



Metrotrans East Africa Limited v Gitau & another (Miscellaneous Civil Application E800 of 2024) [2025] KEHC 10844 (KLR) (Civ) (24 June 2025) (Ruling)

Neutral citation: [2025] KEHC 10844 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E800 OF 2024**

JM OMIDO, J

JUNE 24, 2025

BETWEEN

METROTRANS EAST AFRICA LIMITED APPLICANT

AND

SIMON HIKA GITAU 1ST RESPONDENT

NAOMI WANJIKU T/A MAMALO AUCTIONEERS 2ND RESPONDENT

RULING

1. The Applicant's Notice of Motion application dated 2nd September, 2024, expressed to be brought under Order 51 Rules 1 & 3 of the Civil Procedure Rules, Sections 1A, 1B, 3A, 63(e), 79G and 95 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and all other enabling provisions of the law seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to enlarge time and grant leave to the Applicant to file an appeal out of time against the ruling and order made by Hon. A.G. Njuguna, Resident Magistrate/Adjudicator on 14th June, 2024 in SCCC No. E2718 of 2023, *Samuel Hika Gitau v Metrotrans East Africa Limited & others*.
 - d. That this Honourable Court be pleased to grant an order to restore possession and use of motor vehicle registration number KDK 204M to the Applicant.
 - e. That costs of this application be provided for.



2. The first ground upon which the application is premised are set out on its face and are in precis that the Applicant's application before the lower court that sought an order for setting aside ex parte judgement that was entered against the Applicant on 23rd October, 2023 was dismissed on 14th June, 2024 pursuant to which the 1st Respondent instructed the 2nd Respondent to execute the decree against the Applicant.
3. The Applicant states that it was not notified of the date for the delivery of the ruling or execution proceedings, until the execution proceedings commenced against it.
4. The second ground proffered by the Applicant is that its intended appeal is arguable and has probability of success.
5. The Applicant's third ground is that it continues to for the financing of the motor vehicle registration number KDK 204M, now in the custody of the 2nd Respondent and that the said vehicle is at risk of being sold and transferred to a third party, to the prejudice of the Applicant.
6. Lastly, the Applicant urges that having deposited the entire decretal amount in the lower court, the 1st Respondent stands to suffer no prejudice in the event that the intended appeal is not successful.
7. The application is supported by the supporting and further affidavits of Oscar Omurwa Rosana, who describes himself as a director of the Applicant, sworn on 2nd September, 2024 and 22nd October, 2024 respectively. The said affidavits expound on the above grounds.
8. The application is opposed by both Respondents. The first Respondent filed a replying affidavit sworn on 15th October, 2024 by Njoki Mungai, the 1st Respondent's Advocate while the 2nd Respondent filed grounds of opposition dated 27th September, 2024.
9. In her affidavit, the 1st Respondent's Counsel has made depositions on oath that the Applicant's erstwhile Advocates – Mukami Law Advocates – were always notified by service whenever the matter came up before the trial court but consistently failed to appear. The 1st Respondent gave instances when the said law firm failed to appear, to wit 12th July, 2023. 5th September, 2023 and 23rd October, 2023. Following the several non-appearances, default judgement was entered against the Applicant.
10. The 1st Respondent further states through his Counsel that the parties were properly notified of the delivery of the ruling that dismissed that Applicant's application for setting aside judgement.
11. The 2nd Respondent's grounds of opposition are to raised three points; that the Applicant's application is incompetent for failing to join National Bank of Kenya Limited, which entity was the 2nd Respondent in the lower court; that the vehicle had since been sold to a third party, who in turn sold it to yet another party; and that the Applicant has not disclosed the date when it learnt that the ruling had been delivered and as such, the delay in bringing the application remained unexplained.
12. On 30th September, 2024, I issued directions that the application be canvassed by way of written submissions. The parties filed their respective submissions.
13. I have perused and considered the application, the Applicant's affidavit in support thereof and its further affidavit, the 1st Respondent's replying affidavit and the grounds of opposition filed by the 2nd Respondent and the submissions of the parties. What is clear from the record is that the ruling and order from which the Applicant intends to appeal was delivered on 14th June, 2024 and the application seeking for leave to appeal out of time filed on 3rd September, 2024, about two and a half months after the delivery of the ruling.



14. The period for filing the appeal therefore lapsed on or about 15th July, 2024. There is therefore a delay of about one and a half months in bringing the application for leave to file the appeal out of time.
15. The main issues for determination as discernible from the record are as follows:
 - a. Whether the Applicant has met the prerequisites for leave to appeal out of time.
 - b. Subject to (a) above, whether the court should exercise its discretion to grant the Applicant leave to file its appeal out of time.
 - c. Subject to (a) and (b) above, whether the court should issue an order that motor vehicle registration number KDK 204M be restored to the Applicant
16. Section 79G of the [Civil Procedure Act](#) provides as follows:

79G. 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.
17. It is clear from the text of the above provision of statute that before the court considers granting an order to allow the appeal to be filed out of time, the Applicant must demonstrate to the court that he has good and sufficient cause for filing the appeal out of time (see the cases of [Diplack Kenya Limited v William Muthama Kitonyi](#) [2018] eKLR and [Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others](#) [2014] eKLR).
18. The Supreme Court in the case of [Salat](#) (*supra*) held *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; and
 - f. Whether the application has been brought without undue delay.”
19. Whether there is a reasonable ground for the delay, the Applicant states that its former Advocates were not notified of the delivery of the ruling that resulted in the orders that it intends to appeal from. The learned Adjudicator indicated at the bottom of the ruling that the same was sent to the parties through email. The annexures to the Applicant’s supporting affidavit show that the Advocates on record for



the parties, and particularly the firm of Mukami Law Advocates had provided in their filed documents their respective email addresses.

20. Notably, there is no affidavit filed, sworn by an Advocate from the said law firm to specifically deny receiving the ruling through the law firm's email. It is only a member of that law firm who can attest on oath to that fact.
21. As to whether the application has been brought without undue delay, I agree with the 1st Respondent that the Applicant did not state the date that it got the information that the ruling had been delivered and as such, has not provided sufficient information for the court to determine this issue as is required of a party that seeks the permission of the court to appeal out of time.
22. From the foregoing, I am not persuaded that the Applicant has met the prerequisites for leave to appeal out of time. Thus then, the court cannot judiciously exercise discretion to allow the Applicant appeal out of time.
23. Having determined that the prayer for leave to appeal out of time is not merited, I find it preposterous to determine the prayer that seeks an order that motor vehicle registration number KDK 204M be restored to the Applicant.
24. The result I then reach, based on the reasons above, is that the Notice of Motion application dated 2nd September, 2024 is without merit. I proceed to dismiss it with costs to the Respondents.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 24TH DAY OF JUNE, 2025.

J.M. OMIDO.

JUDGE

For Applicant: Mr. Githinji.

For 1st Respondent: Mr. Kamau For Ms. Mungai.

For 2nd Respondent: Mr. Thuku.

Court Assistants: Mr. Ngoge & Mr. Juma.

