



REPUBLIC OF KENYA



**Lusuru v Aluda (Miscellaneous Civil Application E002 of 2026)
[2026] KEHC 6306 (KLR) (11 May 2026) (Ruling)**

Neutral citation: [2026] KEHC 6306 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CIVIL APPLICATION E002 OF 2026
RN NYAKUNDI, J
MAY 11, 2026**

BETWEEN

AGGREY LUSURU APPLICANT

AND

CAROLINE ALUDA RESPONDENT

RULING

1. What is pending before this Honourable Court for determination is a Notice of Motion Application dated 13th March 2026 premised under section 79G of the Civil Procedure Act and Order 50 Rule 6 and Order 40 rule 1 in which the Applicant is seeking the following orders: -
 - a. That the applicant be granted leave to appeal against the judgment delivered on the 28th January 2026 in Vihiga MCSUCC Cause No. E032 of 2024.
 - b. That the applicant be granted leave to file a Memorandum of appeal and serve out of time.
 - c. Any other order that this Honourable court deems fit to grant.
2. The Application is made on the following grounds on the face of it among others: -
 - a. That the judgment of the lower court was delivered on the 28th January 2026 in the absence of the applicant.
 - b. That counsel for the applicant did not inform the applicant of the said judgment on time because she was unable to reach the applicant on phone.
 - c. That counsel for the applicant was able to reach the applicant on the 9th March 2026 whereby she served the said judgment to the applicant through WhatsApp after the applicant informed her that he his phone had a problem and that is why the same could not go through.
 - d. That the applicant has an arguable appeal.



- e. That the respondent will not suffer any prejudice since the appeal is on the mode of distribution of the estate of the deceased.
 - f. That it will be in the interest of justice that the said application be allowed.
3. The Application is supported by the annexed affidavit sworn by the Applicant who deponed as follows:
- a. That the judgment of the lower court was delivered on the 28th January 2026 in the absence of the applicant.
 - b. That I was present when the judgment was delivered, however I did not inform the applicant of the said judgment on time because she was unable to reach the applicant on phone.
 - c. That I was able to reach the applicant on the 9th March 2026 whereby I served the said judgment to the applicant through WhatsApp whereby the applicant also informed me that he his phone had a problem and that is why he could not be reached.
 - d. That after the applicant read the said judgment he was aggrieved about the same and instructed me to file an appeal, however the time within which to file an appeal had lapsed on 26th February 2026 and by fourteen (14) days.
 - e. That the applicant has an arguable appeal.
 - f. That we have applied and paid for typed proceedings.
 - g. That the respondent will not suffer any prejudice since the appeal challenges the mode of distribution of the estate of the deceased.
 - h. That it will be in the interest of justice that the said application be allowed.
 - i. That it is imperative that orders sought be granted for the interest of justice.
4. The Application was unopposed.

Analysis and Determination

5. I have considered the Notice of Motion Application and the supporting affidavit. The sole issue for determination is: -

Whether the Applicant has satisfied the conditions for grant of leave to file an appeal out of time.

6. Section 79G of the *Civil Procedure Act* states that appeals to this Honourable Court from decrees or orders in the lower court must be filed within thirty days from the date of the decree or order appealed against. There is a proviso that the appeals may be filed out of time if there is “good and sufficient cause” for failure to file the appeal in time. In particular, the said section provides as follows: -

79G. Time for filing appeals from subordinate courts 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.

7. Thus, the court may exercise discretion and extend time to file an appeal out of time if it can be demonstrated that an applicant has a good and sufficient cause for the delay in filing an appeal. The



question here is whether the applicants had such good and sufficient cause. Considering the form an appeal from the magistrates' court to this court takes, none of these documents is necessary for the filing of an appeal contemplated under section 79G of the *Civil Procedure Act*. According to Order 42 Rule 1(1), a memorandum of appeal is adequate for this purpose. This rule provides as follows: -

Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

8. Sub-rule (2) goes further to state what should be contained in the memorandum of appeal. This sub-rule states as follows: -

The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

9. Earlier, the Supreme Court in the case of Nicholas Kiptoo Korir Arap Salat Vs IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that: -

“The 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

10. In *Thuita Mwangi Vs Kenya Airways* [2003] e KLR, the Court of Appeal while considering rule 4 of the Court of Appeal Rules which was in parimateria with section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso Vs 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.”

11. 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 favour. On the question of the exercise of judicial discretion, the Supreme



Court observed in the case of Telkom Kenya Limited Vs 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.... It is this court’s position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant but are the handmaiden of justice that facilitate the right of access to justice in the terms of article 48 of *the Constitution*....” (See also Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others [2019] eKLR.)

12. From the material placed before this Court, the impugned Judgment was delivered on 28th January 2026 while the present Application was filed on 13th March 2026. The delay beyond the statutory thirty (30) days is approximately fourteen (14) days. In the circumstances of this case, I do not find the delay to be inordinate.
13. The explanation tendered by the Applicant is that counsel experienced difficulties reaching the Applicant on phone and only managed to communicate the outcome of the Judgment on 9th March 2026 after establishing contact through WhatsApp. This explanation has not been controverted by the Respondent and this Court is satisfied that the delay has been reasonably explained. Further, the intended appeal concerns the mode of distribution of the estate of the deceased, which is a substantive issue deserving interrogation on appeal. Without delving into the merits of the intended appeal, this Court is satisfied that the intended appeal is not frivolous and raises arguable issues fit for consideration by the appellate court.
14. Equally important, the Application is unopposed. The Respondent has not demonstrated any prejudice that would be occasioned if leave to appeal out of time is granted. On the contrary, denying a party an opportunity to ventilate an arguable appeal on account of a short delay would be contrary to the principles of substantive justice espoused under Article 159(2)(d) of *the Constitution*. This Court is also guided by the principle that mistakes or inadvertence of counsel should not ordinarily be visited upon a litigant where the interests of justice can still be served without occasioning prejudice to the opposite party.
15. Consequently, I find merit in the Notice of Motion Application dated 13th March 2026. Accordingly, the Application is hereby allowed on the following terms: -
 - a. That leave is hereby granted to the Applicant to appeal against the Judgment delivered on 28th January 2026 in Vihiga MCSUCC Cause No. E032 of 2024 out of time.
 - b. That the Applicant is hereby granted leave to file and serve the Memorandum of Appeal out of time within fourteen (14) days from the date hereof.
 - c. That the Record of Appeal shall thereafter be filed and served in within 30 days



- d. That there shall be a status conference on 10th of June 2025 to confirm compliance with the aforesaid orders.
- e. That the costs of the Application shall abide the outcome of the intended appeal.

16. Orders accordingly.

DATED, SIGNED AND DELIVERED AT VIHIGA VIA CTS THIS 11TH DAY OF MAY 2026

.....

R. NYAKUNDI

JUDGE

