

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
MISC. APPLICATION NO. E083 OF 2025

JAMES GICHIMO KIMANI
APPLICANT

VERSUS

FRANCIS WAMWEA WANJUGU
RESPONDENT

RULING

1. This is a ruling over a Miscellaneous Application dated 8.12.2025 seeking leave to appeal out of time from the judgment dismissing the suit delivered on 22.07.2025. The applicant does not deny having knowledge of the delivery of judgment on the said date.
2. An appeal from this court is set out in section 79 G of the Civil Procedure Act 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 good and sufficient cause for not filing the appeal in time.

3. The decision sought to be challenged was given in the presence of the parties. The reason the Applicant gives is that he thought that a post-judgment application was to be sufficient. We are not told which application they made. The delay must be explained. Even a single unexplained day is sufficient to disallow the application. The reason that the delay is not unreasonable and that the delay is not explicable is not a reason for extension of time. If no explanation is given, the court's hands will be tied. The guidelines on the power to extend time were given by the Supreme Court in **Salat v Independent Electoral and Boundaries Commission & 7 others** [2014] KESC 12 (KLR):

17. The court ought to consider the following principles in exercising the discretion to extend time for filing an appeal:

- a. Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;

- b. A party who sought extension of time had the burden of laying a basis for it to the satisfaction of the court;
 - c. Whether the court ought to exercise the discretion to extend time, was a consideration to be made on a case to case basis;
 - d. Whether there was a reasonable reason for the delay, which ought to be explained to the satisfaction of the court;
 - e. Whether there would be any prejudice suffered by the respondents if the extension was granted;
 - f. Whether the application had been brought without undue delay; and;
 - g. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.
4. Thus, extension of time is a not a right but a discretionary order. In this case there is no explanation of the delay. There is no disclosure of the nature of the application made post judgment. Disclosure is important in order for the court to reach an informed decision. Whoever comes to each must not only come to equity with clean hands but must also do equity for an equitable remedy to issue. an

application seeking equitable relief must fail the moment the Court finds the applicant's hands are tainted. In the case of **Esther Nugari Gachomo v Equity Bank Limited [2019] KEHC 7891 (KLR)**, the court posited as follows:

This is what was stated in the case; **Caliph Properties Limited -vs- Barbel Sharma & Another [2015] eKLR**, where the Court stated:

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity.”

5. Further the applicant failed to give a plausible reason for the delay. In the case of **John Martin Muchiri Mugo v British-American Insurance Company (K) Limited [2018] eKLR**, Justice P.J.O. Otieno, stated as doth: -

“From the narrative, the applicant allegedly became aware of the delivery of judgment on 22/6/2022. The Applicant sat on their rights till November, 2022 when they filed this application. There is no plausible

explanation for the delay. I am thus not satisfied that there is explainable delay.

From the record, what seems to have woken the Applicant is the filing of the party and party bill of costs on 30/8/2022 and served on 6/9/2022 as per annexure JMM2 in the Respondent's affidavit. It is not easy to drive out a party from the seat of justice. However, a party who watches the seat of Justice rained on and only wakes up when someone else wants to seat on it, he does not call for mercy but condemnation. Equity only aids the vigilant. The Applicants were totally indolent. There is no explanation for the long delay."

6. The Applicant delayed for over 4 months. The delay may not be inordinate, but has not been explained. A delay of over months has not been explained and as such a delay is unexplained, inexcusable and inordinate. Without a valid reason, this court has no jurisdiction to extend time. It is not manna to dish out. It is an exercise of discretion. Unless the court is properly moved, it has no power to exercise discretion. It is not by whim but through judicious consideration that such an application is considered. The factors to consider in dealing with such an application are: -

- (a) The length of delay.

- (b) The reason for delay.
- (c) The animus of the applicant.
- (d) The prejudice to the Respondent.

7. The Applicant has not explained the delay. It is my considered opinion that the 4 factors above are sequential. Therefore, one must fulfil each as you move to the next. If the delay is inordinate, it may not be necessary to go to the reason for delay. When the delay is reasonable, there must be a real and genuine reason for delay. Where there is doubt, either way, the court can then exercise discretion one way or another. The court cannot find that the delay is inexcusable, inordinate and no reason is given and then, out of sheer whims and fiat, extend time. That makes litigation unpredictable and unending. In **Salome Alice Akinyi v Aridempta Veronica Ooko & another [2019] eKLR**, J Kamau J, stated as follows regarding the issue of vigilance: -

“24. It is correct as the Respondents submitted that “equity aids the vigilant and not the indolent.” However, it was the view of this court that although the Applicant had delayed in filing her appeal, the delay of four (4) months in bringing the application seeking leave to file an application out of time was not inordinate.”

8. It is not necessary to address the prejudice to the Respondent given that the delay is inexcusable, inordinate and unexplained. In any case the intended appeal is from a decision to dismiss a claim for money arising from sale of a vehicle that case not owned by the seller. the applicant was selling that which he did not have contrary to the principle of *Nemo dat quod non habet*. This provides that no one gives what they do not have. The applicant did not even demonstrate how failure to grant the orders sought will prejudice him. A similar scenario was addressed in the case of **Maclean & another v Kiago & another [2025] KEHC 3572 (KLR)**, where A. C Mrima held as follows:

27.As regards the chances of the appeal succeeding if the application is granted, a perusal of the annexed Memorandum of Appeal shows that the Applicants seek to hold the 2nd Respondent liable despite evidence that it was not the owner of the subject vehicle at the time of the accident. They generally fault the trial Court for awarding damages when the burden of proof was not discharged and for making findings based on unreliable evidence.

28.A cursory perusal of the impugned judgment shows a detailed appreciation of the summary of the evidence at the trial Court. A total of six witnesses testified on behalf of the Respondents herein and two

for the Applicants. Liability for the accident was assessed at 100% against the 2nd Applicant and vicariously against the 1st Applicant.

9. In view of the foregoing, the application dated 8.12.2025 is unmerited and is accordingly dismissed. The question of costs is the only outstanding one. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

"It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

10. Given that there was no response, each party will bear its own costs.

Determination

11. In the circumstances, I make the following orders: -
(a) The Application dated 8.12.2025 lacks merit and is accordingly dismissed

- (b) Each part shall bear its own costs
- (c) The file is closed.

DELIVERED, DATED and SIGNED at **NYERI** on this **29th** day of **January, 2026**. Ex Tempore Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of:

Mrs. Magua for the Applicant.

N/A for the Respondent

Court Assistant - Michael