



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Gitau & another v Wanyoike & another (Civil Appeal (Application)
E049 of 2023) [2025] KECA 1243 (KLR) (23 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1243 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E049 OF 2023**

A ALI-ARONI, JA

JUNE 23, 2025

BETWEEN

DAVID MUNGAI GITAU 1ST APPELLANT

MICHAEL GITAU NG'ANG'A 2ND APPELLANT

AND

DANIEL MUIRURI WANYOIKE 1ST RESPONDENT

LYDIA NJOKI ALIAS LYDIA NJERI MURIGI 2ND RESPONDENT

*(Being an appeal from the Judgment of the Environment and Land Court at
Murang'a (Gacheru, J.) delivered on 13th October 2022) in ELC Case No. 347 of 2017)*

RULING

1. Before the court is an application by way of a notice of motion dated 23rd March 2023, brought under Rule 4 of the Court of Appeal Rules, seeking that the record of appeal filed on 23rd March 2023, and served upon counsel for the respondents be deemed as having been filed and served within the extended period.
2. The application is predicated on the grounds on the face of the application and rehashed in the supporting affidavit of the appellants' advocate, sworn on 23rd March 2023, where learned counsel deposed that the notice of appeal was lodged on 27th October 2022; paid for on 26th October 2022 and endorsed on 31st October 2022; the notice was served upon the respondents' advocate on 1st November 2022; 11 days from the date of judgment; that learned counsel wrote a letter requesting for certified copy of the typed proceedings and judgment on 24th October 2022; the certified copies of the judgement and proceedings were ready on 16th December 2022 and collected on 19th December 2022.
3. Learned counsel further states, the Deputy Registrar issued a certificate of delay on 22nd February, 2022 indicating that it took 52 days for preparation of the proceedings; the record of appeal dated 23rd March



2023 was thereafter filed and served upon the respondents' advocates on 23rd March 2023 and upon filing and service of the record of appeal it was brought to his attention that the same was out of time by 14 days as the computation of time was to start running from 16th December 2022; the 60 days lapsing on 9th March 2023; the delay in filing of the appeal was due to a highly regretted inadvertent mistake on the part of learned counsel, part because he wrongly computed the 60 days for filing of the record from the date of issuance of this certificate of delay on 22nd February 2022, rather than from the date when the proceedings were ready being 16th December 2022; the record of appeal has already been filed and served albeit out of time; the delay in filing the appeal being 14 days, in the circumstances is not inordinate; the instant application has been filed timeously; that counsel's mistakes ought not to be visited upon the applicants; the applicants have an arguable appeal with a probability of success; no prejudice whatsoever shall be suffered by the respondents, if the orders sought are granted; and it is fair, just, equitable and in the interest of justice that the applicants' application be allowed as prayed.

