



**Edelvale Trust Jamaa Homes and Mission Hospital & another v Amahati & another (Miscellaneous Civil Application E581 of 2024) [2025] KEHC 11354 (KLR) (Civ) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11354 (KLR)

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

**CIVIL**

**MISCELLANEOUS CIVIL APPLICATION E581 OF 2024**

**JN MULWA, J**

**JULY 31, 2025**

**BETWEEN**

**EDELVALE TRUST JAMAA HOMES AND MISSION HOSPITAL .... 1<sup>ST</sup>  
APPLICANT**

**THE ADMINISTRATOR, EDELVALE TRUST JAMAA HOMES AND MISSION  
HOSPITAL ..... 2<sup>ND</sup> APPLICANT**

**AND**

**HARRISON MUNALA AMAHATI ..... 1<sup>ST</sup> RESPONDENT**

**DR HUDSON A LODENYO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By the Amended Notice of Motion dated 02/08/2024 brought pursuant to Section 1A, 1B, 3A & 79G of the *Civil Procedure Act* (CPA) and Order 42 Rule 6 of the *Civil Procedure Rules* (CPR), The Administrator, Edenvale Trust Jamaa Homes and Missions Hospital (hereafter the 1<sup>st</sup> & 2<sup>nd</sup> Applicants) seek for the following orders-
  - i. Spent.
  - ii. Spent.
  - iii. That this Honourable Court be pleased to issue orders for stay of implementation of the orders arising out of the ruling of Hon Mayamba delivered on 29/05/2024 in Nairobi Milimani Comm. Suit No. E4585 of 2023 pending hearing and determination of the intended appeal.
  - iv. Spent.



- v. That this Honourable Court be pleased to issue orders for stay of execution of proceedings in Nairobi Milimani Comm. Suit No. E4585 of 2023 pending hearing and determination of the intended appeal.
  - vi. That the Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time against the ruling of Hon Mayamba delivered on 29/05/2024 in Nairobi Milimani Comm. Suit No. E4585 of 2023.
  - vii. That the costs of this motion be in the intended appeal.
2. The Application is premised on the grounds on its face thereof and supported by an affidavit sworn by the Rachel Muthoni Njagi dated 02/08/2024. The gist of her disposition is that being aggrieved by the ruling of the lower Court in Nairobi Milimani Comm. Suit No. E4585 of 2023 (the lower Court Suit) delivered on 29/05/2024, the Applicants intend to appeal the said decision however the time within which to lodge an appeal has lapsed necessitating leave adding that delay in filing the appeal was occasioned by the fact that the Applicants being a trust is run by trustees and it took a while to convene a meeting of the trustees to decide the way forward after the delivery of the impugned ruling.
  3. Further the Applicants depose that the lower court case is scheduled for pretrial directions, after which the suit will proceed to hearing as is and if the application is not allowed the intended appeal will render it nugatory. It further stated that the Applicants are ready to offer security as the court may determine.
  4. Harrison Munala Amahati (the 1st Respondent) opposes the motion by way of a replying affidavit dated 04/10/2024. He assails the motion as being an afterthought and that the Applicants have not demonstrated that they have an arguable appeal that raises triable issues with a high chance of success; that the they have failed to demonstrate the delay that came about the convening of the trustee meeting, as such, the assertion remains unproven and a mere excuse.
  5. The 1<sup>st</sup> Respondent further states that the suit before the lower Court being one premised on medical negligence, he stands to be prejudiced therefore it is only fair that he be allowed to prosecute the lower Court suit to finality.
  6. Dr. Hudson A. Lodenyo through counsel intimated that he would not be opposing the motion.
  7. The motion was orally canvassed. That said, the Court has considered the respective parties' oral submissions alongside their rival affidavit material, and has flagged issues for determination thus;
    - a. Whether the Court ought to grant leave to the Applicant to lodge an appeal out of time?
    - b. Whether the Court ought to grant an order of stay of implementation of the lower Court orders issued on 29/05/2024 and/or stay proceedings of the lower Court suit pending hearing and determination of the Applicant's intended appeal?
    - c. Who ought to bear the costs of the motion?
  8. The Court proposes to first address the question of stay of implementation of the lower Court orders issued on 29/05/2024 and or stay proceedings of the lower Court suit pending hearing and determination of the Applicant's intended appeal.
  9. In presenting the instant motion, the Applicants have relied on among other provision Section 3A of the [CPA](#) which specifically reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court", which was judiciously



addressed by the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR and requires no restatement.

- “(2) No order for stay of execution shall be made under subrule (1) unless—
- a. the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
  - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

10. What is before the Court is a miscellaneous application that jointly seeks the relief of stay of proceedings pending hearing and determination of an intended appeal and leave to file an appeal out of time. Indubitably, no appeal has been filed as at writing of this ruling, save for what the Applicant has evinced by way of draft memorandum of appeal (Annexure RMN-2).
11. Order 42 Rule 1 of the *CPR* provides that an appeal to the High Court shall be in the form of a memorandum of appeal. A draft memorandum of appeal does not confirm with the above provision.
12. If the Applicants desired to seek an order to stay proceedings alongside leave to file an appeal out of time, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application.
13. In my considered view, the words that “an appeal may be admitted out of time” in Section 79G equally relied on by the Applicants, appears to admit both retrospective and prospective applications. So that leave under Section 79G may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks stay of proceedings pending an intended appeal in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance.

