



**Gitari v Mbuchi (Environment and Land Appeal E016 of 2021)  
[2025] KEELC 3907 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3907 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL E016 OF 2021**

**JM MUTUNGI, J**

**MAY 22, 2025**

**BETWEEN**

**FRANCIS MBUCHI GITARI ALIAS FRANCIS MURIITHI  
NJERU ..... APPLICANT**

**AND**

**JAMES GITARI MBUCHI ..... RESPONDENT**

**RULING**

1. Before the Court for determination is the Applicant’s Notice of Motion application dated 12<sup>th</sup> July 2024, where the Applicant prays for orders that:
  1. Spent.
  2. The order striking out the Memorandum of Appeal be set aside and the appeal be reinstated.
  3. The Court be pleased to enlarge time within which to comply with the orders of 7<sup>th</sup> May 2024.
2. The application is premised on the grounds set out in the body of the application and in the affidavit sworn by Maina Kagio, the Advocate for the Appellant. Counsel for the Appellant averred that on 7<sup>th</sup> May 2024, the matter was mentioned for directions, and the Applicant was directed to file and serve the Record of Appeal within 30 days failing which the Memorandum of Appeal would stand struck out. The Applicant was also ordered to pay the Respondent “thrownaway” costs for the Notice of Motion application dated 9<sup>th</sup> October 2023 which was compromised. The Advocate deponed that after the Court attendance, the Applicants Office file was inadvertently returned to the Office Registry without being actioned. Counsel deponed that the failure to take action to comply with the Court’s directions was inadvertent and not deliberate and was a mistake on the part of his Office as he had the Applicant’s full instructions to pursue the Appeal to its conclusion on merits. He prayed that the Court exercises discretion to reinstate the Memorandum of Appeal struck out in the interest of Justice.



3. The Respondent opposed the application through a Replying Affidavit sworn on 4<sup>th</sup> October 2024. In this Affidavit, he stated that, in a letter dated 15<sup>th</sup> September 2021, the Deputy Registrar of the Environment and Land Court in Kerugoya requested the Chief Magistrate Court in Kerugoya to forward the necessary documents related to the Appeal. He personally followed up on the typing of the proceedings and the Judgment until its completion. He asserted that the Applicant's inaction prompted him to file the application dated 9<sup>th</sup> October 2023, which was later compromised on 7<sup>th</sup> May 2024. Additionally, he deponed that he filed a Notice of Motion application dated 2<sup>nd</sup> August 2024, in Kerugoya Chief Magistrate Court ELC Case No. E042 of 2021, seeking to discharge the stay orders that were granted pending the hearing and determination of this Appeal.
4. The Respondent further averred that, to date, the Applicant had not complied with the orders issued by this Court on 7<sup>th</sup> May 2024. He contended that the current application is merely an afterthought and that the delay is inexcusable, as the Applicant was given an opportunity to prosecute his Appeal but failed to do so. He contended that granting the orders sought in the application would deprive the Respondent of the benefits of the Judgment delivered by the Lower Court on 18<sup>th</sup> August 2021.
5. On 7<sup>th</sup> October 2024, the Court directed that the application be canvassed through written submissions. The Applicant filed his submissions on 11<sup>th</sup> October 2024, arguing that it would be overly harsh to penalize him for the mistakes made by his Advocate. This mistake he submitted resulted in a delay of only 34 days from the expiration of the initial 30-day period from the time when the Memorandum of Appeal was struck out. The Applicant placed reliance on the case of *Barnabas Maritim v. Manywele Korgoren & Another* (2016) eKLR, where the Court reinstated a suit that had been dismissed for non-prosecution for over five years, emphasizing the importance of ensuring that every litigant has an opportunity to present their case in Court. The Applicant urged the Court to find that his application has merit and, if granted, he would file and serve the Record of Appeal within 30 days.
6. The Respondent in his written submissions dated 6<sup>th</sup> March 2025, submitted that the Applicant was afforded the opportunity to be heard on 7<sup>th</sup> May 2024 as he was allowed to file the Record of Appeal but did not take advantage of it. He argued that the Applicant was now attempting to delay the Administration of Justice through the current application. The Respondent further stated that owing to the Applicant's inaction to prosecute the Appeal he filed a Notice of Motion application dated 2<sup>nd</sup> August 2024 in Kerugoya Chief Magistrate Court ELC Case No. E042 of 2021, seeking to lift the stay orders that were granted pending the hearing and determination of the Appeal. The Respondent in support of his submissions placed reliance on the Case of *Nesco Services Limited v. CM Construction (CEA) Limited* (2021) KLR and the Case of *Njagi Kanyunguti v. David Njeru Njogu* (1997) eKLR.

