



**Mugendi v Atieno (Miscellaneous Civil Application E003 of 2024)
[2025] KEHC 17346 (KLR) (Civ) (24 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17346 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CIVIL
MISCELLANEOUS CIVIL APPLICATION E003 OF 2024
SC CHIRCHIR, J
NOVEMBER 24, 2025**

BETWEEN

PAUL MUGENDI APPLICANT

AND

RHODA ATIENO RESPONDENT

RULING

1. The Applicant's Notice of Motion dated 2nd August 2024, seeks Orders as follows:-
 - a. Spent
 - b. Spent
 - c. That this court be pleased to grant the Applicant leave to appeal out of time against the Ruling and Orders of Hon. M. Odhiambo (SRM) in Isiolo CMCC No.E026 of 2022 delivered on 11/06/2024.
 - d. Spent
 - e. That this Honourable Court be pleased to issue any other orders it deems mete and just in the circumstances.
 - f. That the costs of and incidental to this Application be costs in the intended Appeal.
2. The lower court suit, was instituted by the Respondent, following a road accident which occurred on 1st October 2021. The accident involved the Applicant's motor vehicle registration number KAT 671 H and a motor cycle registration number KMDY 552 A, on which the Respondent was a pillion passenger.



3. Later the Applicant filed the Application dated 7th June 2024, seeking enlargement of time and leave to issue a Third-Party Notice upon Captain Motorcycle Manufacturing Company Limited, the owners of the Motor cycle. The Application was dismissed on 11/06/2024 by the trial court. The Applicant now seeks for enlargement of time to file an Appeal against the aforesaid decision.
4. The Applicant's case is supported by the Affidavit dated 2nd August 2024 and a further Affidavit sworn by Javan Ombado on 5th September 2024, the legal manager at Geminia Insurance Company Limited, the Applicant's insurer.
5. The Applicant deposes that the ruling dismissing the third-party application was delivered on 11/06/2024 without giving the Applicant an opportunity to be heard or issuing a formal ruling. The dismissal of the third-party application on the face of it, without a hearing on its merits, is tantamount to unfair, harsh treatment and contrary to the rules of natural justice.
6. The Applicant argues that the delay in filing the appeal was occasioned by reasons beyond any parties control; that the client issued instructions late; and finally, that the delay was partly due to ongoing investigations necessary to determine the cause of the accident.
7. The Applicant's further states that the appeal is arguable with a likelihood of success. The Applicant has annexed a draft Memorandum of Appeal, stating that the trial court failed to appreciate that the Applicant had raised substantive issues in the third-party application which required determination.
8. The Application is opposed by the Respondent vide a Replying Affidavit dated 2nd September 2024 sworn by Hosea Mutembei Peter.
9. The Respondent states that the joinder of parties is a pre-trial issue and at the moment the matter is at defense hearing. That the matter has been in court for the last 4 years as the accident took place in the year 2021, and that no explanation has been given as to why it took the Applicant five years to file the joinder Application.
10. The Respondent contends that the evidence points to the Applicant's Agent as the cause of the accident, and therefore joinder of any 3rd Party would be a waste of time and is merely meant to delay the matter.
11. The Application was canvassed by way of written submissions

The Applicant's Submissions

12. The Applicant invited this Court to consider the principles guiding the exercise of discretion for extension of time, citing the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR, where the court laid out the principles to consider as : whether there is a reasonable reason for the delay, whether the application was brought without undue delay, and whether the Respondent will suffer prejudice.
13. It is submitted that the delay of two months, from 11/06/2024 to 23/08/2024 when the application was filed is not inordinate. That the delay in filing the Appeal was not intentional. Reliance was placed in the case of *Ndambuki & another v E-Gap Solutions Limited* (2025) KEHC 3855 (KLR), where it was held that a delay of two months was not inordinate.
14. On the reason for delay, the Applicant submits that the delay was due to the missing lower court file; that it is excusable and has nothing to do with the Applicant. In this regard the decision in *Simba Drilling Company Limited v Gasambi* (2025) KEHC 1446 (KLR),



15. The Applicant maintains that the appeal is arguable as it challenges the dismissal of the application without being given a chance to be heard, which constitutes a bona fide issue, and that any prejudice suffered by the Respondent can be compensated through an award of reasonable costs.

The Respondent Submissions

16. It is the Respondent submissions that the Applicant must show good and sufficient cause for the delay, the length of the delay, the reason for delay, the chances of Appeal succeeding and the degree of prejudice likely to be caused to the respondent. In this regard the decision in the case of Nicholas Arap Korir Salat (supra) has also been relied on.
17. The respondent further submits that whereas the discretion of the court is unfettered, the Applicant is under the duty to adduce the material upon which the court can exercise discretion. That the Applicant has not made any attempts to explain the delay; that an Application of this nature principally stands or falls on the demonstrations of “good and sufficient cause”
18. On the chances of Appeal succeeding, it is submitted that no memorandum of Appeal has been annexed to the Application; that the Application for leave to take out 3rd party Notice was filed five years after the suit had been in court; and thus, the Appeal does not stand a chance of succeeding.
19. The Respondent also filed further submissions dated 29th July 2025. However, there was no leave sought to file the said submissions. They are hereby expunged from the record.