#### **Whether the Court ought to enlarge the time within which the Applicants may file its appeal?**

14. The power of the Court to enlarge the time for filing an appeal out of time is expressly donated by Section 79G, as well as Section 95 of the *CPA*. It is trite that for leave to be granted, an Applicant is obligated to sufficiently explain to the satisfaction of the Court the cause of the delay. In *Thuita Mwangi v Kenya Airways* [2003] eKLR the Court reiterated the rendition 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.”

See also: - *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR.

15. The Applicants have explained the circumstances that led to delay in filing of the intended appeal within time in the supporting affidavit; that the Applicants being a trust run by trustees it took a while to convene a meeting of the trustees to decide the way forward after the delivery of the impugned ruling. The 1st Respondent has assailed the explanation by arguing that the Applicants have failed to evince



or demonstrate the delay that came about the convening of the trustee meeting, as such, the assertion remains unproven and a mere excuse.

16. The impugned ruling was delivered on 29/05/2024, the Applicant first moved this Court vide its motion on or about 12/06/2024 which was within the thirty (30) day limitation period within which to file an appeal however, rather than lodge the intended appeal the Applicants moved the Court for orders of stay of proceedings pending hearing and determination of an intended appeal, that could have been lodged within time. Later, with leave of the Court, the Applicants amended their initial motion dated 12/06/2024 on 02/08/2024 by including the prayer that is presently for determination.
17. The approach taken by the Applicants given that they moved the Court promptly within the statutory time, but failed to file the appeal, in the courts view is either omission or commission as no explanation was offered for the anomaly.
18. It is settled that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party seeking extension of time must not be seen to presume on the Court's discretion. Here, the Court is at a loss why the Applicants did not just lodge an appeal on 12/06/2024 before the lapse of the statutory period within which to file an appeal on 29/06/2024 but rather opted on 02/08/2024 to amend their motion and then seek leave within which to lodge an appeal out of time. Suffice to say, that the intention by the Applicants is well demonstrated by the Applicants filing of the initial application within the statutory period allowed at Section 79G of the Civil Procedure Act.
19. The Court of Appeal in Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others [2019] eKLR addressed itself on the question of delay as follows; -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....”
20. A motion of this nature principally stands or falls on the demonstration of “good and sufficient cause” by an applicant; it is what unlocks this Court's discretion. The Court agrees with the 1<sup>st</sup> Respondent that the Applicants have not demonstrated “good and sufficient cause” and granting the prayer sought might only work prejudice against the Respondents. While the Court is alive to the exhortation in Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited [2020] eKLR concerning the importance of a party's right of appeal, the right is not absolute and must be balanced against the Respondent's corresponding right to have the dispute determined expeditiously.
21. The ruling sought to be appealed is dated 29/05/2024. The trial court allowed the Respondents' motion dated 15/10/2023 wherein they had sought leave to file a medical negligence claim against the Respondent Hospital and its doctors. The Applicant Hospital being dissatisfied moved the court in the instant Misc. Application for leave to file appeal out of time as well as an order to stay proceedings pending hearing and determination of the intended appeal.
22. Upon careful consideration of the learned affidavit material and submissions and the cited superior courts decisions, the court finds the prejudice that may be suffered by the Respondents against the Applicants loss and suffering that a denial of the orders sought by the Applicants may be compensated by an award of costs. The period of delay of less than a month is not too unreasonable as to prejudice the Respondents interests in the suit. Further, the court finds no rational to allow the trial court case to proceed for trial, and determined then the decision being appealed against, is a matter of law based under Limitation of Actions Act, when the issue could be clearly determined at the appeal level. It is a



matter that could have clearly been determined as preliminary Objection before the trial court but was taken in the motion that resulted with the ruling of the trial court, and subject of the intended appeal.

23. That said, this court's opinion allowing the Applicants motion would save courts limited time and resources as to avoid the matter being heard twice in the lower court and at appeal level as ably held in *Re Global Tours& Travel case (supra)* , and *Raymond Rutto & 5 others v. Stephen Kibowen* (2021) eKLR, as well as in the case of *Patrick Khaemba v TSC (supra)*, there is no set time of delay in law. What is required is a satisfactory explanation to the court, which would unlock its flow of discretion in favour of the applicant.
24. For the foregoing the court is persuaded to allow the Applicants Amended application dated 02/08/2024, and proceed to issue the following orders;--
  - a. The Memorandum of Appeal shall be filed and exchanged within 7 days of this ruling, and the Record of Appeal to be filed within 45 days.
  - b. An order of stay of implementation of the trial court's ruling dated 29/05/2024 is hereby issued; and
  - c. An order of stay of the trial court proceedings pending hearing and determination of the appeal is hereby granted.
  - d. Costs of the application shall be borne by the Applicants to the 1<sup>st</sup> Respondent.

Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY, 2025**

**JANET MULWA.**

**JUDGE**

