



**In re ING (Deceased) (Petition E007 of 2022)
[2026] KEHC 1754 (KLR) (13 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1754 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PETITION E007 OF 2022
MA ODERO, J
FEBRUARY 13, 2026
IN THE MATTER OF THE MENTAL HEALTH ACT, (CAP 248) LAWS OF KENYA
AND
IN THE MATTER OF ING(DECEASED)**

BETWEEN

PWB APPLICANT

AND

MBW RESPONDENT

RULING

1. Before this Court is the Notice of Motion application dated 10th March 2025 by which the Applicant PWB sought the following orders:-
 - “1. That this Honourable Court be pleased to grant the Respondent/Applicant leave to lodge an Appeal against the judgment and Decree in *Nyeri High Court Misc Petition E007 of 2022* delivered on 28th June 2024 out of time.
 2. That costs of this application be provided for.”
2. The application was premised upon Section 78G Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 51 Rule 1, Order 42 of the *Civil Procedure Rules* 2010, Article 159 of the *Constitution* of Kenya and all other enabling provisions of the law and was supported by the affidavit of even date sworn by the Applicant.
3. The Respondent MBW filed a Replying Affidavit dated 20th May 2025 on which she strenuously opposed the application.



4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 22nd July 2025 whilst the Respondent relied on her written submissions dated 5th August 2025.

Analysis And Determination

5. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by the parties.
6. The only issue for determination is whether the prayer to file appeal out of time ought to be allowed.
7. Section 79G of the *Civil Procedure Act* Cap 21, Laws of Kenya provides 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 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.” [Own emphasis]

8. Therefore the statutory period allowed within which one is required to file an appeal is thirty (30) days. However with the leave of the court this statutory period may be extended.
9. In the case of *Nicholas Kiptoo Arap Salat v IEBC & 7 Others* [2014] eKLR, the Supreme Court of Kenya enunciated the principles applicable in considering an application for leave to file appeal out of time as follows:-

- (a) Extension of time is not a right of any party. It is an equitable remedy that is only available to 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.
- (f) Whether the application has been brought without undue delay.”

10. Likewise in the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015] eKLR the Court of Appeal in considering an application for leave to file appeal out of time stated as follows:-

“.....It is now 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 exercise unfettered discretion. However in the exercise of such discretion, the court must act upon reason (s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are the length of the delay, the reason



for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

11. The law and authorities are clear that the decision of whether or not to allow an extension of time to file appeal lies squarely within the discretion of the court. Such leave ought only be granted when sufficient cause is shown.
12. In this matter the judgment in question was delivered on 28th June 2024. Any party who was dissatisfied with the decision had thirty (30) days from that date to file an appeal.
13. In this matter the application for leave to file appeal out of time has come eight (8) months and ten (10) days after the judgment had been delivered. This delay is in my view inordinate. The reasons advanced for this delay was the Applicants mistaken belief that her advocate had filed the appeal when in fact what the Advocate had filed was an application for stay of execution.
14. I am not persuaded by this argument which I view to be more of an excuse than a reason. Firstly this all too common tactic of many litigants in blaming their advocates can no longer be countenanced by our courts. It has been stated severally that a case belongs to the litigant not to the Advocate. Having instructed an advocate the litigant is required to oversee and track the progress of their case.
15. In the case of *Mwangi Gachiengo & 2 Others v Mwaura Githuku & Another* [2019] eKLR Hon Justice Angote stated that

“It is trite law that a matter once filed in our court does not belong to the advocate but to the litigant. It is the responsibility of the litigant to be in constant touch with this advocate on the position of the matter.”
16. Likewise in *Savings & Loan (k) Limited v Susan Wanjiru Muritu* Nairobi Milimani HCCS No. 397 of 2002, Hon Justice Luka Kimaru stated

“.....It is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigation account of such Advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.....” [Own emphasis]
17. Finally in *Mwangangi v Mugi* [2024] eKLR the Court in dismissing a similar application held as follows:-

“Whereas it is true that mistakes of an advocate should not be visited on a litigant, it is also that suits belong to the parties not their advocates. Thus, where a litigant has instructed an advocate in a matter, he or she has an obligation to follow up on instructions given to ensure that they were executed and executed in good time. This principle was enunciated in the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2015) eKLR where the court stated:-

It is enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.



Similarly in *Bi-Mach Engineers Limited v James Kaboro Mwangi* (2011) eKLR, the court reiterated the duty of an applicant to follow up on instructions given to an advocate and expressed itself as follows:-

The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up on the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty of the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy.

The applicant has not shown any attempts he made to find out from his advocates the position of the matter or follow up on the judgment. The applicant only faults his advocates for not telling him about the judgment. From the foregoing, it is my considered view that the applicant has not satisfactorily explained the delay in filing the intended appeal.....”

18. If as the Applicant says she instructed her advocate to file an appeal what steps did she take to follow up and ensure that the appeal was indeed filed. The applicant participated in and swore affidavits in respect of the application for stay of execution which was filed in July 2024. All this time she still took no steps to ensure that an appeal was filed.
19. I am not persuaded that during the entire time that application was being canvassed the applicant never once sought to enquire about her intended appeal.
20. From the above I find that the Applicant was merely indolent in failing to file her appeal. To now blame her advocate is merely a convenient excuse. In my view the eight (8) month delay in filing an appeal is inordinate given that this suit involves the welfare and care of a vulnerable person.
21. I have perused the intended Memorandum of Appeal annexed to the Supporting Affidavit (Annexure ‘PWB 3’) and in my view it does not raise pertinent issues of law.
22. Finally I find no merit in this application. The same is dismissed in its entirety. Costs will be met by the Applicant.

DATED IN NYERI THIS 13TH DAY OF FEBRUARY 2026.

.....
MAUREEN A. ODERO

JUDGE

