



Kilungu & another v Kivila & 3 others (Environment and Land Miscellaneous Application E015 of 2025) [2025] KEELC 3477 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3477 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E015 OF 2025
NA MATHEKA, J
APRIL 30, 2025

BETWEEN

FRANK NDONYE KILUNGU 1ST APPLICANT

JAMES MAKAU KILUNGU 2ND APPLICANT

AND

HENRY KILUNGU KIVILA 1ST RESPONDENT

COSMAS MULWA KILUNGU 2ND RESPONDENT

KONZA RANCHING & COMPANY SOCIETY 3RD RESPONDENT

JAPHETH MUTUA MUSANGI 4TH RESPONDENT

RULING

1. The application is dated 27th November 2024 and brought under Section 79G and 95 of the [Civil Procedure Act](#) Cap 21 the Laws of Kenya, Order 50 Rule 5, Order 42 Rule 6 and Order 22 Rule 22 of the [Civil Procedure Rules 2010](#) seeking the following orders;
 1. That the Application herein be certified as urgent and service in the first instance be dispensed with.
 2. That this Honourable Court be pleased to extend the time within which the Applicants can file and serve the Memorandum of Appeal and all other appeal documents from the Judgment of the Cooperative Tribunal Court at Nairobi delivered and/or made on the 3rd of October, 2024 in Tribunal Case No. 264 of 2014- *Frank Ndonge Kilungu & James Makau Kilungu v Henry Kilungu Kivila, Cosmas Mulwa Kilungu, Konza Ranching & Co. Society & Japheth Mutua Musangi*.
 3. That costs of this Application be provided for.



2. It is premised on the grounds that the Judgment on this matter was delivered on 3rd October, 2024. The period provided for in law has since lapsed. That upon delivery of the Judgment, the Applicants' Advocates on record made several attempts to contact the Applicants to communicate the outcome of the case and seek further instructions. That despite numerous effects, the Applicants could not be reached within the statutory period of filing the appeal, on account of a technological change on part of the Applicants. That the delay in communication and obtaining instructions from the Applicants persisted until after the statutory period of filing the appeal had lapsed. That eventually, the 1st Applicant contacted the advocates on record and expressed their dissatisfaction within the Judgment and gave instructions to lodge an appeal against the said Judgment. That the delay in filing the appeal was solely occasioned by the inability to promptly receive instructions from the Applicants and was not deliberate or intended to prejudice the Respondents. That the Applicants' intended Appeal raises substantial, arguable issues of law and fact and has overwhelming prospects of success, as more specifically set out in the draft Notice of Appeal annexed to the Affidavit in support of this Notice of Motion.
3. The Respondents submitted that the excuse for the delay is not acceptable. that the case had taken ten years in the tribunal. That there was a similar case in Machakos ELC No. 428 of 2015 and the claimants had lost the case. That the appeal has no chances of success.
4. 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.”

5. 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 town. 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.”

6. 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.”

7 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.”

8. 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 was delivered on 3rd October, 2024, the Tribunal delivered Judgment in the suit herein. The Applicant states that upon delivery of the Judgment, the Applicants’ Advocates on record made several attempts to contact the Applicants to communicate the outcome of the case and seek further instructions. That the Applicants could not be traced within the statutory period of filing the appeal, on account of a technological change on part of the Applicants. That eventually, the 1st Applicant contacted the advocates on record and expressed their dissatisfaction within the Judgment and gave instructions to lodge an appeal against the said Judgment. The Applicant has annexed the correspondence and a draft Memorandum of Appeal. I find that this application was filed on 29th January 2025. I find that the Applicant does 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 it on condition that the appeal is filed and served within the next 30 days. There will be no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF APRIL 2025.

N.A. MATHEKA

JUDGE

