



**Ibrahim v Mutava & another (Environment and Land Miscellaneous Application  
E033 of 2024) [2025] KEELC 2894 (KLR) (25 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2894 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E033 OF 2024  
NA MATHEKA, J  
MARCH 25, 2025**

**BETWEEN**

**HALIMA IBRAHIM ..... APPLICANT**

**AND**

**JOSEPH MULINGE MUTAVA ..... 1<sup>ST</sup> RESPONDENT**

**MLOLONGO DREAM LAND SETTLEMENT SCHEME ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application is dated 19<sup>th</sup> August 2024 and is brought under Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A and 95 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya seeking the following orders;
  1. That this Application be and is hereby certified urgent and heard ex-parte on priority basis in view of its urgent nature and service of the same be dispensed with in the first instance.
  2. That this Honourable Court be pleased to stay execution of the Decree in Mavoko MCELC No. E830 of 2021 pending the hearing and determination of this Application.
  3. That this Honourable Court be pleased to enlarge time and grant leave to the Applicant to lodge an Appeal out of time against the entire Judgment and Decree in Mavoko ELC Suit No. E830 of 2021 delivered on the 27<sup>th</sup> day of June, 2024 by Hon. E.K. Suter (Principal Magistrate).
  4. That this Honourable Court be pleased to stay execution of the Decree in Mavoko MCELC No. E830 of 2021 pending the hearing and determination of the intended Appeal.
  5. That the annexed draft Memorandum of Appeal be deemed as duly filed upon payment of the requisite court fees.



6. That the Application be heard inter partes on such date and time as this Honourable Court may direct.
  7. That this Honourable Court do make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.
  8. That the costs of this Application be in the cause.
2. It is based on the grounds that Judgment in Mavoko ELC Suit No. E830 of 2021 was delivered on the 27<sup>th</sup> of June, 2024 in which the learned trial Magistrate Hon. E. K. Suter made a finding that the 1<sup>st</sup> Respondent had proved root of title and that he was entitled to an order of permanent injunction as against the Applicant. That following the delivery of the said Judgment the Applicant's Advocates on record requested to be furnished with certified copy of typed proceedings as well as the certified copy of the Judgment and there was a delay in procuring the same and during which period the period to lodge an Appeal lapsed. That further delay was occasioned by the unavailability of a copy of the Judgment of the court to enable the Applicant to make an informed decision on the Judgment. That the Applicant has an arguable Appeal which has a high chances of success. That in view of the foregoing, the Applicant is apprehensive that unless this Honourable Court intervenes and grants the orders sought then she runs the risk of eviction and being turned away from the seat of justice. That the Applicant risks suffering substantial loss if such leave to Appeal and stay of execution are not granted as prayed. That the Applicant is ready and willing to abide by any conditions that the court may set as regards the issue of stay of execution. That unless this Application is certified urgent and heard immediately and the orders sought herein granted, the intended Appeal will be rendered nugatory thereby exposing the Applicant to substantial loss and damage.
3. This court has considered the application and submissions therein. 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 that:
- “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.”
4. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & Others vs Wanjiru & Another* (1970) EA 482 the court stated as follows;
- “Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”



5. The Court of Appeal in the above case guided that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in *Edith Gichungu Koine vs Stephen Njagi Thoithi* (2014) eKLR thus;

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

6. The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court. In *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* (2013) eKLR the court held as follows;

- (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 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 on a case to case basis.
- (4) Whether there is 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 of the extension is granted.
- (6) Whether the application has been brought without undue delay; and
- (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

7. I have given due consideration of the record in light of the pleadings, submissions, and principles that guide the court. The reason given for the delay in filing the appeal is that on 27<sup>th</sup> June 2024, the Trial Court delivered Judgment in the suit herein in which the Applicant was dissatisfied. The applicant states that they applied for copies of the typed proceedings and the judgement which delayed. This application was filed on 19<sup>th</sup> August 2024. The draft Memorandum of Appeal states inter alia that the trial magistrate erred in fact and law by failing to evaluate all the material evidence hence arrived at the wrong conclusion. I find that the Applicant has an arguable appeal. I also find that the applicant is not guilty of inordinate delay. I find this application is merited and I grant prayer 3 and 5 only with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF MARCH 2025.**

**N.A. MATHEKA**

**JUDGE**

