

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO

MISC. CIVIL APPLICATION NO. E018 OF 2025

JOEL ONYANGO ADONGO.....
APPLICANT

-VERSUS-

IMELDA MWIKALI PETER & BILHA ACHIENG ODHIAMBO
(Suing as the legal representatives of the Estate of Peter
Mboya Mutisya (Deceased))
.....RESPONDENTS

RULING

1. For determination is the motion dated 17.03.2025 by **Joel Onyango Adongo** (hereafter the Applicant) seeking leave to appeal out of time against the ruling delivered on 30th November 2023 in **Ngong CMCC No. 122 of 2018**. The motion is expressed to be brought inter alia under Sections 79G and 95 of the Civil Procedure Act (CPA). The application was premised on the grounds therein as amplified in the affidavit of **Margaret Ameka**, counsel for the Applicant.

2. To the effect that the Applicant is dissatisfied with the subject ruling and intends to appeal against it, however the statutory time for lodging an appeal had already lapsed; that leave required under Section 75 of the Civil Procedure Act and Order 43 Rules 1(2) and (3) of the Civil Procedure Rules had been sought vide the application for leave filed on 14th December 2023; and that due to scheduling constraints, the leave application was only heard and determined on 7th November 2024, when leave was granted.
3. Further, that in the intervening period, counsel suffered immense grief following the consecutive demise of close family members in October and November 2024, including her brother, nephew, and two sisters, as demonstrated in the burial permits and death certificates annexed to the affidavit. She avers that these events caused emotional and logistical difficulties, preventing her from promptly seeking leave before this court.
4. However, the deponent had made efforts through letters dated 15th November 2024 and 10th December 2024 to

obtain certified copies of ruling and orders. And that on 17th January 2025, the lower court registry informed her office that the documents were ready, but upon collection they were incomplete, hence she lodged a complaint on 19th February 2025 and followed up through email correspondence, and eventually on 5th March 2025, the registry having confirmed that the proceedings were ready, they were collected on 10th March 2025.

5. Counsel asserts that she had shown good and sufficient cause for the delay and that the intended appeal was arguable, as shown in the annexed draft Memorandum of Appeal. Hence denying leave would unjustly bar the Applicant's right of appeal, while no prejudice would be suffered by the Respondents if the orders sought are granted. Accordingly, she urged the court to exercise its discretion in favor of the Applicant by granting leave to file the appeal out of time.
6. **Bryan Moturi**, counsel for the Respondents swore the affidavit in opposition to the motion. Stating that judgment was entered on 21st September 2021, yet the

Applicant had failed to satisfy the decretal sum, instead resorting to filing multiple applications, including the present one, with the sole aim of frustrating the Respondents from enjoying the fruits of their judgment.

7. While acknowledging that the Applicant's application dated 30th November 2023 was dismissed vide the ruling sought to be appeal, he pointed out that leave to appeal was subsequently granted on 7th November 2024. However, the Applicant failed to act on that leave and has belatedly approached this court without evidence to demonstrate the efforts made to pursue the appeal after leave was granted. Moreover, contending that on 6th February 2025, his firm wrote to the Applicant's advocate seeking clarification on whether an appeal had been filed, but no response was received. In his view therefore the present motion on offends the principle of law that the law aids the vigilant, not those who sleep on their rights, and should be dismissed with costs.
8. The deponent stating that the Respondents are widows of the deceased, who was the sole bread winner have been

denied the benefit of their judgment for over four years urged that, if the court is inclined to grant the motion, the Applicant ought to be compelled under Order 42 Rule 14 of the Civil Procedure Rules to deposit the entire decretal sum into a joint interest-earning account pending determination of the appeal. He concludes that no prejudice would befall the Respondents if such an order were made.

9. Based on the consent of the parties, the motion was determined on the basis of their respective affidavits on record.

Analysis and Determination

10. The court has considered the motion, the rival affidavit material on record. The key prayer in the motion before the court is seeking leave to appeal out of time. The power of the court to enlarge time for filing an appeal is donated by Sections 95 and 79G of the CPA as read with Order 50, Rule 6 of the CPR. The principles governing leave to appeal out of time are well-settled. A successful

applicant must demonstrate “*good and sufficient cause*” for not filing the appeal in time.

11. In **Thuita Mwangi v Kenya Airways [2003] eKLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

12. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon

which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of **Telkom Kenya Limited v John Ochanda and 996 Others [2015] eKLR** that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court's discretion in curing the pleadings before it. This Court's position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full

compliance with procedure has not taken place....”

13. The Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stating inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include; 1. 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; 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis; 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; 5. Whether there will be any prejudice

suffered by the Respondent if the extension is granted; 6. Whether the application has been brought without undue delay. 7.”

14. The ruling which is the subject of the proposed appeal was delivered on 30.11.2023 and the present motion filed on 17.03.2025, a delay of about 1 year and 109 days. The Applicant having sought leave required under Section 75 of the Civil Procedure Act and Order 43 Rules 1(2) and (3) of the Civil Procedure Rules vide the application for leave filed on 14th December 2023, obtained the said leave on 7th November, 2024. During which period counsel suffered bereavement having lost close family members as shown from the attached annexures.
15. There is no denying that there was delay in filing this application but in the court's view the evidence placed before the court demonstrates satisfactory reasons for the delay. Secondly, having perused the draft memorandum of appeal the court did not consider the grounds therein to be patently frivolous. All that is required is a demonstration that the appeal is worthy of

consideration by the court, and not necessarily that it will succeed. The Court of Appeal in **Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited (2020) eKLR** stated that an arguable appeal need not be one that will succeed, so long as it raises a bona fide issue for determination by the Court.

16. The court also emphasized the right of appeal in the following terms: -

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of Richard Ncharpi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding inter alia, that:

(i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the

Rule of law; (ii) the right to be heard is a valued right; and (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”

17. In order to facilitate the Applicant’s right of appeal, the court is inclined to grant the orders sought. No doubt, the Respondents hold a decree in their favour which has not been satisfied, and further delay portends prejudice against them. However, the remedy cannot lie in demanding that the Applicant deposits the decretal sums at this stage, as that could well amount to encumbering the right of appeal. Order 42 Rule 14 of the CPR which the Respondents have cited provides:-

“(1) At any time after the memorandum of appeal has been served the court, in its discretion, may order the appellant to give

security for the whole or any part of the costs of such appeal.

(2).....

(3) If security for costs is not given within the time ordered the court may dismiss the appeal.”

18. In order to balance the Applicant’s right of appeal against the Respondents’ interests, and to expedite the appeal, the court will grant the motion dated 17.03.2025 in the following terms:

a. The memorandum of appeal shall be filed and served within 14 days of today’s date.

b. Within 14 days of today’s date, the Applicant shall also deposit into court the sum of Kes. 150,000/- (One Hundred and Fifty Thousand) as security for costs.

c. In the event of default in respect of (a) or (b) above, the leave hereby granted shall automatically lapse.

- d. The Applicant shall file and serve the record of appeal within 30 days of today's date.
- e. The Applicant shall fully prosecute the appeal within 12 months of today's date, that is, by the 2nd of April 2027.
- f. In the event of default in respect of (d) or (e) above, the appeal shall stand automatically dismissed for want of prosecution, with costs to the Respondent.
- g. The costs of the motion are awarded to the Respondents in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 2ND DAY OF APRIL 2026.



C.MEOLI
JUDGE

In the presence of:

For the Applicant: Mrs. Ameka

For the Respondents: Ms. Wambui h/b for Mr. Moturi

C/A: Lepatei

ORIGINAL