

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**MISCELLANEOUS CIVIL APPLICATION NO. E052 OF 2025**

**MAURINE ALUOCH ONYIMBO.....APPLICANT**

**-VERSUS-**

**ESTHER WANJIKU KAMANJA.....RESPONDENT**

**RULING**

**1.** The Applicant approached this court through a Notice of Motion dated 15<sup>th</sup> September, 2025, seeking orders thus;

**1) Spent.**

**2) That this honourable court be pleased to grant leave to file her appeal out of time against the lower court's judgment and the decree for the ends of justice.**

**3) That this honourable court be pleased to order that Civil Appeal No. E035 of 2024 be and is hereby deemed as properly filed and allow the same to be heard on merits.**

**4) That the costs of this application be provided for.**

**2.** The application is premised on an affidavit deposed by Njoki Muriithi learned counsel seized of the matter; and, grounds that the appeal was instituted following a judgment in

**Nyahururu CMCC No. 193 of 2018 Maurine Aluoch Onyimbo v Esther Wanjiku Kamanja** delivered on 23<sup>rd</sup> September, 2024, a matter that was severally mentioned by the Deputy Registrar. That a Record of Appeal was filed and served upon the Respondent's counsel on 15<sup>th</sup> July, 2025 and the matter was placed before the Deputy Registrar on 10<sup>th</sup> September, 2025 for directions.

3. That counsel for the Applicant only recalled that the appeal was not filed on 21<sup>st</sup> October, 2024 when she prepared for the same. That the mistake was occasioned by the staff at the Applicant's advocate's office.
4. That the Respondent has filed an application dated 8<sup>th</sup> September, 2025, seeking that the appeal be struck out for being filed out of time. That upon re-computation of time and given the fact that there were two (2) public holidays namely 10<sup>th</sup> October, 2024 and 20<sup>th</sup> October, 2024 then it is apparent that time was lapsing by close of business on 25<sup>th</sup> October, 2025.
5. That it will be in the interest of justice that the application be allowed since the Applicant suffered grave injuries from the accident which have gravely affected her livelihood and the Respondent will suffer no prejudice.
6. The Respondent filed grounds of opposition in response where it is stated that **Order 50 Rule 6 of the Civil Procedure Rules** mandates the court to enlarge time

where a limited time has been fixed for doing any act or taking proceedings under the Rules.

7. That the Applicant having full knowledge of their indolence in filing the appeal, **Nyahururu HCCA No. E035 of 2021** has not sought enlargement of the period of filing of the appeal which divests the court the jurisdiction to entertain the application.

8. The application was disposed through written submissions. I have duly considered the application, affidavit in support, grounds of opposition and rival submissions.

9. **Section 79G of the Civil Procedure Act** provides thus;

***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.***

10. Granting the order sought is discretionary. The remedy is granted if it is demonstrated to the court that the delay was caused by sufficient cause that is satisfactory. The judgment herein was delivered on 23<sup>rd</sup> September, 2024.

Apparently the Applicant was avid, did instruct the advocate to file an appeal which was done but without leave of court having delayed for 2 days. Apparently, the delay was caused by the advocate's office hence the explanation given was plausible.

- 11.** It is argued that the Applicant has an arguable appeal. Reliance is placed on the case of **Dande & 3 Others v Director of Public Prosecutions & 2 Others (Petition 4(E005) of 2020) [2022] KESC 23 (KLR)** where it was stated that;

***“Remembering that an arguable appeal is not one that must necessarily succeed, but is simply one that is deserving of the court’s consideration; that what must be avoided is to render the success of the appeal, if successful, nugatory or an academic exercise; that the court, in exercising its discretion, balances between the lower and the higher risks of injustice; and that no definitive conclusions ought to be made as that can only be in the appeal.”***

- 12.** It should be demonstrated that the intended appeal is not hopeless, one that calls for consideration by the court. It is urged that the Applicant sustained serious injuries that will require a follow up orthopedic surgery. It is demonstrated that the appeal is not frivolous as it raises grounds calling for determination, hence it is arguable.

**13.** It is unlikely that the Respondent will suffer any prejudice as she will have the opportunity to defend the appeal therefore substantive justice calls upon the court to grant the order sought.

**14.** In the premises, I grant the Applicant leave to appeal out of time within 30 days of today.

**15.** It is so ordered.\_

**Dated, signed and delivered virtually this 28<sup>th</sup> day of April, 2026.**

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**L.N. MUTENDE**  
**JUDGE**