



REPUBLIC OF KENYA



KENYA LAW
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**Wathuku v Gitundu (Civil Application E107 of 2025)
[2026] KECA 96 (KLR) (30 January 2026) (Ruling)**

Neutral citation: [2026] KECA 96 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E107 OF 2025
M NGUGI, JA
JANUARY 30, 2026**

BETWEEN

CHARLES WANJOHI WATHUKU APPLICANT

AND

CHARLES MWANGI GITUNDU RESPONDENT

(Being an application for extension of time to file the notice of appeal and record of appeal out of time against the judgment and orders of the High Court at Nyeri (Bahati Mwamuye J.) dated 18th December 2024 in Nyeri High Court Civil Appeal No. 19 of 2022)

RULING

1. In the application dated 23rd July 2025 supported by an affidavit sworn by the applicant on the same date, the applicant seeks extension of time to file a notice of appeal against the decision of the High Court in Nyeri High Court Civil Appeal No. 19 of 2022.
2. In the said decision, the High Court set aside a decision of the Chief Magistrate's Court in CMCC No. 102 of 2014 in which the Chief Magistrate's Court had entered judgment for the appellant jointly and severally against the respondent and a (then) deceased co-defendant for, inter alia, loss of use of two motor vehicles. The High Court found, among other things, that the trial court had erred in not finding that the appellant's suit was res judicata and in allowing his claim for loss of use of two vehicles, and allowed the respondent's appeal.
3. The applicant now seeks leave of this Court to file his notice of appeal from the decision out of time. He avers that judgment in the High Court was delivered on 18th December 2024, but that his advocates on record were not present as they were not notified of the delivery date; that he only became aware that judgment had been delivered when he enquired about the judgment at the court's registry; and that he informed his advocates who immediately wrote a letter dated 18th March 2025 to the court registry



- requesting for a copy of the judgment. He avers that a copy of the judgment was not made available to his advocates until 16th July 2025.
4. The applicant asserts that the delay in filing the notice of appeal was therefore not intentional but was caused by factors beyond his control; that this application has been filed without undue delay; and that his intended appeal has high chances of success as evidenced by a draft memorandum of appeal annexed to his affidavit. It is his averment that the respondent will not be prejudiced if the application is allowed, and such prejudice as he may suffer can be compensated by an award of costs.
 5. In a further affidavit sworn by the applicant's advocate, Anthony Mwangi Ng'ang'a, it is averred that the High Court judgment was only supplied to the applicant on 16th July as evidenced by a letter of that date from the Deputy Registrar.
 6. The respondent opposes the application by an affidavit sworn by his advocate, Paul Amuga, on 16th September 2025. Mr Amuga avers that he served the applicant's advocates with a notice on 25th July 2024 indicating that the judgment was to be delivered on 18th September 2024; that the applicant's advocate was absent on the dates when the judgment was rescheduled for delivery, namely 31st October 2024 and 28th November 2024 when the new date of 18th December 2024 was given.
 7. It is his averment, further, that the applicant went to sleep between September 2024 and 18th March 2025; and that he only filed this application on 23rd July 2025, four months after he learnt that the judgment had been delivered. It is the respondent's case that the applicant had been indolent, and that the application is incompetent as it only prays for extension of time to file a notice of appeal and not the record of appeal.
 8. It is further argued that the applicant's appeal is not arguable as the court found that he had no locus standi to prosecute the case as the grant issued to him in respect of the estate of one Wathuku Ngare had been revoked.
 9. The respondent filed submissions dated 23rd September 2025 in which he reiterates his averments. He relies on the case of Paul Kagia Kungu -vs- Bidan Kamau Waiganjo & 3 Others [2023] eKLR to submit that the applicant has not explained the delay in seeking leave to file his appeal out of time, and his application should be dismissed with costs.
 10. I have read and considered the application, the affidavits in support and opposition thereto, and the respondent's submissions. The applicant seeks exercise of this Court's discretion under rule 4 to extend time for him to file his notice of appeal against the decision rendered on 18th December 2024. The discretion of the Court under rule 4 is unfettered, but it must be exercised judiciously, guided by established factors. These are the length of the delay, the reasons for the delay, the chances of success of the intended appeal, and the prejudice to the respondent if the extension of time is granted- see the Supreme Court decision in Nicholas Kiptoo Arap Salat v IEBC & 7 Others [2015] eKLR.
 11. The decision that the applicant seeks to file a notice of appeal with respect to was delivered on 18th December 2024. This application is dated 23rd July 2025. If one allows for the Christmas recess in 2024, there was a delay of some six months from the date of the judgment. The applicant avers that he only learnt about the judgment on 18th March 2025 when he visited the court registry. He further explains that he only received a copy of the judgment on 16th July 2025. He has annexed to his application his advocates' letter dated 18th March 2025 requesting for the file to be returned to the registry in Nyeri; and the letter dated 12th June 2025 from the Deputy Registrar, Constitutional and Human Rights Division in Nairobi, returning the file to the court registry in Nyeri, where it was received on 17th June 2025.



