

Case ID: [2026] KEHC 128 (KLR) Copy

Title: Dubat & another v Omar & 5 others [2026] KEHC 128 (KLR) Copy

Court: High Court

Judges: JN Onyiego

Date: 19 January 2026

Parties: Dubat & another v Omar & 5 others [2026] KEHC 128 (KLR) Copy

---- JUDGMENT TEXT ----

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISC. CIVIL APPLICATION NO. E017 OF 2025

ADEN FARAH DUBAT.....APPLICANT

VERSUS

MOHAMED SHUEB OMAR.....1ST RESPONDENT

ABDI SHEIK ABDULLAHI.....2ND RESPONDENT

MOHAMED ABDI YARE.....3RD RESPONDENT

RULING

Vide a notice of motion dated 30th October 2025, the applicant herein moved this court pursuant to sections 1A,3A and 95 of the Civil Procedure Act seeking court's leave to enlarge time for purposes of instituting an appeal out of time. The application is anchored on the particulars set out on the face of it and averments contained in the affidavit in support sworn by C.P.Onono counsel for the applicant.

It is the applicant's case that the impugned judgment being Garissa CM's court civil case number 29 of 2020 together with two other related files arising from the same accident was delivered on 17-12-2024. That after delivery of the said judgments, the trial court did not release copies of the judgments nor their files immediately. That the court kept the three files on grounds that it was to amend and correct a few mistakes and errors but failed to release them until May 2024 when he located the files in respect of CMCC NO.30 OF 2020 and CMCC NO.28 of 2020 in the registry by which time the appeal had lapsed. That every effort to have a copy of the judgment in the impugned judgment were fruitless until 14-10-2025 hence this application.

It was deposed that the delay in filing the appeal in time was not deliberate and that it was occasioned by the trial court which withheld the relevant files from the registry.

In response, the respondents opposed the application vide a replying affidavit sworn 2-12-2025 arguing that; there was no justification for the delay; the delay is unreasonable; the appeal is not arguable and has no chances of success and; that the affidavit in support of the application is sworn by counsel instead of the applicant.

I have considered the application herein, response thereof and oral submissions by both counsel. The only issue for determination is whether the applicant has met the threshold for grant of leave for extension of time.

Under Section 79G of the Civil Procedure Act, time for filing an appeal from a judgment of the subordinate court to the High Court is 30 days. The same provides that:

79G. Time for filing appeals from subordinate courts

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.

Further, Section 95 of the civil procedure Act goes further to state that;

"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

When an application for extension of time is before a court, the court ought to take into account several factors as was observed by the court in the case of *Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. 255 of 1997 UR* where it was stated that:

"It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are:

First, the length of the delay.

Secondly, the reason for the delay;

Thirdly possibly the chances of the appeal succeeding if the application is granted; and

Fourthly the degree of prejudice to the respondent if the application is granted."

Similarly, drawing from comparative jurisprudence on the matter of enlargement of time pending appeal, the Supreme Court of South Africa in the case of *S vs Smith [2012] 1SACR 567* elaborated the test to be applied on applications for leave to appeal in the following manner:

"What the rest of reasonable prospect of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore the applicant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding, more is required to be established than there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, a rational basis for the conclusion that there are prospects of success on appeal".

As such, extension of time within which to appeal 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.

The question therefore is whether the applicant has met the above conditions.

As for the length of the delay, it is not in dispute that the impugned judgement was delivered on 17.12.2024 and the application herein filed on 20.11.2025 which is roughly one year and one month

from the date of the said judgment. In the case of Jaber Mohsen Ali & Another vs Priscilla Boit & Another E & L No. 200 of 2012 {2014} eKLR the Court stated that what is unreasonable delay is dependent on the circumstances of each case. Even one day after Judgment/Ruling could be unreasonable delay depending on the Judgment/Ruling of the Court and any order given thereafter.

The applicant submitted that upon delivery of the judgment they requested for a copy of judgment and proceedings but in vain till October 2025. According to Mr. Onono counsel for the applicant, the magistrate did not release the court file nor copy of judgment upon delivery. Unfortunately, there is nothing on record to show that the applicant did apply for a copy of the proceedings or judgment.

There is no proof of delay in releasing the file nor judgment by the trial court. As it is now, the blame on the court is not established as no court in my opinion can retain a judgment it has delivered for over one year. No effort was made even in writing to request for supply of proceedings or judgment.

Besides, the applicant did not even bother to file a notice of appeal to express his intention to appeal. Since the applicant is seeking an equitable remedy, he must satisfy the court he is deserving the orders and that equity does not come to the aid of the indolent. In my opinion, the application is an afterthought.

The right to be heard is not only constitutionally entrenched but it is also the corner stone of the Rule of law; a valued right; and is so basic that a decision which is arrived at in violation of it will be a nullity, 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. [See Article 50 of the constitution].

In the same breadth, Article 159 (2) (d) of the 2010 Constitution of Kenya mandates this court to administer substantive justice without undue regard to procedural technicalities. In my view and in the interest of justice, the reasons for the delay of close to one year is not justified nor reasonable. The reasons advanced for the delay cannot by all means be supported. Accordingly, it is my finding that the delay is unreasonable and unsupported. In the absence of persuasive reasons for the delay, this court cannot exercise its discretion in favour of the applicant.

As for the chances of the intended appeal succeeding, I have perused the draft memorandum of appeal herein without any other court record attached. It is trite that in deciding whether an appeal is arguable or not, the court is bound to consider whether the said intended appeal raises a bona fide issue for determination by the Court. For the intended appeal to be termed as arguable, all that is needed in Law is that there be even one arguable point and that will suffice [See Commissioner of Customs vs Anil Doshi, {2017} eKLR; Joseph Gitahi Gachau & Another vs Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008].

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are:

First, the length of the delay.

Secondly, the reason for the delay;

Thirdly possibly the chances of the appeal succeeding if the application is granted; and

Fourthly the degree of prejudice to the respondent if the application is granted.”

In the absence of the court record, this court cannot independently ascertain whether there is an arguable appeal. In any event, having held that the delay was unreasonable, I do not find merit in the application. Accordingly, the application is dismissed.

Dated, signed and delivered virtually this 15th day of January 2026

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J.N.ONYEGO

JUDGE