

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
HIGH COURT MISCELLANEOUS APPLICATION
NO. E116 OF 2025

JOHN MWANGI----- APPLICANT

VERSUS

ALICE NJOKI NJENGA & JOSEPH MBOTE NJENGA
(Suing as the legal representatives of the estate of
the LATE ISAAC NJENGA MBOTE
(DECEASED)-----RESPONDENTS

RULING.

1. By a notice of motion application dated 20th June 2025, brought under the provisions of Section 1, 1B, 3, 3A and 79G of the Civil Procedure Act and Articles 159 (2) (d) of the Constitution of Kenya, the applicant seeks for the following prayers: -

a) That the applicant be granted leave to appeal out of time against part of the ruling of Honourable Alice Chemosop Towett, Principal

*Magistrate in Naivasha CMCC No. E272 of 2021,
delivered on 19th February 2025 at Naivasha.*

*b) That costs of this application do abide the
outcome of the intended appeal.*

2. The application is based on the grounds thereto and the affidavit of the event date sworn by the applicant. In a nutshell, he deposes that he is the defendant in Naivasha Civil Suit Number E272 of 2021 and that the suit proceeded ex parte and judgment entered in favour of the respondents in the sum of Kshs 2,919,550 plus costs and interest.
3. That by a ruling delivered on 19th February 2025, the ex parte judgment was set aside and he was condemned to pay costs to the respondents and deposit the entire decretal sum as a precondition of setting aside the ex parte judgment.
4. That he intends to appeal against the said decision however, the appeal was not filed on time as the advocate instructed to file the same left the law firm

representing him without informing the remaining advocates of the status of the matter.

5. He avers that the time allowed to appeal under the Civil Procedure Act has since lapsed but nevertheless the court has the power to enlarge time within which to file the appeal. That the delay occasioned is not so inordinate and is not inexcusable.
6. The applicant further avers that the intended appeal raises arguable and serious grounds as evidenced by the memorandum of appeal filed herein. That the grant of leave sought will safeguard his fundamental rights to access to justice and not to be condemned unheard. Further the grant of leave will operate to meet the end of justice
7. That the respondents will not suffer any prejudice if this application is allowed as they can be adequately compensated by way of costs. Finally,

that the mistake of a counsel should not be visited on him.

8. However, the application was opposed vide a replying affidavit dated 30th July 2025 sworn by the respondents. The respondents aver that the application is incompetent, misconceived, scandalous, frivolous and an utter abuse of the solemn court process and should be treated with extreme prejudice and be struck out with costs to the respondents.
9. In a rather long affidavit going into the background of the matter up to the time the subject application was filed, the respondents aver in a nutshell that, although the applicant alleges that the reason why the appeal was not filed in time is because the Advocate tasked to file the appeal left employment from the firm instructed, there is no evidence to support the same.

10. That from the reasons stated in the elaborate replying affidavit, the application is baseless and clearly an excuse and a lie crafted to manipulate this Honourable court into allowing the application and aiding an indolent litigant.
11. Further, from the conduct of the applicant in this matter, it is evident that he intends to frustrate finalization of this matter and will go to any end to avoid execution.
12. That the applicants have been changing advocates from G&G Advocates (negotiating settlement) after judgment was delivered, later appointed Ochieng & Associates (after filing and service of notice to show cause).
13. That when the notice to show cause was fixed for hearing, the applicant said his Advocates strategically ceased acting and the firm of Gakuhi, Chege & Associates Advocates came on record. That stay was granted with a condition that parties

negotiate throw away costs, which the respondents failed to pay and later filed an application to set aside judgment, which was allowed.

14. That thereafter execution commenced and the respondents, have appointed the firm of B.G. Wainaina & Co. Advocates, seeking to set aside the conditions the failed to comply with.

15. The respondents aver that equity aids the vigilant and not the indolent and that the applicant's conduct clearly shows that he has been indolent, not once, not twice, not thrice.

16. But failure to follow up on the filing of the appeal despite reminders shows the applicant has been indolent and this court cannot come to his aid.

17. Further that judgment was delivered on 12th August 2021 and to date the applicant has continued to drag finalization of this matter four (4) years later. Furthermore, the ruling that is intended to be appealed against was delivered on 9th February

2025 and the applicant has approached the court after four (4) months after the delivery of the said ruling.

18. That, he who comes to equity must come with clean hands yet the applicant herein has unclean hands. Finally, that the principle of finality which is hinged on public interest policy requires that litigation must come to an end.

19. The application was disposed of vide oral submissions considered herein. Notably, the application is premised on the provisions of section 79 G of the Civil Procedure Act which states that: -

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.

20. The case law on this provision is settled that the court has discretion to extend time to admit an appeal out of time as stated in the case of; Paul Njage Njeru vs Karija K. Mugambi (2021) eKLR as follows: -

The discretion to extend time must be exercised within the established principles of the law and the factors to be considered when determining an application seeking leave to appeal out of time were discussed by the Court of Appeal in Omar Shurie V Marian Rashe Yafar(Civil Application No. 107 of 2020) being: -

i) the length of the delay;

- ii) *the reason for the delay;*
- iii) *the chances of the appeal succeeding if the application is granted;*
- iv) *the degree of prejudice to the respondent if the application is granted*

21. In the instant matter the delay to file the appeal is four (4) months, in my considered opinion it is not inordinate. However, the reason for delay that a lawyer left the law firm is unsubstantiated.

22. The grounds of appeal in the memorandum on prima facie basis indicate trial issues. As regards the prejudice that either party will suffer, I find that there is evidence of the applicant is always changing lawyers consequently delaying the matter to the respondents' prejudice in terms of delay in the hearing and determination of the matter.

23. The question that arises is whether the court should exercise discretion in favour of the applicant. In the case of; *Butt vs Rent Restriction Tribunal (1982) KLR*

417 where the Court of Appeal held that discretion should be exercised in such a way as not to prevent an appeal.

24. In this matter, there is no stay order prohibiting the respondents from executing the judgment if the conditions for stay have not been met and similarly the respondents can be compensated in costs.

25. To the contrary failure to allow the appeal to be heard on merit will deny the applicant the right to access justice as enshrined under Article 48 of the Constitution of Kenya.

26. The application is allowed on conditions that:

a) The applicant pays the respondents throw away costs of Kshs 10, 000.

b) The record of appeal be filed within 14 days of the date of this order.

c) The costs of this application be borne by the applicant.

Dated, delivered and signed this 23rd day of March
2026.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. B.G. Wainaina for the applicant

Mr. Kibati for the respondents

Ms. Hannah: court assistant