



**Mulei v Mwanja (Environment & Land Miscellaneous Case  
E054 of 2024) [2025] KEELC 3196 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3196 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND MISCELLANEOUS CASE E054 OF 2024**

**AY KOROSS, J**

**APRIL 8, 2025**

**BETWEEN**

**NGINA JANE MULEI ..... APPLICANT**

**AND**

**PRISCILAR NTHAMBI MWANIA ..... RESPONDENT**

**RULING**

**Applicant's case**

1. This ruling seeks to determine the notice of motion dated 2/12/2024 that has been filed by the applicant whereby she seeks the following reliefs from this court: -
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. The honourable court be pleased to grant the applicant leave to file her intended appeal out of time.
  - e. The honourable court be pleased to issue any other or further orders that it deems fit in the circumstances of this case.
  - f. Costs of the motion be in the course.
2. The motion is supported by the grounds set out on the body thereof and the supporting affidavit sworn by the applicant Ngina Jane Mulei on the instant date.



3. In a brief summation of the grounds and depositions, it is her position that though she entered an appearance and filed a defence in the lower court, she was never served with a hearing notice and was not privy that a judgment had been entered against her on 23/08/2023.
4. She argued sometimes on 10/06/2024, she became aware of a Notice to Show Cause (NTSC) when she was telephoned from cellphone no. 0700\*\*\*\*\* informing her that the NTSC would be served upon her but that was not to be.
5. She contended on an undisclosed date, she perused the court file and established the outcome of the judgment and at that time, the period to appeal had expired. She stated her intended appeal had a high chance of success.
6. She also filed a further affidavit which she deposed on 24/01/2025 without leave of the court and as a result, it is hereby expunged from the record.

### **Respondent's case**

7. By the law firm of M/s. Priscillar Kioko & Associates, the respondent opposed the motion by filing a replying affidavit which she deposed on 16/12/2024.
8. Unfortunately, this affidavit addressed matters of evidence that were before the trial court and in this court's view, the respondent should have restricted herself to matters at hand.
9. On the prayer for an extension of time, she asserted a hearing notice was duly served through the applicant's email which had been provided in the memorandum of appearance but she was silent on the issue of service of a judgment notice.
10. As to the allegation that the NTSC was never served upon the applicant, she availed an affidavit of service which showed the applicant was duly served via WhatsApp media on her cellphone no. 0768XXXXXX.
11. She argued the applicant has not tendered good and sufficient cause why time should be extended and that the applicant was hellbent on misleading the court on the issue of non-service. According to her, she would be highly prejudiced if the motion was allowed.
12. Just like the applicant, the respondent similarly filed a supplementary affidavit deposed on 29/01/2025 without leave and it has to suffer a similar fate as the applicant's further affidavit; it is expunged from the record.

### **Parties' submissions**

13. As directed by the court, both parties' counsels filed written submissions. The applicant's law firm on record Ms. C. M Maweu Advocates filed written submissions dated 24/01/2025.
14. In them, counsel recognizes the following issues as arising for determination; the threshold for grant of stay pending appeal and leave to file appeal out of time.
15. In response, the respondent's counsel's submissions dated 28/01/2025 identify the following issues as falling for determination; whether the applicant should be granted leave to file the appeal out of time and whether the applicant should be granted a stay pending appeal.
16. It is noted both counsels argued on the spent prayers of stay. This is because it is evident from the face of the motion that the applicant sought reliefs on stay pending hearing and determination of the application inter parties.



17. Therefore, upon identifying and considering the issues for determination, this ruling shall later on in its analysis and determination, consider each of the counsel's arguments on the particular issue and also bear in mind the judicial precedents that they have both relied upon to buttress their respective arguments.

### **Issues for determination.**

18. I have carefully considered the motion, its grounds, affidavits, and parties' rival submissions. In cognition, the following issues arise for determination: -
- a. Whether leave should be granted for the applicant to appeal out of time against the lower court suit.
  - b. What orders should this court issue including an order as to costs?

### **Analysis and Determination**

19. These two issues shall be handled together. Section 79G of the [Civil Procedure Act](#) provides that appeals originating from the lower court should be filed before this court within 30 days from the date of the decree or order appealed against.
20. However, in occasions of delay, parties can by Section 95 of the [Civil Procedure Act](#), move this court to exercise its judicious discretion based on good and sufficient grounds and the court may extend the time as it deems fit even if the time originally fixed has expired. Section 79G of the [Civil Procedure Act](#) states;

“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.”

While Section 95 of the [Civil Procedure Act](#) provides as follows: -

“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.”

21. This court adopts the Court of Appeal's decision in *First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000(2002) 1 EA 65* which summarized some of the tests that guide the court when exercising discretion on whether to enlarge time as follows:

“..... the length of the delay, the explanation if any for the delay, the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is frivolous one which will only result in delay of the course of justice, whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.”

22. In considering the motion, this court has to bear in mind that though it has unfettered discretion, it must exercise its judicious discretion which is anchored on reason, material, and evidence placed before it.



23. Since the circumstances of each case are unique as even a singular day could be tantamount to delay, each case has to be considered on its set of conditions.
24. In addition, this court must also consider its principal objective of facilitating the just, expeditious, proportionate, and accessible resolution of disputes as provided for in Section 3 of the *Environment and Land Court Act*.
25. In considering the principles in First American (Supra) on delay, it is the humble view of this court that the applicant is guilty of delay as the judgment was allegedly rendered on 28/08/2023 and this motion filed on 12/02/2024 a period of close to 1 ½ years.
26. What then were the reasons for the delay and did they meet the threshold of good and sufficient cause? The applicant advances 2 reasons for the delay one being that she was not aware of the judgment.
27. To this court, this is sufficient ground because even though there is proof a hearing notice was served upon her, she did not attend the court during the scheduled hearing date.
28. When the matter was subsequently reserved for judgment by the lower court, it was expected that a judgment notice would be served upon her but that was not so.
29. This leads us to the 2<sup>nd</sup> reason advanced by her which was that she was never served with the NTSC and she only became aware of the judgment of the court when she perused the lower court file.
30. In this court's humble view, the 2 reasons are intertwined since as soon as the applicant became aware of the judgment even though not served with a judgment notice, she was expected to promptly move this court which was not so.
31. From the affidavit of service of 14/06/2024, she was served with the NTSC on the instant date and she has not disputed the cellphone no. that was used to serve her is indeed hers. It suffices she became aware of the judgment on 14/06/2024 yet she filed this motion 6 months thereafter.
32. Hence, it can only be concluded the instant motion is nothing more than an afterthought intended to forestall the warrants of arrest that are against her.
33. Additionally, it would appear that the alleged perusal of the court file by the applicant is nothing more than a smokescreen intended to hoodwink this court as no date of such perusal has been disclosed or a receipt or letter availed demonstrating that undeniably such a perusal took place.
34. This court need not say more, the burden was upon the applicant to demonstrate by way of evidence, plausible and satisfactory reasons for the delay and in the absence, this court concludes, finds, and holds the applicant has not met the ingredients to warrant enlarging the time for her to file an appeal out of time.
35. On issue (b), it is trite law costs follow the event and since the motion is unsuccessful, this court hereby awards costs to the respondent. Thus, it hereby issues the following final disposal orders: -
  - a. The notice of motion filed on 2/12/2024 is hereby dismissed with costs to the respondent.
  - b. This file is hereby effectively marked as closed.

It is so ordered.

**DELIVERED AND DATED AT MACHAKOS THIS 8<sup>TH</sup> DAY OF APRIL, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**



Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Maweu for the applicant.

N/A for respondent.

Ms Kanja Court Assistant.

