

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(CIVIL DIVISION)

HCCA NO E196 OF 2025

KIMATHI STEPHEN MUCEKE.....APPELLANT

VERSUS

MOMBASA TAMASHA DISTRIBUTORS LTD1ST
RESPONDENT

DAVID GITHINJI2ND RESPONDENT

RULING

1. The court below delivered a judgment on **8th May 2025**. The appellant is aggrieved with the said judgment as the Court, in his view, failed to award special damages as pleaded and proved in the sum of **Kes. ,740**. On the **3rd July 2025**, he filed a memorandum of appeal dated **1st July 2025**.
2. Subsequently, vide an application dated **7th July 2025**, the appellant/applicant sought the following orders;
 - a. Spent;
 - b. That this honorable court be pleased to grant the appellant/applicant leave to file an appeal against part of the judgment in **Mombasa CMCC No 1122 of 2017** delivered by Hon E M Mwamuye (CM) on **8th May 2025** out of time;

6. I have considered the application, the responses thereto, as well as the submissions of the parties. The issue I must determine is whether leave to appeal out of time should issue.

7. In the case of **Paul Musili Wambua v Attorney General & 2 Others [2015] eKLR**, the Court of Appeal, while considering an application for extension of time to file a notice of appeal, 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 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.”

8. Although the length of delay was not too long, I am not convinced that a good reason has been given for the failure to file an appeal on time. The allegation that there was a Court Tracking System downtime over an extended period is, in my view, uncorroborated.

9. Regarding the merits of the appeal, it is doubtful, in my view, whether there are good grounds of appeal. The respondent has urged that it made an offer to the appellant, which was accepted by receipt and

encashment of the cheque. The respondents urged that under the doctrine of accord and satisfaction, such action bound him and that he cannot make any further demand. On a prima facie basis, this is very persuasive argument, which creates a doubt in the mind of the court as to the merits of the intended appeal.

10. As was stated by the Supreme Court in the case **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)**, extension of time is not a right of a party, but is a discretionary remedy. The burden lies on the applicant to show that it would be equitable to exercise the discretion in his favour.
11. Regarding prejudice, it is my view that extending time would be prejudicial to the respondent, as upon paying, it had a legitimate expectation that the matter was at an end.
12. The upshot of the foregoing is that I see no merit in the application dated **7th July 2025**. The same is dismissed with costs.
13. It is so ordered.

Dated and signed in Mombasa, this **3rd** day of **March 2026**. Delivered virtually through **Microsoft TEAMS**.

Gregory Mutai
JUDGE

In the presence of:

Mr. Barasa, holding brief for Mr. Anjarwalla, for the Respondent;

Ms. Ambutsi, holding brief for Mr. Kibara, for the Applicant; and

Mr. Hamisi - Court Assistant.

Original