



**Katana & another (Both Suing as the Administrators and Legal Representatives  
of the Estate of Asha Kibibi Katana - Deceased) v Kiarie (Civil Appeal  
E038 of 2024) [2025] KEHC 12350 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12350 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E038 OF 2024  
F WANGARI, J  
JULY 31, 2025**

**BETWEEN**

**SEIF JUMAPILI KATANA ..... 1<sup>ST</sup> APPELLANT**

**REHEMA KATANA NGOMBO ..... 2<sup>ND</sup> APPELLANT**

**BOTH SUING AS THE ADMINISTRATORS AND LEGAL REPRESENTATIVES  
OF THE ESTATE OF ASHA KIBIBI KATANA - DECEASED**

**AND**

**STEPHENE KIARIE ..... RESPONDENT**

**RULING**

1. The Appellants filed a Memorandum of Appeal dated 19/02/2024 and filed on 20/02/2024 having been dissatisfied with the Judgment of the court Kwale RMCC No. E017 of 2021 which was delivered on 19/01/2024.
2. The Respondent filed a Notice of Preliminary Objection dated 28/03/2024 on grounds that the time for filing the appeal lapsed rendering the appeal unsustainable under Section 79 of the *Civil Procedure Act*. The appeal was time barred and no leave of the court was sought. That it therefore ought to be dismissed with costs to the Appellant forthwith.
3. The Appellants filed a Notice of Motion application dated 30/01/2025 pursuant to Order 50 Rule 6 and Order 42 Rule 1 of the Civil Procedure Rules, and Sections 79G and 1A, 1B and 3A of the *Civil Procedure Act*. The Appellants seek for orders that this court be pleased to issue orders excluding the period between the date of Judgment (19/01/2024) and its certification on 02/04/2024 from computation of time, and deem the appeal to have been filed within 30 days statutory period.



4. That this court be pleased to grant orders for extension of time for the appeal to be filed out of time and subsequently admit the Memorandum of Appeal herein and that it be deemed to be filed within the statutory time limit, and that costs be provided for.
5. The application was based on grounds on its face and the Supporting Affidavit sworn on 30/01/2025 by Seif Jumapili Katana. It was deponed that at the time of delivery of the judgment, filing of pleadings was still physical and/or through email as the online filing system had not yet been introduced in Kwale Law Court.
6. The Applicants through their advocates repeatedly requested for a copy of the Judgment in person and via phone calls to Kwale Court Station but they were informed that it had not been sent, as the presiding Magistrate Hon. Kiongo had been transferred to Milimani Commercial Courts.
7. Subsequently with the 30 days for filing an appeal nearly lapsing, the Applicants proceeded to draft and hold the Memorandum of Appeal dated 19/02/2024. That however, on the said date, the Applicants experienced a system challenge where the case tracking system was slow and the invoice was generated the following day on 20/02/2024 in the evening.
8. Further stated that ultimately, a certified copy of the judgment was availed to them through email on 02/04/2024, more than 2 months after the 30 days period of filing an appeal had lapsed. That the delay in filing the appeal was not intentional but due to failure to access a copy of the judgment on time to prepare the grounds of appeal, and challenges by the CTS in filing the appeal on 19/02/2024.
9. That the delay was not inordinate the appeal having been filed one day after lapse of the 30 days. That the intended appeal and/or memorandum of appeal raise serious issues with overwhelming chances of success and that the Respondents will not be prejudiced in any way as they will have a chance to respond. The Applicants therefore prayed that the orders are granted.
10. The Respondent also filed a Replying Affidavit dated 12/05/2025 that judgment in the initial suit, Kwale MCCC No. E017 of 2021, came up on 19<sup>th</sup> January 2024, it was read out in open court where both advocates on record were present, and that the Applicants had 30 days to file the Memorandum of Appeal.
11. That the Appellants have not provided any evidence to show when they applied for a copy of the judgment. That the Applicant filed the Memorandum of Appeal before they got a copy of the judgment and that they cannot therefore use that reason to convince this court to grant them the orders they seek. That the Applicants also claimed that the Judiciary CTS was slow but no evidence has been given to this court to prove that, and there was no letter to the Executive Officer complaining of any system downtime.
12. The Respondent further deponed that the application herein was filed nearly one year after the Applicants filed their Memorandum of Appeal out of time. That the Respondent's advocates on record received a copy of the Memorandum of Appeal on 04/03/2024 under protest and indicated that the same was time barred.
13. That however, the Applicants did not take the necessary steps to correct the position. The Respondent stated that the application lacks merit and should be dismissed with costs, and that the Preliminary Objection dated 28<sup>th</sup> March 2024 should be allowed.
14. It was directed that the Notice of Motion and the Notice of Preliminary Objection be canvassed by way of written submissions. Both parties complied by filing their rival submissions.



