



**Mbui (Sued as the Legal Rep' of the Estate of Mbui Mwoga  
– Deceased) v Mungania (Miscellaneous Civil Application  
E011 of 2025) [2025] KEELC 1158 (KLR) (11 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1158 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
MISCELLANEOUS CIVIL APPLICATION E011 OF 2025  
JO MBOYA, J  
MARCH 11, 2025**

**BETWEEN**

**PATRICK MATI MBUI (SUED AS THE LEGAL REP' OF THE ESTATE OF MBUI  
MWOGA – DECEASED) ..... APPLICANT**

**AND**

**ELIAS MURITHI MUNGANIA ..... RESPONDENT**

**RULING**

1. The Applicant herein has approached the court vide Notice of Motion Application dated 20<sup>th</sup> February, 2025; brought pursuant to the provision of sections 3A, 79G and 95 of the [Civil Procedure Act](#); and wherein the Applicant has sought for the following reliefs:
  - a. That this Application be certified as urgent, service be dispensed with and it be heard Ex-parte in the first instance.
  - b. That this Honourable Court be pleased to order a stay of execution of the Judgment issued by the Honourable trial Court on 3<sup>rd</sup> October, 2024 and all other consequential orders pending the hearing and determination this application inter partes.
  - c. That this Honourable Court be pleased to order a stay of execution of the Judgment issued by the Honourable trial court on 3<sup>rd</sup> October, 2024 and all other consequential orders pending the hearing and determination the intended appeal.
  - d. That this Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time.
  - e. That the costs of this Application be costs in the cause.



2. The instant application is premised on various [diverse] grounds, which have been enumerated in the body thereof. In addition, the application is supported by the affidavit sworn by Patrick Mati Mbui [the Applicant] sworn on even date, namely; the 20<sup>th</sup> February, 2025 and to which the deponent has annexed inter alia a copy of the Judgment which is sought to be appealed against.
3. Upon being served with instant application, the Respondent herein filed a Replying affidavit sworn on 6<sup>th</sup> of March, 2025; and wherein the Respondent has raised various issues, inter alia that the application has been filed with unreasonable delay, and which delay has neither been accounted for nor explained by the Applicant. Furthermore, the Respondent has also averred that the Applicant has failed to annex a copy of the draft memorandum of appeal, to demonstrate that the intended appeal is arguable and thus worthy of being canvassed before the court.
4. Moreover, the Respondent has averred the same [Respondent] shall be disposed to suffer undue prejudice and grave injustice, if the application before hand is allowed. In particular, it has been averred that the Respondent is an old person, currently aged 90 years; and hence the continuation of the proceedings herein, including the intended appeal shall cause undue prejudice and anxiety to the Respondent.
5. The instant application came up for hearing on 11<sup>th</sup> of March, 2025; whereupon the advocate for the respective parties covenanted to canvass [ventilate] the application by way of oral submissions. In this regard, the court agreed and the application was duly canvassed. Furthermore, the submissions rendered by and on behalf of the parties are on record.
6. Nevertheless, it is important to point out that during the hearing of the application, learned counsel for the Applicant intimated to the court that same [learned counsel] shall not be canvassing the limb of the application touching on and concerning the question of stay of execution pending the intended appeal. For good measure, counsel posited that same was abandoning the limb under reference.
7. Instructively, the instant application proceeded on the basis of prayer four [4] only, namely, the limb concerning leave to file an appeal out of time. In this regard, the court shall only concern itself with the said prayer and not otherwise.
8. Having considered the application; the response thereto and the submissions on record, I come to the conclusion that the determination of the instant application turns on two [2] key issues, namely; whether the application has been mounted with unreasonable delay and if so, whether the delay has been accounted for or explained; and whether the Respondent shall suffer undue prejudice or grave injustice, if the application is granted.
9. Regarding the first issue, namely; whether the instant application has been filed with unreasonable delay and if so, whether the delay has been duly accounted for, it is imperative to state and observe that the judgment that is sought to be appealed against was delivered on the 3<sup>rd</sup> of October, 2024; while the subject application was filed on 20<sup>th</sup> of February, 2025.
10. On the other hand, it is also important to recall that the though the judgement was rendered on 3<sup>rd</sup> October 2024, the applicant herein had 30 days wef the 3<sup>rd</sup> of October , 2024, to file/ lodge an appeal to this court, where appropriate.[See the provision of section 79G of *Civil Procedure Act* Chapter 21 of Laws of Kenya]
11. Additionally, it is instructive to take cognizance of the provisions of order 50 rules 1,2, and 3 of the Civil Procedure Rules 2010, which exempts the duration between 21<sup>st</sup> of December of a particular year to the 13<sup>th</sup> day of January the year following, from the computation of time. Suffice to state that the duration under reference is not to be computed while discerning the duration and/or extent of delay.



