



REPUBLIC OF KENYA



**Masese v Hellen & another (Civil Miscellaneous E981 of 2024)
[2025] KEHC 3693 (KLR) (Civ) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL MISCELLANEOUS E981 OF 2024**

**LP KASSAN, J
MARCH 26, 2025**

BETWEEN

JANET KEMUNTO MASESE APPLICANT

AND

KURIA WANDUNDU HELLEN 1ST RESPONDENT

CYPRIAN ONYANGO ODADA 2ND RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 25.10.2024 brought under Sections 1A, 1B, 3A and 79G of the *Civil Procedure Act*, Order 42, and Order 51 Rule 1 of the *Civil Procedure Rules* 2010, and all enabling provisions of the law wherein the Applicant seeks orders to wit:
 - a. That the Honourable court be pleased to grant the Applicant leave to file Appeal out of time against the judgment of Hon. Lucy Njora (SPM) delivered on 3rd September 2024 in Milimani CMCC No. 3277 of 2019.
 - b. That the costs of this application be provided for.
2. The said application is premised on the grounds on its face and further supported by the affidavit sworn by the Applicant. The Applicant's case is that judgment was delivered on 03.09.2024. The Applicant followed up on the copy of the proceedings and judgment which she was unable to get in good time by which time the 30 days window to file an appeal had lapsed. The Respondent would not suffer any injustice if the application was allowed as prayed. The intended appeal raised valid and triable issues with high chances of success. It was in the interest of justice that court does grant leave to file the appeal out time.



3. The Application is opposed by the Respondent vide a replying affidavit sworn on 23.09.2024 by the Respondent. He deponed that The Applicant failed to attach a certificate of delay from the court registry to substantiate the claimed administrative delays. The two-month delay was inordinate and unexplained. That the draft Memorandum of Appeal lacked substance and merely rehashed arguments. Lastly, the Applicant did not demonstrate diligence (e.g., follow-up correspondence or use of online court systems) and granting leave would prejudice the Respondents, who succeeded at trial.
4. The application was canvassed by way of written submissions.

Applicant's submissions

5. The Applicant relied on Section 79G *Civil Procedure Act* which permits appeals out of time with "good and sufficient cause." In the cases of *Mwangi v Kenya Airways* [2003] KLR and *Philip Chemwolo & Another v Augustine Kubede* [1982-88] KAR 103 the Courts should excuse delays caused by factors beyond a litigant's control. Also in the case of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi* [2018] eKLR, a two-month delay was excused where court processes caused the holdup. The Applicant herein submitted that the delay was not inordinate, the appeal raised triable issues, and no prejudice would arise. She prayed the application be allowed.

Respondents' submissions

6. The Respondents countered and submitted that in the cases of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] EA 33 and *County Executive of Kisumu v County Government of Kisumu* [2017] eKLR an extension requires explaining the entire delay period and proving diligence. In *Swain v Hillman* [2001] 1 All ER 91 the Applicant's draft appeal lacked realistic prospects of success. The Respondents submitted that the failure to provide a certificate of delay or evidence of follow-up efforts rendered the explanation insufficient. They prayed that the application be dismissed with costs.

Analysis & Determination

7. I have considered the Application, responses and the submissions filed herein. The main facts relating to the Application herein are not in dispute. These include the existence of the ruling in Nairobi CMCC No. 3277 of 2022 delivered on 03.09.2024 in favour of the Respondent.
8. The issues for determination herein are
 - i. Whether the Applicant herein should be granted leave to appeal out of time against the judgment in Nairobi CMCC No.3277 of 2019?
 - ii. Who should bear the costs?
9. Section 79G of the *Civil Procedure Act* provides that the appeals from the subordinate court to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. It provides:

“Every appeal from a subordinate court to high court should be filed within a period of thirty days from the date of the decree or order appealed against, From such period any time the lower court may certify as having been requisite of a copy of the 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 the filing of the appeal in time.”



10. It allows for the extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.
11. The court in exercise of its discretion is supposed to take into account the length of the 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 and whether the matter raises issues of public importance. (See Court of Appeal in *Edith Gichungu Koine v Stephen Njagi Thoithi* (2014) eKLR)
12. In addition, Section 95 of the *Civil Procedure Act* grants to the court the “discretion, from time to time, to enlarge” any time fixed for the doing of any act under the Act. See also, Order 50 Rule 6 of the *Civil Procedure Rules*. Thus it is incumbent upon the Applicant to satisfy the court that it had good and sufficient cause for not filing the appeal in time, and is deserving of the court’s discretion.
13. The judgment in the primary suit Nairobi CMCC No. 3277 of 2019, was delivered on 03.09.2024. The application herein was filed about 51 days after the 30 days leave to appeal had lapsed. The explanation given is the Applicant tried to trace the file and acquire proceedings. In light of this, the delay in bring the application herein although inordinate is with reason.
14. As to whether the Respondent will suffer any prejudice, this has to be weighed against a party’s constitutional right to be heard (See Court of Appeal case *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR.). The Applicant deposed that the Respondent will not suffer any prejudice if the orders of leave are granted. The Applicant has expressed her chances of appeal succeeding. The Respondent’s deposition as to the prejudice he will suffer cannot dislodge the clear prejudice the Applicant stands to suffer.
15. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his/her favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. The discretion of the court must always be exercised judiciously. The Applicant having expressed her intentions to be heard by this court on appeal, it is my considered view that she ought to be given an opportunity to pursue the appeal.
16. For the above reasons, the Applicant has satisfied the conditions for grant of leave to appeal out of time.
17. Taking all relevant factors into consideration, I do order that;
 - a. The Applicant is granted leave to file an appeal out of time and the same must be filed and served within the next 21 days from the date of this ruling.
 - b. The costs of this Application will be in the cause.
18. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF MARCH 2025.

HON. L. KASSAN

JUDGE

In the presence of;

Makumi for the Applicant

Khakami for Applicant

Martin holding brief Arusei for the Respondent



Carol – Court Assistant

