



REPUBLIC OF KENYA



**KENYA LAW**  
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**Otieno v Omwanda & another (Miscellaneous Civil Application  
E016 of 2022) [2025] KEHC 9007 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9007 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
MISCELLANEOUS CIVIL APPLICATION E016 OF 2022**

**CW MEOLI, J**

**JUNE 26, 2025**

**BETWEEN**

**GAD OTIENO ..... APPLICANT**

**AND**

**DOUGLAS OMWANDA ..... 1<sup>ST</sup> RESPONDENT**

**KESEY OMWANDA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. For determination is the motion dated 16.03.2022 by Gad Otieno [hereafter the Applicant] seeking that the Court be pleased to extend time and grant him leave to appeal out of time against the judgement Kajiado CMCC No. No 132 of 2019 [hereafter the subject suit] and that the draft memorandum of appeal attached to the motion be deemed as properly filed. The motion is expressed to be brought inter alia under Sections 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act* [CPA] and order 50 Rule 6, Order 50 Rule 6 of the Civil Procedure Rules [CPR]. The application was premised on the grounds therein as amplified in the affidavit of Evans Umidha Oruenjo, the Applicant's advocate.
2. Counsel deposed that the subject suit had been fully heard in the lower court and a judgement date reserved. He averred that he had erroneously diarized the matter indicating that it would be coming up on 9.03.2022 instead of 7.02.2022, and that judgment was delivered in favour of Douglas Omwanda and Kesey Omwanda [hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Respondent/ Respondents] on the latter date, and in his absence. He stated that his failure to attend court was due to a mistake resulting in the lapse of time for filing of appeal. And that upon realizing the mistake they moved with speed and filed the current application. He asserted that the intended appeal is arguable and has high chances of success. Finally stating that it is in the interest of justice that the application be allowed as the Applicant ought not to be penalized for the mistake of counsel.



3. Through the affidavit in reply sworn by the 1<sup>st</sup> Respondent, the Respondents opposed the motion. Therein contending that grounds supporting it are insufficient. They however stated that if the court was persuaded to grant the orders sought, it should impose a condition requiring the Applicant to deposit security for costs in the sum of Kes.150,000/- noting that the subject suit was instituted in 2019.
4. The Applicant's advocate filed a further affidavit on 31.10.2022 stating that no costs were awarded in the subject suit and the Respondent's demand for security for costs in the sum of Kes. 150,000/- was onerous. Asserting that the Respondents will have opportunity to defend the appeal thus will not suffer any prejudice. Revisiting the delivery of judgment in the subject suit, counsel contended that he had since discovered that the magistrate delivered the judgement before the reserved judgement date, and without notice, hence the said court, not the Applicant is to blame.
5. The motion was canvassed by way of written submissions. Counsel for the Applicant invoking Section 79G of the *Civil Procedure Act* argued that the power to enlarge time is discretionary, and governed by established principles. Citing in support the case of First American Bank of Kenya Ltd v Gulab P Shah & 2 others [2002] 1EA 65 , inter alia.
6. Contending that there was no dispute that the impugned judgment was delivered without notice, counsel referred to the annexed copy of proceedings in the subject suit indicating that on 15.12.2021 the judgement was scheduled for 9.3.2022 and not 7.02.2022 when it was delivered without notice. This being contrary to the provisions of Order 21 Rule 1 of the CPA, requiring that notice of date of delivery of judgement be served upon parties. That the said omission amounts to sufficient ground for enlargement of time. Counsel calling to his aid the Court of Appeal decision in Ngoso General Contractors Ltdv Jacob Gichunge [2005]1KLR 737.
7. Asserting that the Applicant had an arguable appeal, counsel placed reliance on the case of Kenya Commercial Bank Ltdv Nicholas Ombija [2009] eKLR.
8. As regards security for costs counsel citing Order 26 Rule 1 of the CPR asserted that it is a matter in the court's discretion, which must be exercised judiciously taking into account the circumstances of the case. Counsel argued that in considering whether to grant an order for security for costs, the court will consider the ability of the Applicant to pay the costs in the event his intended appeal is not successful. However, there was need to strike the right balance between the right of access to justice and the need to ensure that the Respondents are not disadvantaged. And that in this case, there is no demonstration of the Applicant's inability to pay the costs of the intended appeal whereas no costs were awarded in the subject suit. Hence urging the court not to impose any condition for deposit of security for costs.
9. On their part, the Respondents submitted that the motion if granted, should be subject to strict terms that the appeal shall be filed within 7 days and that the Applicant deposits security for costs in the sum of Kes. 150,000/- pending the appeal.

