Lutta v Ndegwa & 2 others (Miscellaneous Civil Application E124 of 2025) [2026] KEHC 1193 (KLR) (5 February 2026) (Ruling)

Neutral citation: [2026] KEHC 1193 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

MISCELLANEOUS CIVIL APPLICATION E124 OF 2025

FN MUCHEMI, J

FEBRUARY 5, 2026

BETWEEN

DANIEL ANDATI LUTTA ..... APPLICANT

AND

JESSY GITAHI NDEGWA ..... 1ST RESPONDENT

NELSON ATUTI OGANYA ..... 2ND RESPONDENT

RONNEY SUMBA MAUNDU ..... 3RD RESPONDENT

RULING

1. The application dated 10th July 2025 seeks for orders of leave to file an appeal out of time against the judgment in Thika Small Claims Court SCCC No. E1197 of 2024 delivered on 24th April 2025.

2. The 1st respondent opposed the application and filed a Replying Affidavit dated 7th August 2025.

Applicant's Case

3. The applicant states that on 24th April 2025, the trial court delivered judgment in Thika SCCC E1197 of 2024 in favour of the 3rd respondent as against the applicant for a sum of Kshs. 317,530/-. He states that although the firm of Mugenya & associates were acting for him in the suit, the said advocates did not attend to the matter when it came up for judgment. He was therefore unaware of the outcome of the case and was unable to make an informed decision on whether to lodge an appeal.

4. The applicant states that he made several follow ups with his advocates and that on 23rd June 2025, he learnt that orders had been issued against him on 24th April 2025. Being aggrieved with the decision of the trial court, the applicant states that he decided to appeal against the decision but the time to do so had lapsed. The applicant further states that he made several attempts to call and visit his former advocates for purposes of instructing them to file the appeal but in vain. He therefore, states that

he visited the offices of Osundwa & Company Advocates and instructed them to lodge an appeal against the judgment. It is argued that the mistakes of an advocate should not be visited upon an innocent litigant and he should not be prejudiced and denied his right to appeal due to his advocates' miscommunication.

5. The applicants avers that the delay herein is not inordinate or so great so as to be inexcusable.

The 1st Respondent's Case

6. The 1st respondent states that although the applicant had instructed an advocate to handle the matter on his behalf, the case does not belong to the advocate but to the specific party. The applicant had a personal duty to equally follow up with the status of the matter as it would be him who would be condemned to settle the decree and not his advocate. That notwithstanding, the 1st respondent states that on 6th May 2025 his advocate wrote to the applicant's advocate and informed them of the judgment and further tabulated costs. Further on 13th May 2025, the respondent's advocate served the applicant with the notice of entry of judgment through his personal number. As such, the applicant was aware of the judgment as early as two weeks from the date delivery. It is not correct that the applicant came to learn of the existence of the said judgment on 23rd June 2025 as he claims.

7. The 1st respondent argues that the applicant is seeking an equitable remedy but has failed to give full disclosure of facts and has therefore approached the court with unclean hands. Further, the 1st respondent states that the applicant is guilty of indolence as he has brought the current application more than two months after time for filing an appeal has lapsed.

8. The 1st respondent states that the draft memorandum of appeal does not raise any arguable grounds.

9. The applicant filed a Supplementary affidavit dated 10th November 2025 and states that the screenshot as attached is fictitious and a fraud as the time stamps or read receipts on the said screen shot are not as they ordinarily appear in normal WhatsApp communications. The applicant further states that the notice of entry of judgment is not a formal notice of entry of judgment but rather a mere text message. Thus, the applicant reiterates that the delay was not intentional and was occasioned by circumstances outside his control.

10. Parties put in written submissions.

The Applicant's Submissions

11. The applicant relies on the case of First American Bank of Kenya Ltd vs Gulab P. Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65 and Edith Gichugu Koine vs Stephen Njagi Thoithi [2014] eKLR and submits that he has demonstrated that the delay was caused by his advocate and as soon as he became aware of the judgment, he moved with speed to obtain the services of another advocate to protect his interests. The applicant argues that the delay in filing the appeal was due to the non-attendance of his advocates at the date of delivery of judgment and lack of communication from them.

12. Relying on the cases of Mwangi vs Mwangi [1999] 2EA 234; Philip Chemwolo & Another vs Augustine Kubende [1982] KAR 103; Grindlays Bank International (K) & Another vs George Barbour Civil Application No. Nai 257 of 1995 and Gichuhi Kimira vs Samuel Ngunu Kimotho & Another Civil Application No. Nai 243 of 1995, the applicant argues that a party need not be punished for the mistakes of his advocate.

13. The applicant refers to the case of Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR and submits that he has an arguable appeal whereby he raises the issue of territorial

jurisdiction of the trial court. The applicant argues that since the accident occurred on Nairobi Naivasha Highway, the matter should not have been heard in Thika.

14. The applicant submits that the respondent shall not suffer any prejudice if the application is allowed. On the other hand, it is argued that refusal of the application would unjustly lock the party out from exercising his statutory right of appeal.

The 1st Respondent's Submissions

15. The 1st respondent relies on the cases of Kirera vs M'Kirera & 2 Others (Civil Application E073 of 2022) [2023] KECA 2(KLR) (17 January 2023) and submits that the reasons advanced by the applicant for failing to file the appeal are not plausible as judgment was delivered via the CTS portal on 24th April 2025 and on 6th May 2025, his counsel wrote to the applicant's counsel and informed him of the judgment and tabulated the costs. Further on 13th May 2025, his counsel served the applicant with a notice of entry of judgment.

