

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
MISCELLANEOUS CIVIL APPLICATION NUMBER E009 OF 2025

ABDUL BACHANI.....APPLICANT

-VERSUS-

STEPHEN JOEL MACHARIA MWANGI.....RESPONDENT
(Being an application for leave to file an appeal out of time against ruling and orders of the Chief Magistrate’s Court at Thika (P. Mutua PM) civil case number E383 of 2021 dated 13-03-2024)

RULING

This an application for leave to file an appeal out of time against ruling of the lower court delivered on 13-03-2024. Although the lower court case number is not mentioned in the body of the application or the supporting affidavit, I gather from the ruling and the draft memorandum of appeal exhibited in the supporting affidavit that the relevant case is Thika Chief Magistrate’s Court civil case number E383 of 2021.

The genesis of the appeal is that, the applicant’s suit in the lower court was dismissed for want of prosecution on 12th July 2023 after the applicant and his advocate failed to attend court. The applicant made an application to reinstate the suit arguing that his counsel had been unable to log-in to the court session due to network issues. The trial court was not convinced of the reason but it nevertheless exercised its discretion in favour of the applicant and reinstated the suit on condition that the applicant paid the respondent costs of Kshs 6,000.00 within fourteen days. The court ordered further that failure to comply with the

order for payment of costs within the stipulated time, the application would stand dismissed. This was on 21-02-2024.

When the matter came for mention on 13th March 2024, it turned out that the applicant had paid the costs that morning and his advocate's explanation that he could not pay in time because he did not have the defendant's contacts was dismissed by the court with a holding that the late payment could not save the case. This is the ruling which the applicant intends to challenge.

The application is supported by the applicant's affidavit sworn on 20th July 2024 and further affidavit sworn on 21st August 2025. In them, the applicant avers that, the delay in filing the appeal was caused by unavailability of the proceedings which were supplied to him on 20-06-2024 although he had applied for the same on 13-03-2024. He claims that he could not file the appeal without the typed proceedings. He depones that the appeal has high chances of success and that the respondent does not stand to suffer any prejudice upon grant of the orders sought. He adds that he had paid costs ordered by the trial court to be paid to the respondent on 13-03-2024 although it was outside the time frame given by the court.

In his replying affidavit sworn on 28th July 2025, the respondent swears that application is an abuse of the court process, frivolous, mischievous and undeserving of the court's discretion. He says that the delay in filing the application was inordinate and has not been explained and that there is no letter showing when the applicant applied for the typed proceedings. He states that the applicant's pattern of conduct showed that he had no intention of prosecuting the matter to its logical conclusion and he had exhibited disrespect for court directions and neglect of his own claim. He adds that the applicant is seeking to misuse the appellate process to revive a dead suit under the guise of procedural

fairness. He concludes that he stands to suffer prejudice if the application is allowed.

I have considered the application, the parties' affidavits and submissions. No doubt the applicant has a right to appeal and have his day in court. In order to succeed in an application of this nature, the applicant must demonstrate that he has an arguable appeal and that the delay in filing the application was not inordinate and was excusable.

In *Charles N. Ngugi v ASL Credit Limited [2022] KEHC 1951 (KLR)*, it was held that;

'The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in THUITA MWANGI V KENYA AIRWAYS LTD [2003] eKLR. They include the following:

- i) The period of delay;*
- ii) The reason for the delay;*
- iii) The arguability of the appeal;*
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;*
- v) The importance of compliance with time limits to the particular litigation or issue; and*
- vi) The effect if any on the administration of justice or public interest if any is involved.'*

Whereas the applicant has an arguable appeal as based on what is pleaded in the memorandum of appeal, I do not find the explanation for the delay satisfactory.

Other than the delay in filing the appeal, there has been delay in filing the application which has not been explained. Despite the application having been drawn on 20th June 2024, it was not filed until 13-05-2025 at 1204 hours. This was eleven months after the applicant had received the typed proceedings and one year and two months after the ruling was delivered. This delay has not been explained.

I agree with the respondent that the antecedent and conduct of the applicant in the lower court manifests a person who had no interest in progressing the matter. The applicant has exhibited the same conduct in filing this application. An order for leave to file appeal out of time is discretionary and only parties who respect the process of the court deserve a favourable exercise of the discretion.

The ruling the applicant seeks to challenge was delivered in presence of the counsel for the applicant and by its nature, I don't think it needed any evaluation for one to make a decision on whether or not to appeal. Further, the Civil Procedure Act and Rules do not require that a memorandum of appeal should be filed together with the proceedings although a party may need to go through the decision and proceedings to decide on their next cause of action.

I agree with the position taken by Honourable Lady Justice R.E. Aburili in ***Onyango v Rateng [2023] KEHC 1154 (KLR)*** where she stated that;

'However, there is no evidence that they paid for the same and secondly, to file a Memorandum of appeal, one does not necessary require certified proceedings and the decision to be appealed against. Counsel could peruse the court file and craft grounds of appeal and file an appeal which can be amended as there is no requirement that proceedings and or judgment must accompany a Memorandum of appeal.'

Based on what I have stated above, I find that the applicant does not deserve the orders sought. This application is hereby dismissed with costs to the respondent.

Dated signed and delivered at Nairobi this 30th day of April 2026.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Kereu Benjamin holding brief for Mr. Muturi Njoroge for the applicant and in absence of the respondent.