



**Mbao v Everflora Limited (Miscellaneous Civil Application  
E015 of 2024) [2025] KEHC 4123 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4123 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
MISCELLANEOUS CIVIL APPLICATION E015 OF 2024**

**FN MUCHEMI, J**

**MARCH 27, 2025**

**BETWEEN**

**KENNEDY OCHIENG MBAO ..... APPLICANT**

**AND**

**EVERFLORA LIMITED ..... RESPONDENT**

**RULING**

**Brief facts**

1. The application dated 29<sup>th</sup> November 2024 is seeking for orders of leave to file an appeal out of time against the ruling in Gatundu CMCC No. 68 of 2017 delivered on 1<sup>st</sup> October 2024.
2. The respondent opposed the application by filing Grounds of Opposition dated 27<sup>th</sup> January 2025.

**Applicant's Case**

3. The applicant states that the ruling in Gatundu CMCC No. 68 OF 2017 was delivered on 1<sup>st</sup> October 2024 where the trial court dismissed his application dated 11<sup>th</sup> June 2024 which sought orders of setting aside the orders dismissing the suit and reinstating the same, whereas the said suit was filed on 10<sup>th</sup> May 2017. Being aggrieved with the said judgment, the applicant is desirous of lodging an appeal against the said ruling but the statutory period prescribed by the law has already lapsed.
4. The applicant states that the delay in filing the appeal was occasioned by the fact that his advocates were unable to get a copy of the typed ruling, study the same and take instructions from him. By the time his advocates got a copy of the typed ruling, the statutory period within which to file an appeal had already lapsed. The applicant states that the delay is not inordinate and granting the application will not occasion any prejudice to the respondent.



5. The applicant avers that the intended appeal raises valid and triable issues with very high chances of success.
6. The applicant states that he is willing to abide with any conditions as maybe set by this court in granting the prayers sought.

### **The Respondent's Case**

7. The respondent states that the application is frivolous, vexatious and an abuse of the court process. The respondent further states that the reasons given for the delay are unconvincing and in any event, unsupported by any evidence at all. The respondent states that the application is misconceived, improper and ripe for dismissal. Further, the application is erroneously supported by an affidavit deposed by the advocate on record and not the client, a defect that is incurable and only renders the entire application bad in law and incurably defective.
8. Parties disposed of the application by way of written submissions.

### **The Applicant's Submissions**

9. The applicant relies on Section 79G of the *Civil Procedure Act* and the case of *Mwangi v Kenya Airways Ltd* [2003] eKLR and submits that he was not able to obtain a copy of the ruling delivered by the trial court on 1<sup>st</sup> October 2024 and their efforts to secure a typed copy of the said ruling was not immediately successful. Furthermore, upon getting the same, perusal and advising the applicant, the statutory period within which the memorandum of appeal should have been filed had lapsed.
10. The applicant submits that the delay was neither intentional nor was he indolent. The delay was occasioned by factors out of his control and the applicant seeks the honourable court's indulgence.
11. The applicant submits that the ruling in the trial court was delivered on 1<sup>st</sup> October 2024 and the instant application was brought before the court on 29<sup>th</sup> November 2024. Thus the delay is not inordinate and the applicant requests the court to pardon his delay. To support his contentions, the applicant relies on the case of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another* [2018] eKLR.
12. The applicant submits that the intended appeal raises pertinent issues and it is in the broader interest of justice that the court grants the orders sought. The applicant further submits that the respondent will not experience any degree of prejudice if the prayers sought are granted.

### **The Respondent's Submissions**

13. The respondent submits that the applicant filed the suit in the trial court on 10<sup>th</sup> May 2017 which arose from an injury at work and therefore fell within the *Work Injury Benefits Act*. The said legislation's constitutionality was challenged and the Supreme Court of Kenya delivered its judgment on 3<sup>rd</sup> December 2019 in Petition No. 4 of 2019. The Chief Justice issued practice directions on the conduct of the proceedings of claims filed after the Act's commencement, before the supreme court judgment and those filed after the Supreme Court's decision. The directives clearly state that only pending matters after the commencement of the Act but before the Supreme Court judgment could proceed to their logical conclusions before the courts. The respondent submits that as of the date of the said directives, the applicant's suit had been dismissed for want of jurisdiction, a decision that the applicant has never appealed or reviewed.



