



REPUBLIC OF KENYA



**KENYA LAW**  
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**John & another v Adawo (Environment and Land Miscellaneous Case E004 of 2022) [2025] KEELC 5297 (KLR) (17 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 5297 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND MISCELLANEOUS CASE E004 OF 2022**

**MN KULLOW, J**

**MARCH 17, 2025**

**BETWEEN**

**PHILIP ACHIENG JOHN ..... 1<sup>ST</sup> PLAINTIFF**

**GORDON ACHIENG ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ELIUD KWAGWARA ADAWO ..... DEFENDANT**

**RULING**

1. By a Notice of Mention dated 15/3/2022 the Applicant sought for orders:-
  - i. Spent
  - ii. That these are interim stay of execution of the Judgement and because of the subordinate court in *Migori ELC No. 82 of 2018* delivered on 4/3/2020.
  - iii. That the honourable court be pleased to enlarge time to the proposed Applicants and upon time being enlarged the proposed Applicant be allowed to file appeal out of time. And
  - iv. That the cost of the Application be provided for.
2. The Application was supported by Affidavit of Philip Achieng John the proposed Appellant who deponed that on 4/3/2020 the trial court had entered Judgement in favour of the Respondent and that he is aggrieved of the said Judgement. He had instructed an advocated to reply the said Appeal but the same was not filed and that the mistake to file the appeal on time was not of his own making a fact he learned when he visited the court requesting to check on the status of the appeal.
3. The Applicant contended that by the time he realised this mistake by his advocate, the 30 days window allowed by the court had lapsed.



4. The Application was opposed by the Respondent by way of grounds of opposition filed on 6/6/2022 in which the Respondent contended that the Application was Pre-mature, misconceived and otherwise and abuse of the process of the court.
5. The Respondent further contended that the Application does not satisfy the conditions set out under order 42 Rule 6 of the Civil Procedure. Rules to the extent that the Applicant had not shown or established any evidence of substantial loss and further that the Application has been overtaken by events and lastly that the Application was filed 2 years after the Judgement was rendered and no explanation for the delay was given.
6. The Application was deponed by way of Written Submissions. In his submissions he reiterated that he had instructed his advocate to file an appeal on his behalf. However, at the Registry he found that the said Appeal was not filed and he thus prays that the mistake of his advocate should not be visited on him.
7. The Applicant contends that he rushed to court and applied for a copy of the Judgement and Proceedings and filed the instant Application and thus pray the court to exercise its discretion in allowing the application.
8. The Respondent in response to the Submission the Applicant filed his Submissions and he contested that the Application has not sufficiently satisfied the requirement under order 42 Rule 6 of the Civil Procedure Rules. He stated that the Applicant has not shown that substitutional loss may result if the Application is not granted, that the Application was made after a long period of time.
9. The Respondent further countered that the Applicant has since the Judgement vacated the suit land.
10. I have considered the Application, the grounds opposition to the same and the submissions filed by the parties. This is an Application in which the Applicant is inviting the court to exercise its discretion. He states that the delay in filing the Application was occasioned by not his own mistake but by an advocate who he had instructed. He has reiterated on several occasions that a party should not be punished to the mistake of his advocate.
11. The Respondent on the other hand states that the Application was filed long after the Judgement was delivered and that the Applicant has not satisfied the conditions of the orders sought.
12. The burden of offering sufficient explanation for delay was both stated in the case of Susan Oloo – 2 Others v Doris Odindo Omollo (2019) eKLR where the court held that;

In the instant Application which is founded on Rule 4 of the Court Rules, the single Judge has discretion with which it he must exercise judiciously.”

In the case the Applicant has stated that the delay was occasioned by his advocate and hence he should not be blamed for the same. Which the court assures him and, in the circumstances, and having considered the Application, I find as follows:

- i. That an order of stay of execution is hereby issued in the Judgment of the case in *Migori MISC ELC NO. 82 of 2028*.
- ii. That leave is hereby granted to the Applicant to file his Appeal out of time on conditions that he files the Memorandum of Appeal within 14 days of the date of his order and that be prosecuted within 90 days.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH, 2025**



**MOHAMMED N. KULLOW**

**JUDGE**

In the presence of:

Vincent Court Assistant

No appearance For the Plaintiff

No appearance for the Defendant