### **Analysis and Determination.**

7. I have reviewed the Notice of Motion application dated 12<sup>th</sup> July 2024, the Replying Affidavit dated 4<sup>th</sup> October 2024, and the submissions by the parties. The issues for determination are: whether the Court has the jurisdiction to set aside the orders that struck out the Memorandum of Appeal despite the default clause; whether the delay in filing the Record of Appeal is excusable; and whether the Appellant is entitled to the discretionary relief of an extension of time and reinstatement of the Appeal.
8. The brief background of this matter is that the Appellant filed a Memorandum of Appeal on 20<sup>th</sup> August 2021, challenging the Judgment of the Chief Magistrate's Court in ELC Case No. E042 of 2021. Owing to delay in prosecuting the Appeal, the Respondent filed an application dated 9<sup>th</sup> October 2023, seeking dismissal of the Appeal for want of prosecution. This application was compromised on 7<sup>th</sup> May 2024, when the Court issued an order requiring the Appellant to file and serve the Record



of Appeal within thirty days; and failure to do so would result in the automatic striking out of the Appeal. On 10<sup>th</sup> July 2024, the Court confirmed that the Memorandum of Appeal had been struck out. Subsequently, the Appellant filed the instant application dated 12<sup>th</sup> July 2024, seeking to set aside the order striking out the Appeal and praying for an extension of time to comply with the Court's orders from 7<sup>th</sup> May 2024.

### **Jurisdiction to set aside the striking out order.**

9. The power of the Court to enlarge time is provided under Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules. Order 50, rule 6. to enlarge time Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the Court orders otherwise.

#### Section 95. Enlargement of time

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.

10. In the case of *Margaret Njoki Kamau v Reuben Ndivo Mwangi* (2021)eKLR, Kemei J. stated that:-

“Order 50 Rule 6 provides that where a specific time is fixed for doing an act or taking any proceedings, the court has powers to enlarge such time on terms, notwithstanding that the application is brought after the time prescribed has lapsed. The Court's power to enlarge time is unfettered. The discretion must, however, be exercised judiciously and not capriciously.”

11. The principles that govern the exercise of discretion to extend time were authoritatively enunciated by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others* (2014)eKLR where the Court stated 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-by-case basis;
4. Whether there is a 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 Respondents if the extension is granted;

SUBPARAGRAPH 6.



### **Whether the application has been brought without undue delay.**

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
12. In the present case, the order of 7<sup>th</sup> May 2024 had a self-executing clause, and the Court further confirmed on 10<sup>th</sup> July 2024 that the Appeal stood struck out. The confirmation by the Court introduced an element of finality. However, even in such circumstances, the Court may invoke its inherent power under Section 3A of the *Civil Procedure Act* to do Justice provided no undue prejudice is occasioned to the opposite party.
13. The Court of Appeal in the Case of Caltex Oil (K) Limited v Rono Limited [2011] eKLR stated;  

“However, the fact that a default clause has been imposed by a Court does not necessarily deprive a court of its jurisdiction to extend time. As a general principle, where the court fixes time for doing a thing, it always retains power to extend time for doing the act until it has made an order finally disposing of the proceedings before it. It seems that the main test is whether the court still retains control of the order, notwithstanding that there has been a default. That would necessarily depend on the true construction of the default clause.”
14. The overarching consideration remains the interests of Justice.

### **Whether the delay is excusable.**

15. The explanation offered by the Appellant’s Counsel is that the file was returned to their Office Registry, and the required action inadvertently escaped his attention. While this is unfortunate, it is not uncommon in the legal practice even by Senior Advocates to be caught by such occurrences where in advertent mistakes and/or omissions occur. Courts have consistently held that mistakes of counsel, though regrettable, should not be visited upon innocent litigants. In this case the Appellant was clearly innocent and the blame squarely by at the feet of his Advocate who has admitted mistake.
16. In the Case of Philip Keipto Chemwolo & another v Augustine Kubende (1986)eKLR, the Court stated as follows;  

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having his case heard on merit . . . the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.
17. In this case, there was a delay of thirty-four (34) days from the expiration of the Court-ordered deadline up to when the striking out was confirmed. There is no evidence of intentional delay or any attempts to manipulate the situation. The Counsel was actively engaged throughout the proceedings and attended Court on 10<sup>th</sup> July 2024. This Court is convinced that the omission was not willful and the conduct does not demonstrate gross negligence.

### **Whether the Appellant Deserves the Relief Sought.**

18. The Appellant has shown a clear intention to pursue the appeal. Although the delay is unfortunate, it has been clearly explained and addressed promptly. The Respondent has expressed concerns about



delay and potential prejudice, especially since he has moved to lift the stay orders in the Lower Court. However, prejudice alone cannot overshadow the Appellant's right to be heard, especially when the delay is not excessive and can be addressed with costs. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* (2014) eKLR laid out the relevant principles for granting an extension of time: the explanation for the delay; whether the application was submitted without undue delay; and whether granting the extension would result in undue prejudice. This application meets the criteria set in *Nicholas Kiptoo Arap Korir Salat's* case to warrant the exercise of discretion in favour of the Applicant.

**Conclusion.**

19. Considering all the circumstances, and in the interest of doing substantive justice, the Court finds merit in the application and exercises its discretion in favour of allowing the application on the following terms:-
1. The order of this Court made on 10<sup>th</sup> July 2024 confirming the striking out of the Memorandum of Appeal is hereby set aside.
  2. The Memorandum of Appeal is reinstated.
  3. The Appellant shall file and serve the Record of Appeal within twenty-one (21) days from the date of this Ruling.
  4. The Appellant shall pay the Respondent's thrown-away costs assessed at Kenyan Shilling Ten (Kshs. 10,000) within the same period.
  5. In default of compliance, the Memorandum of Appeal shall stand struck out without further reference to the Court.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 22<sup>ND</sup> DAY OF MAY 2025.**

**J. M. MUTUNGI**

**ELC - JUDGE**

