

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
MISCELLANEOUS CIVIL APPLICATION NO. E090 OF 2024

AND

IN THE MATTER OF THE ESTATE OF MBOO ABILA
(DECEASED)

BETWEEN

MBOO OTIENO ISAIAH.....
APPLICANT

VERSUS

ELVIS AYIEMBA..

.....RESPONDENT

RULING

1. The Applicant’s Notice of Motion dated 12th November, 2024 is expressed to be brought under *Sections 1A, 1B and 3A* of the *Civil Procedure Act, Cap 21 Laws of Kenya, Order 10 Rule 11* of the *Civil Procedure Rules* and *Articles 29, 50 and 159* of the *Constitution of Kenya* and seeks the following orders:

a. *[Spent]*.

b. THAT the Honourable Court be pleased to enlarge time to the Applicant to appeal against the ruling of Hon. K. Cheruiyot dated 6th August, 2024 in *Kisumu Chief Magistrate’s Court Succession Cause No. E052 of 2020*.

c. THAT the costs of the application be provided for.

2. The grounds upon which the application is premised are set out on its face. The pertinent grounds are that the time within which to prefer an appeal from the matter before the lower court has since lapsed and the reason for the delay is explainable and reasonable and that the Applicant stands to suffer immense prejudice if the order sought is not granted as its intended appeal is arguable and meritorious. The other grounds are, with respect to the Applicant, grounds that should aptly be within the appeal.
3. The application is supported by the affidavit sworn on 12th November, 2024 by **Mboo Otieno Isaiah**, the Applicant herein, in which he expounds on the above grounds and states that the reason for the delay in filing of the appeal was due to the fact that it took him time to instruct Counsel to file the appeal due to the fact that he works in a gold mine and that by the time the delivery of the ruling was communicated to him, the time within which to appeal had lapsed.
4. The Applicant states that the application is filed in good faith and that it will serve the ends of justice if the order sought is granted.
5. The Applicant has annexed to his supporting affidavit, *inter alia*, a copy of the ruling from which he intends to prefer an appeal and a draft memorandum of appeal.

6. The application is opposed by the Respondent, who to that end filed a replying affidavit which he swore on 5th March, 2025. The grounds upon which the application is opposed are generally that the application has not been made in good faith and that the intended appeal is an abuse of the court process. It would seem that just like the Applicant, the Respondent has also delved into matters that should be urged within the intended appeal.
7. This court directed that the application proceeds by way of written submissions and the parties herein filed their respective submissions.
8. I have perused and considered the application, the Applicant's affidavit in support thereof, the Respondent's replying affidavit and the submissions of the parties.
9. What is clear from the record is that the ruling and order from which the Applicant intends to appeal was delivered on 6th August, 2024. The application seeking for leave to appeal out of time, subject of which this ruling is made, was filed on 13th November, 2024. The period within which to appeal lapsed on or about the 5th September, 2024. There is therefore a delay of a period of more than two months in bringing the application.

10. What this court should then proceed to determine is:
- a. Whether the Applicant has met the prerequisites for the grant of leave to appeal out of time.
 - b. Subject to (a) above, whether the court should exercise its discretion to grant the Applicant leave to file its appeal out of time.

11. *Section 79G of the Civil Procedure Act* provides as follows:

79G. 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 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.

(Underlined emphasis).

12. It is clear from the text of the above provision of statute that before the court considers granting an order to allow the appeal to be filed out of time, the Applicant must demonstrate to the court that he has good and sufficient cause for filing the

appeal out of time (see the cases of **Diplack Kenya Limited v William Muthama Kitonyi [2018] eKLR** and **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] eKLR**).

13. The Supreme Court in the case of **Salat** (supra) held *inter alia* that:

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

a. 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;

b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;

d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

e. Whether there will be any prejudice suffered by the respondent if the extension is granted; and

f. Whether the application has been brought without undue delay.”

14. Whether there is a reasonable ground for the delay, the Applicant states that the instructions to its Counsel to file a Memorandum of Appeal were issued and/or communicated late due to the fact that he works in a gold mine and that by the time the delivery of the ruling was communicated to him, the time within which to appeal had lapsed.

15. The Applicant does not state when he received information that the and order ruling that he intends to appeal from had been delivered and how the same impeded the issuance of timely instructions to his Counsel.

16. The Applicant has not, in the circumstances accounted for the lengthy delay of more than two months in filing the application seeking to appeal out of time. In my view, it is not enough for a party to merely state that he got the information of the delivery of the ruling or order intended to be appealed from late. The party must be precise on the exact date that he got that knowledge so that the court can then proceed to consider whether the application has been presented

timeously. That is so because a satisfactory explanation must be given by the party seeking leave to appeal out of time, accounting for the entire period of the delay.

17. Thus then, the delay by the lengthy period of more than two months, is not only inordinate, in the circumstances, but also remains unexplained and is therefore inexcusable.

18. In the obtaining situation, I will agree with the Respondent that the Applicant did not file the application that seeks the permission of the court to appeal out of time without unreasonable delay.

19. From the foregoing, I am not persuaded that the Applicant has met the prerequisites for leave to appeal out of time.

20. Thus then, the court cannot judiciously exercise discretion to allow the Applicant appeal out of time.

21. The result I then reach, based on the reasons above, is that the Notice of Motion application dated 12th November, 2024 is without merit. I proceed to dismiss it.

22. The Respondents shall have the costs of the application, which I take the liberty to assess at Ksh.4,000/-

23. This file is closed.

DELIVERED (virtually), DATED & SIGNED this 11th December,
2025.

JOE M. OMIDO
JUDGE

FOR APPLICANT: No appearance.

FOR RESPONDENTS: No appearance.

COURT ASSISTANTS: **Mr. Ngoge & Mr. Juma.**