Analysis and Determination

20. I have considered the application, the affidavit in support, the replying affidavit and the rival submissions of the parties. The principles to consider are well-settled. In Nicholas Salat (supra) case cited by both parties, the considerations when determining an Application of this nature are: whether the application was brought without undue delay; whether there is a reasonable reason for the delay, and whether the Respondent will suffer prejudice. Another consideration is whether the intended Appeal has a chance of succeeding. This last consideration was stated in the case of Leo Sila Mutiso vs. Helen Wangari Mwangi [1999] 2 EA 231, where the court held; -“The decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”
21. The ruling, which is sought to be challenged in the intended Appeal was delivered on 11.06.2024, while the present Application was filed on 23.08.2024, that was a delay of two months. I do not consider the two months delay to have been inordinate.
22. The next question is whether good and sufficient cause for the delay in filing the appeal has been shown. I have looked at the reasons given by the Applicant. On ground (e) of the grounds appearing on the face of the Application it is stated that the reason for the delay was “the Applicant/ Insurer has issued instructions late”. In paragraph 8 of the supporting Affidavit the legal manager of the Applicant’s insurer gave another reason. He states: “unfortunately through no fault of either party, the time to file an Appeal against the said orders has run out. Lastly under paragraph 10 of the same affidavit, he states: “there was a delay in concluding investigations of the occurrence of the accident to reconcile the same with the orders of the trial court which had dismissed our third party Application but once we concluded the same it became apparent and clear that the third party materially contributed to and should be held liable for the occurrence of the accident.”



23. The above was all that there was in terms of demonstrating good and sufficient cause. There are other reasons given in the submissions, but it is well settled that submissions are not evidence. Additional facts in the submissions is often an attempt at filling the gaps in evidence. It must not be allowed. The first two reasons, as stated in the preceding paragraph, are not reasons or sufficient reason. This is the Applicant's case, not the Advocates. By stating that the Applicant was late in giving instructions, it is apparent that his advocate is purporting to own the case. It is the Applicant who should be explaining why there was a delay in giving instructions to the Advocate. No such explanation has been given. Further stating that it was no one's fault without expounding on the statement is lazy. It is not an explanation at all.
24. The court entirely agrees with the respondent that the Applicant has not made any effort to demonstrate that there was any reason for the delay. In applications of this nature the Applicant is under the duty to convince the court that there was indeed a good and sufficient cause for the delay. It is evident that the Applicant has abdicated its duty in this regard. In the case of *Wanyoike Kariuki vs Republic COA CRAPPL E060 of 2024*, the court while relying on the decision in *Andrew Kiplagat Chemarigo V. Paul Kipkorir Kibet [2018] eKLR* opined that; "...the law does not set out any minimum or maximum period of delay. All it states is that the delay should be satisfactorily explained. A plausible and satisfactory explanation for the 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. Further in the case of *Paul Musili Wambua v Attorney General & 2 others [2015] KECA 471 (KLR)* it was held: "it is now well 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 whims or caprice."
26. The court finds the last purported reason not to be genuine. The Applicant is suggesting that it was after the dismissal of their Application for 3rd party proceedings that they now went out and carried investigation. However, I have looked at the Affidavit in support of the Application for leave to take out 3rd party proceedings in the lower court. In that affidavit, the Applicant was stating that it was upon carrying out the investigations that they did conclude that the proposed third party was largely responsible for the accident. It raises the question; if the investigation had been carried out that first time, which was this "other" investigation that caused the delay in filing the Appeal?
27. Something else I observed is that whereas the entire investigation report is not attached, from the statement accompanying the investigations report, it shows that the statement was recorded in the year 2021, and presumably that was the time the report was done. It cannot therefore be true that the investigation took a while and hence the reason for the delay in filing the Appeal or even for filing the third-party proceedings.
28. On the question of whether the Appeal stands a chance of succeeding, the question of when the investigation was carried out as aforesaid is material. Without delving so much into the issue, I have my reservation on the chances of the appeal succeeding.
29. The court has considered the issue of any prejudice being occasioned to the respondent. The suit was filed in the year 2021, while the Application for leave in respect of third-party proceedings was filed in 2024. That was the third year after the suit had been in court. The respondent has stated, and the statement has not been controverted, that the plaintiff's case had closed when the Application was brought. Any further delay in the case is prejudicial to the respondent.



30. In this regard I rely on the decision of the court of Appeal in Rael Muyaka & 6 others v Waitaluk Land Disputes Tribunal Comprising of Mbotto Kidai & 3 others [2007] KECA 107 (KLR), Justice Onyango (JA) cited approvingly the decision in Major Joseph Mweteri Igwate vs. Muhura M'Ethare & Attorney General – Civil Application No. Nai. 8 of 2000 (unreported) by stating : “ Lakha J.A (as he then was) made a summary of the same principles when he stated:

“The application made under rule 4 of the Rules is to be viewed by reference to the underlying principle of justice. In applying the criteria of justice, several factors ought to be taken into account. Among those factors is the length of any delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal (without holding a mini appeal) the effect of the delay on public administration, the importance of the compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind that time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance to them.”

31. The applicant has not only come out as indolent, but also less candid . Equity does come to the aid of the vigilant not the indolent and he who comes to equity must approach the court with clean hands . In this regard the Applicant has failed the test on two counts. His attempts at using the investigation report as a reason for delay is clearly misleading.
32. The Applicant is undeserving of the orders sought. The Application is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY, AT NAIROBI THIS 24TH DAY OF NOVEMBER 2025.

S. CHIRCHIR

JUDGE

In the presence of :

Roba Katelo- Court Assistant

Ms. Otego for the Applicant

