount to prejudice in law. As stated in *Kenya Industrial Estates Ltd v Samuel Khayadi* [2018] eKLR, courts should not elevate procedural lapses above the right of a party to ventilate a genuine grievance.
25. Guided by these principles, I am satisfied that the applicant has offered a reasonable explanation for the short delay, that the intended appeal is arguable, and that no prejudice will be occasioned to the respondents if leave is granted. This Court is therefore persuaded that it is in the interest of justice to exercise its discretion in favour of the applicant.
26. Accordingly, the Notice of Motion dated 12th August 2024 is allowed on the following terms:
 - a. The applicant is granted leave to file and serve a memorandum and record of appeal out of time against the judgment delivered on 2nd July 2024 in Butali SRMCC No. 74 of 2018.
 - b. The applicant shall file and serve the memorandum of appeal within fourteen (14) days from the date hereof.
 - c. The costs of this application shall abide by the outcome of the appeal.
 - d. Right of Appeal 30 days.
 - e. File closed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 5th DAY OF NOVEMBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Mr. Ombima for the Applicant present online.