12. The applicant states that he received the judgment on 16th July 2025 and filed this application a week or so later on 23rd July 2025. The question is whether the delay is inordinate, and whether the applicant has sufficiently explained the delay.
13. The applicant's case is that the judgment was scheduled for delivery on 18th September 2024. It was not delivered then, and was rescheduled, according to the respondent, to 31st October 2024 and, thereafter, to 28th November 2024, on which date it was rescheduled to 18th December 2024 when it was delivered. The applicant states that he got to know that it had been delivered on 18th March 2025 when he visited the High Court registry, and his advocate wrote to request for the file to be returned to the registry in Nyeri so he could access the judgment. The letter from the Deputy Registrar in the Constitutional and Human Rights Division in Nairobi indicates that the file was returned to the high Court in Nyeri on 17th June 2025. The present application was filed on 23rd July 2025.
14. The respondent submits that there was a delay of eight months, which is inordinate and has not been explained. On the contrary, I find that the applicant has advanced reasons and presented documents that incline me to exercise discretion under rule 4 in his favour. From the letter by the Deputy Registrar, Constitutional and Human Rights Division, forwarding the file to the registry in the High Court in Nyeri, it would appear that the appeal was heard during the Rapid Results Initiative (RRI) in the High Court in Nyeri by a judge from the Constitutional Division of the High Court in Nairobi. Judgment was scheduled for 18th September 2024; rescheduled to 31st October 2024; then to 28th November 2024, and finally delivered on 18th December 2024.
15. In those circumstances, while the applicant's advocate would have been expected to make inquiries at the registry, the fact that he does not appear to have done so should not be visited on the applicant. The applicant followed up and established that the judgment had been delivered, and further inquiries by his advocate led to the return of the file to the High Court registry in Nyeri. This application was filed shortly thereafter, and I am satisfied that the delay has been sufficiently explained.
16. A further factor to be considered under rule 4 is the possibility of the appeal succeeding. I bear in mind that as a single judge dealing with an application under rule 4, it is outside my remit to enter into the merits of the applicant's appeal. I note, however, that the applicant sets out five grounds of appeal in the draft memorandum of appeal annexed to his application. Among the grounds set out are whether the trial court erred in finding that the issues raised by the applicant in his suit were res judicata; and in finding that loss of use of the motor vehicles had not been established, both of which are matters of fact. Given the above grounds and the others raised in the memorandum of appeal, I confine myself to observing only that the intended appeal is a second appeal in which the jurisdiction of this Court is confined to matters of law. In light of this, the applicant may wish to consider whether he wishes to pursue an appeal to this Court.
17. In the end, however, I allow the application dated 23rd July 2025. The applicant is granted leave to file the notice of appeal out of time. The said notice shall be filed and served within fourteen (14) days of the date hereof, failing which the leave granted shall lapse.

DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JANUARY 2026.

MUMBI NGUGI

..... **JUDGE OF APPEAL**

I certify that this is

a true copy of the original.



Signed

DEPUTY REGISTRAR