16. The 1st respondent submits that although the applicant takes issue with the form of the notice of entry of judgment served upon him, the WhatsApp text sent to the applicant disclosed all the details of the parties, the amount awarded, the penal notice and even the party drawing the said notice and a copy of the notice reproduced in the text is annexed to the affidavit of service. It is therefore immaterial that the notice was not shared in form of a signed document.

17. The 1st respondent refers to the decision in Republic vs Laikipia District Land Dispute Tribunal & 3 Others [2006] KEHC 1510 (KLR) and submits that cases belong to litigants and not the advocate. The applicant has a personal duty to follow up on his matter not only with his advocate but also with the court as it is him who would bear the burden of settling the decretal sum and not his counsel.

18. The 1st respondent argues that the delay in filing the application is inordinate as it is filed more than two months after judgment was delivered. On whether the appeal is arguable, the 1st respondent refers to the case of Damji Pragji Mandavia vs Sara Lee Household & Bodycare (K) Ltd (2007) eKLR and submits that an intended appeal need not be successful but the applicant must show that it is not frivolous. The 1st respondent argues that Thika Small Claims Court has jurisdiction to determine matters within Kiambu and the accident occurred at Kinale area and was reported at Lari police station, both in Kiambu County. The 1st respondent argues that the argument on jurisdiction is not plausible and the same is frivolous. The other grounds of appeal do not address any specific issues and are generalized. Furthermore, the applicant never objected to the jurisdiction of the court and cannot now raise it at the appellate stage.

The Law

Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;

19. Section 79G of the *Civil Procedure Act* states:-

> 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.

20. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of Diplack Kenya Limited vs William Muthama Kitonyi [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

21. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated 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;

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

22. Similarly in the case of Paul Musili Wambua vs Attorney General & 2 Others [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

> " .....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 exercises 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 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."

23. It is trite that the judgment herein was delivered on 24th April 2025 and the applicant filed the current application on 17th July 2025. This is about two months outside the time limited for filing an appeal. The applicant has attributed the delay in filing his appeal on the ground that his advocates failure to attend the judgment and their lack of communication of the judgment with him.

24. On perusal of the trial record, judgment was delivered on 24th April 2025 vide CTS and the trial court granted 30 days stay. The applicant blames his advocates for not attending judgment and has even stated that he visited their offices on several occasions but the same proved futile. The applicant has however failed to show his due diligence in trying to get the judgment or know the position of the matter by logging into the CTS himself or going physically to the registry. Further, he has failed to show any express instructions he gave his advocates or letters written to them to show he was following up on his case. That notwithstanding, the law is clear that it is the responsibility of the litigant to be vigilant and proactive in following up on their cases. It is evident that a litigant ought to pursue his claim even when he is represented by counsel. This principle was enunciated in the case of Habo Agencies Limited vs Wilfred Odhiambo Musingo (Civil Appeal Application 124 of 2004) [2015] KECA 987 (KLR) (16 January 2015) (Ruling) where the court held:-

> It is not 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 emphasised that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.

25. Further in the case of Rajesh Rughani vs Fifty Investment Ltd & Another (2005) eKLR, the Court of Appeal held:-

> It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter. if the advocate was simply guilty of inaction that is not excusable mistake which the court may consider with some sympathy.

26. It is on record that the 1st respondent's counsel sent an email to the applicant's advocates informing him of the judgment and tabulating costs payable. On 13th May, the 1st respondent's advocates served the applicant with the notice of entry of judgment through his personal phone number 0712018336. The applicant has not denied that the number used is registered in his name. The 1st respondent has demonstrated that the number is that of the applicant by attaching the relevant documents. The said notice was effectively served as illustrated by the two ticks in WhatsApp. This is supported by the Affidavit of service dated 13th May 2025. The applicant was aware of the judgment but chose not to do bother. The blame on the advocates on record, is not justified. No communication to the applicant's advocates has been attached to support the allegation. The reliance placed on the inaction by counsel to lodge an appeal, in my view, is not sufficient cause for this court to exercise its discretion in favour of the applicant.

27. Accordingly, it is my considered view that the applicant has not given any plausible explanation on the reasons for the delay.

28. On perusal of the intended Memorandum of Appeal and the judgment of the trial court, it is my considered view that the appeal does not raise pertinent issues of law. It is trite that, an appeal from the Small Claims Court to the High Court is only allowed on matters of law pursuant to Section 38 of the *Small Claims Court Act*. The grounds of appeal as set out in the memorandum of appeal pertain to points of fact save for the ground on jurisdiction. The issue of jurisdiction was not raised by the applicant in the lower court. And it is therefore an afterthought on part of be applicant. Thus, it is evident that the chances of the appeal succeeding if the instant application is granted are limited.

29. In the circumstances it is my considered view that the applicant has not established that he deserves exercise of this court's discretion for extension of time to appeal.

30. Accordingly, the application dated 10th July 2025 lacks merit and is hereby dismissed with costs to the 1st respondent.

31. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 5TH DAY OF FEBRUARY 2026.

F. MUCHEMI

JUDGE