4. Despite being served with a hearing notice, the respondents' counsel neither filed a replying affidavit nor submissions in reply.
5. Learned counsel for the applicants filed submissions and a list of authorities, both dated 21st June 2025, and submitted that an application for extension of time may be made either before or after filing the record of appeal; the applicants have already filed the record of appeal and now seek an extension of time so that the appeal may be deemed as having been filed within the prescribed period. In support he cited the case of *Imperial Bank Limited (in Receivership) & Another vs. Alnashir Popat & 18 Others* [2018] eKLR.
6. Further, he submitted that a delay of 14 days is not inordinate. In support of this contention, he relied on the case of *Tarcisio Kagunda Waithathu & 3 Others vs. Regina Nyambura Waithathu* [2018] eKLR, where a delay of 35 days was excused based on counsel's miscalculation of days. He also cited the case of *LSG Lufthansa Service Europa/ Africa GmbH & Another vs. Eliab Muturi Mwangi* [2019], eKLR where the court excused the delay of 29 days occasioned by an administrative mix-up in the chambers of the advocate. Learned counsel submitted that the instant application was made in good time, being one day after the filing of the record of appeal.
7. On the plausibility of the delay, learned counsel submitted that the reason for the delay, being counsel's inadvertent mistake in the computation of time is plausible as he erroneously calculated the 60-day period for filing the record of appeal from the date of issuance of the certificate of delay (22nd February 2022) rather than from the date when the proceedings were ready (16th December 2022). He cited in support the case of *Sultan Hasham Lalji vs. Diamond Hasham Lalji & 2 Others* [2019] eKLR, where this Court exercised discretion to extend the time to file an appeal in favour of an applicant, finding the counsel's mistake in computation of time to be plausible.
8. In urging the court to excuse his mistake learned counsel also relied on the case of *LSG Lufthansa Service Europa/ Africa GmbH & another vs. Eliab Muturi Mwangi (Practicing in the name and style of Muturi Mwangi & Associates Advocates)* [2019] KECA 932 (KLR), where the court observed that even those who ought to know better, such as lawyers, will occasionally make mistakes in the case the court referred with approval to the case of *Belinda Murai & Others vs. Amos Wainaina* [1979] KLR 278, where it was held that the door of justice should not be closed merely because counsel has made a mistake.
9. Learned counsel in relying on the case of *Joseph Wanjohi Njau vs. Kabau*, Civil Application No. 97 of 2012 urged that the applicant has a good appeal, that raises serious issues, including the court's finding on a party's mental capacity to transact; the court's finding on evidentiary matters where it held that sale agreements were not produced contrary to the evidence and record; misapplication of Section 3(7)



and the repealed Section 3(3) of the Law of Contract Act and whether the respondents' counterclaim was statute barred under Section 7 of the Limitations of Actions Act.

10. Further, learned counsel submitted that no prejudice will be suffered by the respondents since, despite being served, they have not filed a response to the instant application. Learned counsel urged the court to consider the injustice the applicants will suffer in being denied their right to a fair hearing enshrined under Article 50 of the Constitution, and that the record of appeal has been filed and served, albeit out of time.
11. This Court enjoys an unfettered discretion under Rule 4 of the Court's Rules to enlarge the time within which an act is to be done. Rule 4 stipulates that:

“The Court of Appeal may; on such terms as may be just, by order, extend the time limited by these rules, or by any decision of the court or a superior court, for the doing of any act authorized or required by these rules, whether before or after the doing of the act and a reference in these rules to any such time shall be construed as a reference to that time as extended.”

12. Learned counsel admitted to a delay of 14 days in filing the record of appeal and explained that he miscalculated the time due to an inadvertence on his part. In *Abdul Aziz Ngoma vs. Mungai Mathayo* [1976] KLR 61, 62, this Court held that:

“We would like to state once again that this court's discretion to extend time under rule 4 only comes into existence after “sufficient reason” for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”

13. In the case of *Tarcisio Kagunda Waithathu & 3 Others vs. Regina Nyambura Waiththu* [2018] eKLR, a delay of 35 days was excused. Similarly, in *Sultan Hasham Lalji vs. Diamond Hasham Lalji & 2 Others* [2019] eKLR, this Court found a delay of 29 days to be excusable. The 14-day delay is undoubtedly excusable, in the circumstances explained by learned counsel. In the often cited case of *Belinda Murai & 9 Others vs. Amos Wainaina* [1979] eKLR, the court had this to say of counsel's mistake:

“The former advocate's belief was a mistake on a point of law, however wrong he might have been in his belief. No one has said that it was a deliberate act. On the contrary, his obstinate adherence to his wrong belief shows that he genuinely, though mistakenly, believed his view was correct.

A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel, though in the case of a junior counsel, the court might feel more compassionate. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes, which are politely referred to as erring in their interpretation of laws and adoption of a legal point of view, which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said Change is inevitable. In a progressive country, change is constant.



Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress.”

14. The respondents did not respond to the application to show any likely prejudice that they might suffer. Therefore, I find that the 14-day delay may not cause any prejudice to the respondents.

In addition, on the face of it, the appeal appears to have arguable points.

15. In the end, I allow the application. Costs will abide by the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF JUNE, 2025.

ALI-ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