## Submissions

15. The Applicants in their submissions dated 15/04/2025 argued on whether the appeal was filed within stipulated time that it is evident under Section 79G of the Civil Procedure Act that in computing time, the period excluded is that which the lower court may certify as having been requisite for preparation and delivery to the Appellants a copy of the decree or order.
16. On whether there was sufficient cause, the Applicants stated that the cause for delay were circumstances beyond their control. They relied on the case of Kiambu HCCA No. E196 of 2022, Re Estate of Wanjiru Mbogo (Deceased) (Civil Appeal E196 of 2022) [2023] KEHC 22743 (KLR).
17. On whether there was delay and whether it was inordinate, the Applicants urged the court to be guided by the case of Siaya E024 of 2021, STECOL Corporation Limited v Susan Awuor Mudemb (2021) eKLR, and that one-day delay in filing the Memorandum of Appeal was not inordinate.
18. On whether the Appeal has high chances of success, the Applicants submitted that ground in the Memorandum of Appeal raise triable issues with overwhelming chances of success. That the Applicants should therefore be allowed to canvass the appeal and have final determination of the issues. The Applicants pointed out that the Respondent will not be prejudiced if the application is allowed, and they placed reliance on Mombasa Court of Appeal Case No. 71 of 2016, Charles Karanja Kiiru v Charles Githinji Muigwa (2017) eKLR.
19. The Respondent filed his submissions dated 13/05/2025 and contended that the Applicant has not complied with Order 42 Rule 6 (2) of the Civil Procedure Rules, which requires that the application must be made without unreasonable delay.
20. That the Supreme Court in the case of Naomi Wangeci Gitonga & 3 Others v Independent Electoral & Boundaries Commission and 17 Others (2018) eKLR set out the guiding principles on extension of time which were also expressed in the case of Nicholas Kiptoo Arap Salat v Independent Electoral & Boundaries Commission & 7 Others (2004) eKLR. The Respondent submitted that there was no reason advanced to this court why a Memorandum of Appeal was not filed on time.
21. On whether the Appellants have an appeal with chances of success, the Respondent submitted that the Applicant in this matter is an uncle to the deceased and that the awards under the Fatal Accidents Act are for the benefit of wife, husband, parent or child.
22. That during trial, the Appellants confirmed that the only dependant particularized in the Amended Plaint dated 28/10/2022 was one Katana Ngombo, father to the deceased who also passed on and there was no other dependant. That the Applicant therefore has no basis to claim under the Fatal Accidents Act.

## Analysis

23. I have considered the Notice of Preliminary Objection, the application, supporting affidavit, and the submissions by the parties. The issues for determination are: -
  - a. Whether the appeal is time barred and ought not be allowed
  - b. Who should bear costs
24. First, the parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal



in the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696. At page 700, Law, JA stated: -

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701, Sir Charles Newbold, P added: -

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

25. For a Preliminary Objection to succeed the following tests ought to be satisfied; Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit or application.
26. The issue of time limitation is an issue of law. The jurisdiction to extend time for filing appeal is set out under Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the *Civil Procedure Act* provides as follows;

“ 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 satisfies the court that he had good and sufficient cause for not filing the appeal in time”

27. This Court’s discretion in enlarging appellate time has also been set out in a number of judicial authorities. In the case of Mombasa County Government v Kenya Ferry Services & Anor (2019) eKLR, at paragraph 25, the Supreme Court held that;
25. Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. extension of time is not a right of a 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 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 on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied]

28. Further, In the case relied of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, the court set out the conditions for grant of extension of time to be premises on the following:

- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.

29. It is not in dispute that the Memorandum of Appeal was filed one day after the lapse of time of filing the appeal. The same was filed without leave of court. It was stated that the one day delay was due to challenges of getting a copy of Judgment from Kwale Court, and the challenges faced in the e-filing platform. The explanation given is excusable as 3<sup>rd</sup> parties are involved and may not have been within the full control of the Appellants.

30. The above notwithstanding, leave of the court ought to have been sought to have the Memorandum of Appeal be admitted out of time. The Respondent filed the Notice of Preliminary Objection dated 28/03/2024. The same was served upon the Applicants.

31. It is not until 30/01/2025 when the Appellant filed the application seeking to have the Memorandum of Appeal be admitted out of time. That is 10 months after the P.O was filed, and over one year after the Memorandum of Appeal subject to this ruling was filed.

32. Despite the appeal having been filed out of time, it was business as usual for the Appellants that even after the Respondent filed the P.O, no action was taken by the Appellant.

33. In *Nairobi Bottlers Limited vs Ndungu & Another* [2023] KESC 96 (KLR), the court declined to accede to the request to deem the appeal which had been filed out of time as properly filed for the same would amount to sanctioning an illegality. That an order of extension or enlargement of time ought to have been sought prior to the filing of the record of appeal and which order can only be granted where there is a plausible reason for the delay.



34. The appeal having been filed out of time without leave and is for striking out. In exercise of the court's discretion, I see no reason to deprive the Respondent of costs which I so award.

**Determination**

35. Having found as above, the following orders flow therefrom: -

- a. The Preliminary Objection dated 28/03/2024 has merits this appeal is hereby struck out.
- b. The Notice of Motion dated 30/01/2024 lacks merits and the same is dismissed.
- c. Costs awarded to the Respondent.
- d. File is deemed as closed.

Orders accordingly.

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

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**F. WANGARI**

**JUDGE**

In the presence of:

Ms. Otuya Advocate for the Applicants

Ms. Njoki Advocate for the Respondent

Ms. Norah, Court Assistant