14. The respondent relies on the cases of *Muriuki (Suing in his capacity as the Chairperson and on behalf of Ukombozi Green Gardens Welfare Association) v Ukombozi Holdings Limited* [2025] KEELC 612 (KLR) and *Nicholas Kiptoo arap Korir Salat v Independent Electoral & Boundaries Commission & 7 Others* [2014] eKLR and submits that the applicant has not annexed any proof that he obtained the ruling late. Furthermore, the dates, request for the ruling or the date the client gave instructions have not been presented or even mentioned. The respondent argues that the allegation that the counsel had difficulty getting a copy of the ruling is unexplained and unproven. No attempt has been made to show the steps taken to obtain the ruling in any event. The respondent submits that the application is an afterthought as the delay has not been explained and thus ought to be dismissed.
15. The respondent submits that it stands to suffer great prejudice since the case is over an incident alleged to have happened in the year 2017 and it has not only lost touch with its potential witnesses but will also be at pains to assemble records and documents it could rely on at the trial.
16. The respondent submits that the applicant has had adequate time to pursue his claim in the appropriate forum and he chose not to do so as a result it ought not be subjected to the processes the applicant is pushing for.
17. The respondent submits that at the current stage, the court need not consider the merits or lack of thereof of the intended appeal, the court should first be convinced that the reasons given for the delay are proved. In the instant case, no proof has been offered and as such the application ought to be dismissed.

#### **Issues for determination**

18. The two main issues for determination herein are:-
  - a. Whether the Supporting Affidavit is incompetent and ought to be expunged.
  - b. Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time.

#### **The Law**

##### **Whether the Supporting Affidavit is incompetent and ought to be expunged**

19. The respondent has attacked the validity of the applicant's supporting affidavit on the premise that it has been sworn by the applicant's advocate. The respondent argues that such a defect is incurable and renders the entire application bad in law and incurably defective.
20. The Court of Appeal in *Hakika Transporters Services Ltd v Albert Chulab Wamimitaire* [2016] eKLR expressed the following:-
 

As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination. Rule 9 of the *Advocates (Practice) Rules* however permits an advocate to swear an affidavit on formal or non-contentious matters.
21. Nevertheless, the law does not prohibit or bar advocates completely from swearing affidavits but such an affidavit should relate to issues that are born out of the record of the court, issues which have been pronounced upon, issues that the court is to take judicial notice of, settled issues of law and/or



issues that are admitted by the adverse party in the subject proceedings. In the instant case, the instant application is supported by an affidavit sworn by the counsel for the applicant. He has deponed to facts that are borne out of the court record and issues which are not contested. The facts sworn by the advocate do not raise serious questions of fact and evidence which would require the advocate to be cross examined to determine the truth. In my considered view, the said affidavit is competent and thus the application is proper before the court.

**Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;**

22. Section 79G of the *Civil Procedure Act* states:-

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 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.

23. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

24. 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 stated *inter alia* that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.”



25. Similarly in the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

26. The ruling herein was delivered on 1<sup>st</sup> October 2024 and the applicant filed the current application on 29<sup>th</sup> November 2024. This is approximately twenty eight (28) days outside the time limited for filing an appeal. The applicant has attributed his delay for failure on his advocates part to obtain a typed copy of the ruling.

27. On perusal of the record, the applicant has not annexed any evidence to show the date his advocates applied for a copy of the ruling. Further, the applicant has not shown any correspondence to the court Executive Officer following up on supply of the ruling. Additionally, the reason as stated by the applicant is very vague as it has not stated to the court whether it obtained a copy of the ruling and when it received such copy of the ruling. The delay of twenty eight (28) days may not be inordinate, but in the instant case, the applicant has not given any plausible explanation on the reasons for delay.

28. I have further perused the draft Memorandum of Appeal and noted that the grounds of appeal do not raise arguable points of law. Furthermore, I have perused the ruling dated 1<sup>st</sup> October 2024 and appreciated the trial court’s reasoning in dismissing the application dated 11<sup>th</sup> June 2024. Thus, without delving into the merits of the appeal, the intended appeal has very limited chances of success. Consequently, I find that this applicant has not established any tangible ground for extension of time to file an appeal.

### **Conclusion**

29. It is my finding that this application dated 29<sup>th</sup> November 2024 lacks merit and is hereby dismissed with costs.

30. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27<sup>TH</sup> DAY OF MARCH 2025.**

**F. MUCHEMI**

**JUDGE**

