



REPUBLIC OF KENYA



KENYA LAW
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**Tumanka v Tumanka & 2 others (Civil Case E004 of 2025)
[2025] KEHC 17237 (KLR) (20 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17237 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE E004 OF 2025
CW MEOLI, J
NOVEMBER 20, 2025**

BETWEEN

JOYCE NYAMBURA TUMANKA APPLICANT

AND

ESTHER WAIRIMU TUMANKA 1ST RESPONDENT

SILVESTER TUMANKA LEPOSA 2ND RESPONDENT

THE LAND REGISTRAR NGONG 3RD RESPONDENT

RULING

1. This matter was erroneously designated as a civil suit, rather than a miscellaneous cause initiated by the filing of the miscellaneous motion dated 7.02.2025 (hereafter the motion) by Joyce Nyambura Tumanka (hereafter the Applicant) against Esther Wairimu Tumanka, Silvester Tumanka Leposa and the Land Registrar, Ngong (hereafter the 1st to 3rd Respondents respectively). The appearance of parties are also erroneously reversed in the titles of some of the documents filed herein, but are correctly set out in this ruling.
2. The motion seeks inter alia that the Court be pleased to extend time and grant her leave to appeal out of time against the ruling delivered on 4.12.2024 (hereafter the subject ruling), and to restrict any dealings on land parcels described as LR No Ngong/Ngong/102699 and LR No Ngong/Ngong/102700 (hereafter the suit property) pending hearing and determination of the appeal; and to issue an order directing the Executive Officer Ngong Law courts to prioritize the typing and certification of the ruling and proceedings of Matrimonial Property Cause No. 1A of 2018. The motion is expressed to be brought under Sections 1A, 1B, 3A, of the *Civil Procedure Act* and order 50 Rule 5 of the Civil Procedure Rules among others.
3. The motion was predicated on the grounds on its face and the Applicant's affidavit. To the effect that the subject ruling was delivered on 4.12.2024 without the Applicant's knowledge or that of her



- advocate; that her advocate immediately followed up seeking the typed proceedings for purpose of filing the appeal; that numerous efforts in that regard did not bear fruit; the lower court file was only availed to her counsel for perusal on 31.01.2025; that the delay was therefore not deliberate and that she should not be penalized for it; that should leave not be granted she would suffer irreparable harm as the 1st Respondent is in adverse possession of the title documents in respect of the suit property and could dispose of it; that the intended appeal is arguable and raises pertinent points of law and therefore has a high chance of success; that the application has been made without undue delay; and that the Respondent will not suffer any prejudice or damage not compensable by an award of costs.
4. The motion was opposed by grounds of opposition, and a replying affidavit dated 22.05.2025 sworn by the 1st Respondent, who views the application as frivolous, misleading, and an abuse of the court process, lacking in factual and legal foundation, in violation of mandatory legal provisions regarding leave to appeal out of time, and fails to provide for security for costs. Additionally, she asserts that the application is an afterthought, and the annexed documents (JNT-1 and JNT-2) demonstrate the Applicant's prior knowledge of the ruling date, undermining the Applicant's claims. Contending further that the High Court is functus officio, having rendered judgment on 28th October 2020 concerning the property LR Ngong/Ngong/30672, and an appeal not having been lodged within the prescribed period, the present motion amounts to a backdoor appeal on matters conclusively determined over three and a half years ago. She emphasizes that the subject property has already been distributed in accordance with the judgment and is no longer available for re-litigation or redistribution. Moreover, the Respondent accuses the Applicant of approaching the court with unclean hands, thus disqualifying herself from equitable relief sought. Hence, in her view, the application should be dismissed.
 5. The motion was canvassed by way of written submissions. By submissions dated 17.06.2025, counsel for the Applicant addressed the question whether the 33-day delay in filing the appeal is excusable under Section 79(G) of the *Civil Procedure Act*. Asserting that the Applicant was not a party to the original matrimonial property suit and only became aware of the subdivision of her land after the judgment, counsel stated that she promptly sought review as an interested party, and disputes the 1st Respondents' claim that she had prior knowledge of the ruling date, asserting that it was delivered in her absence and without proper notice. Her counsel submits that the delay was not inordinate and was occasioned by the unavailability of typed proceedings, which she had actively pursued.
 6. Citing several precedents including *Charles Karanja Kiiru v Charles Githinji Muigwa* [2017] eKLR and *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR, counsel reiterated that the key considerations in an application of this nature include the period of delay, the reasons for the delay, the degree of prejudice to the Respondent if the application is granted, and whether the matter raises issues of public importance. Further relying on the emphasis in the decision of the Court of Appeal in *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015] eKLR, that courts exist for the purpose of dispensing justice, and judicial officers must ensure that decisions manifest fairness and reflect the best interests of the people whom the law is intended to serve. The Court therein giving further exhortation against prematurely shutting litigants out of the justice system, especially where they have not had a chance to be heard.
 7. The Applicant also cited the words of Apaloo JA in *Phillip Chemunto v Augustine Kibende* (1982–1988) KAR 103, that mistakes will always happen and unless there was evidence of fraud or overreach, there was no error or default that cannot be put right by an award of costs. In conclusion, counsel reiterated the affidavit material to the effect that the proposed appeal raises substantial issues, particularly regarding the classification of the disputed property as matrimonial and that the delay was neither unreasonable nor prejudicial.