### **Analysis and Determination**

10. The court has considered the motion, the rival affidavit material and submissions on record. The key prayer in the motion before the court is seeking leave to appeal out of time. The power of the court to enlarge time for filing an appeal out of time is expressly donated by Section 95 of the CPA as read with Order 50, Rule 6 of the CPR. The principles governing leave to appeal out of time are well-settled. A successful applicant must demonstrate "good and sufficient cause" for not filing the appeal in time.



11. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v 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.”

12. 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 favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of *Telkom Kenya Limited v 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....”

See also *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR.

13. 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 stating 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.
7. ....”



See also County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR.

14. There is no dispute that the judgment in the subject suit was delivered on 7.02.2022 and the present motion filed on 18.03.2022, a delay of about 10 days after the lapse of the period stipulated for filing appeal. The delay is not inordinate, especially given the undisputed material presented by the Applicant by his further affidavit that judgment initially scheduled for 9.03.2022 was apparently brought forward to the 7.02.2022. There is no evidence of notice of the change of date to the parties. The Applicant's earlier affidavit was apparently sworn by counsel before perusing the record of the subject suit, hence purporting mis-diarisation.
15. Thus, while the obviously inconsistent explanations by his counsel may not be visited upon the Applicant, the court takes a dim view of the fact that counsel took it upon himself to swear affidavits on contentious matters on behalf of his client. Such conduct must be frowned upon as counsel ought not to enter the arena of contention between the parties. As much as the said counsel was privy to certain matters pertinent to the motion, that did not obviate the need for the Applicant to swear an affidavit; after all, he is the primary party, not his advocate. That said, the second explanation appears credible and reasonable, given the undisputed material tendered in support.
16. On the question whether the intended appeal is arguable, the court having perused the draft memorandum of appeal and does not consider it patently frivolous. All that is required is a demonstration that the appeal is worthy of consideration by the court, and not necessarily that it will succeed. The Court of Appeal in Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR stated that such appeal:

“... may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”
17. In Vishva's case [supra], the Court emphasized the right of appeal in the following terms:-

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized .... in the case of Richard Ncharpi Leiyagu v IEBC & 2 Others [supra]; Mbaki & Others v Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another v Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding inter alia that:

  - [i] the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
  - [ii] the right to be heard is a valued right; and
  - [iii] that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”
18. In order to facilitate the Applicant's right of appeal, the court is persuaded to exercise its discretion in the Applicant's favour. However, the Respondents have urged that a condition for deposit of security for costs be imposed against the Applicant in such event. Order 26 Rule 1 of the CPA provides that in any suit, the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party to be given by any other party. As correctly argued by the Applicant, this



discretion must be exercised judiciously, and with the right of parties to be heard in sight. Moreso where a party has demonstrated that he has an arguable appeal.

19. Concerning applications brought under the above provisions, the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others*, [\*CA No. 38 of 2013\*](#) [2014] eKLR, observed that: -

“In an application for further security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.”

20. Although no formal application has been made for security of costs here, the foregoing passage applies with equal force in the present matter. There is no demonstration by the Respondents that the Applicant will be unable to pay costs in the event the appeal is unsuccessful. The court is not persuaded that this is a proper case to attach a condition requiring security for costs to the order granting leave to appeal out of time.

21. In the result, the court will allow the motion dated 16<sup>th</sup> March 2022 on terms that the Applicant is granted leave to file an appeal within 14 days. Given the cumulative delay in this matter [it is well over two years since the impugned judgment of the lower court] , and conscious of its duty to further the overriding objective in Section 1A and 1B of the CPA, the court deems it appropriate to impose a further condition that the appeal to be filed pursuant to the leave hereby granted shall be fully prosecuted within 12 months of filing, failing which it will automatically stand dismissed for want of prosecution, with costs to the Respondents. The costs of the motion are awarded to the Respondent in any event.

**DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 26<sup>TH</sup> DAY OF JUNE 2025.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Applicant: Ms. Auma h/b for Mr. Ogutu

For the 1<sup>st</sup> Respondent: Mr. Amolo

For the 2<sup>nd</sup> Respondent: Mr. Amolo

C/A: Lepatei

