



REPUBLIC OF KENYA



KENYA LAW
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**Mutai v Cherotich (Civil Appeal E027 of 2023)
[2025] KEHC 3986 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3986 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E027 OF 2023**

**JR KARANJA, J
MARCH 27, 2025**

BETWEEN

COLLINS MUTAI APPELLANT

AND

BETTY CHEROTICH RESPONDENT

RULING

1. The notice of motion dated 1st August, 2023 essentially seeks an order for filing appeal out of time and for the annexed memorandum of appeal be deemed to have been duly filed upon payment of the requisite fees.
2. The grounds for the application are set out in the notice of motion. Grounds four (4), five (5) and six (6) are most relevant in as much as they allude to the mistake of counsel in failing to file an appeal within the prescribed period.
3. In the supporting affidavit dated 1st August, 2023 the Applicant avers that the impugned ruling was delivered on 30th May, 2023 after which he instructed his counsel to lodge an appeal. The counsel then requested for certified copies of the proceedings but inadvertently forgot to file the memorandum of appeal within the prescribed file.
4. The Applicant contends that the delay in filing the appeal was an excusable oversight on the part of his counsel and that the Respondent will not suffer any prejudice if the orders sought herein are granted.
5. The Respondent opposed the application and both parties presented their respective arguments for and against the application by way of written submissions which were duly considered in the light of the supporting grounds and those in opposition thereto.



6. The basic issue which arose for determination was whether the Applicant provided and established satisfactory grounds for exercise of this court's discretion in his favour by allowing the filing of the intended appeal out of time.
7. Section 79 (G) of the Civil Procedure Act under which the application is founded provides that; -

“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 satisfied the court that he had good and sufficient cause for not filing the appeal in time”.
8. In this case the impugned ruling in Kericho Children's Court Case No. 17 of 2017 was delivered on 30th May, 2023 and the memorandum of appeal dated 1st August, 2023 was filed herein on 2nd August, 2023. This meant that the delay by the Applicant in filing the appeal extended for a period of one (1) month or thereabout excluding the thirty days prescribed for filing an appeal from the time of delivery of the judgment/ruling.
9. The explanation given by the Applicant for the delay was that his advocate inadvertently forgot to file the memorandum of appeal within the prescribed time. The Applicant thus implied that the failure to file the appeal within time was occasioned by the mistake of his Advocate. This implied further that “to forget” is a mistake which is not the case herein as there was nothing from the Applicant to suggest that his advocate chose to forget or that he deliberately acted recklessly, carelessly or negligently in forgetting to file the memorandum of appeal.
10. The suggestion by the Applicant was clearly that his Advocate was not negligent but merely forgot to file the appeal in time. The Applicant was herein speaking for his unnamed counsel/Advocate without saying why his counsel could not speak for himself/herself by way of a supporting affidavit and confirm what was stated by him (Applicant).
11. Although to forget is human and not necessarily a mistake it was intriguing why the counsel said to have forgotten to file the memorandum of appeal did not depone an affidavit in support of the application and shed some light in determining whether his/her forgetfulness was actually a mistake arising from his/her negligence and/or lack of diligence
12. It cannot therefore be said that the delay in filing the appeal was occasioned by the mistake or negligence of the Applicants counsel and the Applicants contention in that regard was merely an unproved allegation which could not provide sufficient cause for exercise of this court's discretion in his favour.
13. From all the foregoing, it is clear that the Applicant had more than enough opportunity to be heard on his intended appeal but for reasons known to himself he failed and/or neglected to utilize the opportunity by failing to file the appeal within time. Instead he sat pretty and ran to the court a month or so after the expiry of the prescribed time thereby creating a valid suggestion that his present application was nothing more than an afterthought.
14. As to whether the Respondent would suffer no prejudice if the appeal was to be filed out of time, it must be noted that the dispute between the Applicant and the Respondent revolved around the rights and welfare of their children. These are the innocent souls bearing the brunt of their parent's disagreements and/or marital disputes. It is their welfare which is of paramount importance in such disputes in which they are unwillingly dragged. The question of the Respondent or even the Applicant.



Suffering prejudice in this matter would not therefore arise. On the contrary, the more this matter delays in court the higher the prejudice being occasioned to the children.

15. In sum, the present application wanting on merit and is hereby dismissed with each party bearing their costs.

DATED AND DELIVERED THIS 27TH DAY OF MARCH, 2025

J.R. KARANJAH

JUDGE.

In the presence of; -

Mr. Langat for Applicant

Respondent in person.