8. In her submissions dated 17.07.2025 the 1st Respondent repeated her grounds of opposition and submitted that the Applicant is vexatious litigant and citing Court of Appeal's decision in *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR, on the definition of abuse of the process of the court. And reiterating the Applicant's awareness of the ruling date, as evidenced by her annexures "JNT-1" and "JNT-2," asserts that the motion is an afterthought. On the question of leave to appeal out of time, counsel restated the provisions of Section 79 G of the [Civil Procedure Act](#) and the case of *Diplack Kenya Ltd v William Muthama Kitonyi* [2018] eKLR, to the effect that a successful applicant must demonstrate good cause. Counsel also relied on the Supreme Court's decision in *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others* [2014] eKLR, before submitting that the Applicant has failed to meet these requirements, the application having been filed 44 days since the subject ruling, which delay is inordinate and inexcusable.
9. Moreover, it is pointed out, the Applicant has not provided a certificate of delay from the trial court while the annexed draft memorandum of appeal does not raise triable issues. And that the proposed appeal is moot, the judgment concerning the disputed property having been delivered on 28th October 2020, and the property distributed. In conclusion, the court was urged to dismiss the application with costs.

Analysis and Determination

10. The court has considered the motion, the rival affidavits and the submissions by the parties. The power of the court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the CPA. Section 79G of the CPA provides that:

“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 good and sufficient cause for not filing the appeal in time.”
11. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the [Civil Procedure Act](#), reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”
12. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR



enunciated the principles applicable in an application for leave to appeal out of time. The Court stating inter alia that:

“(The underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
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See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

13. Concerning the period of delay in this case, it is not in dispute that the subject ruling was delivered by the subordinate court on 4.12.2024. The Applicant in her supporting affidavit alleged that she and her counsel were unaware that the ruling was delivered. That upon learning of the event, her advocate immediately sought typed proceedings and copy of the subject ruling for purposes of filing the appeal, but the advocate did not obtain the proceedings in good time. Her annexures JNT 1 and JNT 2 comprise a copy of the letter dated 4.12.2024 seeking for copies of the typed proceedings and receipt showing lodging thereof on 5.12.2024.
14. The present application was filed on 7.02.2025, a total delay of about 36 days excluding the Christmas period when time does not run under Order 50 Rule 6 of the Civil Procedure Rules. Thus, the delay here is about 6 days beyond the appeal window applicable here. The delay is not inordinate and has been attributed to delay in obtaining copies of the ruling and proceedings, thus reasonably explained.
15. As to whether the intended appeal is arguable, the court having perused the draft memorandum of appeal and does not consider it patently frivolous. All that is required is a demonstration that the appeal is worthy of consideration by the court, and not necessarily that it will succeed. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR stated that such appeal:

“... may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”



16. Moreover, it has not been demonstrated that the Respondents will suffer undue prejudice, that cannot be compensated by an award of costs, if leave to appeal is granted as sought herein. In Vishva's case (supra), the Court emphasized the right of appeal in the following terms:-

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of Richard Ncharpi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding inter alia that:

- i. the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- ii. the right to be heard is a valued right; and
- iii. that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”

17. In order to facilitate the Applicant's right of appeal, the court is persuaded to exercise its discretion in her favour. However, the 1st Respondent have urged that a condition for deposit of security for costs be imposed against the Applicant in such event. Order 26 Rule 1 of the CPA provides that in any suit, the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party to be given by any other party. This discretion must be exercised judiciously, and with the right of parties to be heard in sight. Moreso where a party has demonstrated that he has an arguable appeal.

18. In the result, the court will grant leave to the Applicant to file an appeal within 14 days. As for the second prayer in the motion, it appears premature as no appeal has been lodged yet. However, in view of the subject matter of the proposed appeal, and in the interest of justice, the court will grant a temporary order to maintain the status quo obtaining as of the date of this ruling in respect of the suit property. The temporary order will last for 14 days. The 1st Respondent is awarded the costs of the motion in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 20TH DAY OF NOVEMBER 2025.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the 1st Respondent: Mr. Njagi

C/A: Lepatei