12. Arising from the foregoing, it is imperative to underscore that the duration of delay in respect of instant matter and which deserves consideration of the Court runs from the 4<sup>th</sup> of November, 2024 to the 20<sup>th</sup> of December, 2024 and thereafter from the 13<sup>th</sup> of January, to 20<sup>th</sup> of February, 2025 [the latter which is the date when the application was filed]
13. To my mind the entire duration that was taken by the Applicant herein before filing and/or mounting the current application constitutes a total of 83 days. In this regard, the totality of duration that must be explained and/or accounted for is 83 days.
14. Has the applicant accounted for the delay under reference. In endeavor to discern and decipher whether the applicant has accounted for and/or explained the delay, it suffices to revert to the supporting affidavit and to confirm the explanation which has been given by the applicant herein.
15. To start with, the Applicant has contended that same [Applicant] was aggrieved with the judgment of the subordinate court and thereafter same proceeded to and instructed his [applicant's] advocate to file/lodge an appeal to the Environment and Land Court. However, it has been averred that despite instructing his advocate to file and lodge an appeal, the advocate failed to do so, either within the set timeline or at all.
16. Moreover, the applicant has averred that upon instructing the advocate to file/lodge appeal the previous advocate represented and/or intimated to the applicant that same [previous advocate] had filed the appeal. In this regard, the applicant has posited that the same [applicant] believed the words of the previous advocate.
17. Never the less the applicant averred that his efforts to procure and obtain copies of sic the appeal, if any, that had been filed were not successful. In this respect, it has been averred that the applicant was thereafter constrained to approach the environment and land court registry at Meru to ascertain whether an appeal was indeed filed or otherwise.
18. Pertinently, the applicant averred that upon checking with the Environment and Land Registry at Meru same [applicant] established that no appeal had been filed or lodged on his behalf or at all. In any event, the applicant also averred that by the time same discovered that no appeal had been filed, the time for filing an appeal had long lapsed.
19. Additionally, it was contended that efforts to reach out to the previous counsel were in vain and/ or futile. In this regard, the applicant has averred that same [applicant] was constrained to retain and instruct the current advocate to take up the matter and to procure leave for purposes of filing the appeal out of time.
20. Though the Respondent has contended that the applicant herein has neither tendered nor exhibited any retention agreement or payment receipt to confirm instructions to the previous advocate, there is no gainsaying that the averment[s] by and on behalf of the applicant, have neither been controverted nor impugned. Consequently, this court is minded to believe the averments by the applicant.
21. Furthermore, there is no gain saying that the reasons and/or explanations that have been espoused by the applicant, are reasonable and believable. In my humble view, I am persuaded that the applicant herein indeed instructed his previous counsel to mount an appeal, but same [previous counsel] failed to do so.
22. For good measure, it is important to underscore that in an endeavor to discern whether the reasons given are reasonable and credible, the court is not obligated to undertake an exhaustive scrutiny



[investigation] with a view to finding out whether the reason and/or explanation offered is true beyond [sic] reasonable doubt.

23. Notably, the duty of a civil court is to discern whether the reason canvassed is more probable than not. In this regard, the reasons that have been proffered are probable, reasonable, cogent and plausible. [see the holding of the Court of Appeal in the case of *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) [see paragraph 12 and 13 thereof]
24. Moreover, the need to exhibit and espouse reasonable and probable reasons for the delay was also underscored by the Court of Appeal in the case of *Andrew Kiplagat Chemarigo v Paul Kipkorir Kibet* [2018] eKLR. [see paragraph 12 thereof]
25. The need to justify the reasons for the delay to the satisfaction of the court, prior to and before partaking of the equitable discretion of the court, was also highlighted by the Supreme Court of Kenya in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 others* Civil [Civil Application No. 16 of 2014] [2014] eKLR where the Supreme Court distilled various factors to be proved/established.
26. For coherence, the Supreme Court highlighted the following grounds;

From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

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 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;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
27. Taking into account the guideline[s] espoused by the supreme court in the decision supra ; coupled with the dicta in the case of *County Executive of Kisumu vs. Kisumu County Government* 2017 eKLR; and the decision in *Postal Housing Co-operative Society Limited v Telkom Kenya Limited & 5 others; Ministry of Public Service, Youth and Gender Affairs & 2 others (Interested Parties)* (Civil Application E499 of 2023) [2024] KECA 588 (KLR) (24 May 2024) (Ruling); I am persuaded that the applicant herein has placed before the court sufficient material to explain the delay under reference.



28. Turning to the question of prejudice and whether the Respondent shall suffer grave injustice, it is imperative to state that the dispute before hand touches on and concerns land. Indeed, the dispute revolves around trust, namely; whether the suit property is held by the Respondent on trust for the applicant herein or otherwise.
29. Furthermore, it is also worthy to recall and reiterate that land matters and disputes in general, are emotive and thus deserve due interrogation, to avert deployment of [sic] self help mechanisms, which may arise if such disputes are not dealt with and addressed in accordance with the rule of law. The sensitivity of land matters is common ground. To this end, it is suffices to cite and reference the decision of the Court of Appeal in the case of *Elizabeth Wambui Gitbinji and 29 others vs. Kenya Urban Roads Authority [KURA] and others* 2019 eKLR. [see the Judgement of Ouko JA, as he then was].
30. Owing to the sensitivity of land matters, it behooves courts of law to endeavor to investigate such dispute[s] with a view to getting to the depth of the claims. Suffice it to underscore that unless there exists compelling reasons and injustice, which cannot be atoned for vide costs, a court of Law should be inclined towards facilitating the liberty of a party, in this case, the applicant, to appropriate the right of access to justice. [see article 48 of *the constitution* 2010]
31. To my mind, the mere fact that the Respondent is aged more than 90 years and thus desirous that the subject matter be brought to a close, by and of itself, does not demonstrate [constitute] any prejudice or injustice to be suffered.
32. Moreover, it is not lost on this court that in an endeavor to exercise discretion, the court is called upon to balance the rights and interest of the applicants [namely, desire to appeal] as against the rights and interests of the Respondent who is desirous to appropriate the fruit[s] of the judgment. In this regard, the court undertakes a delicate balance and in the process, same [Court] strikes a middle ground, which vindicates the rights of both parties in equal measure.
33. Flowing from the foregoing, it is my humble view that the Respondent herein has neither demonstrated any prejudice or injustice to be suffered, if the leave sought is granted. In any event, it suffices to state that the prejudice, if any, that maybe suffered by the Respondent; is capable of being remedied by an award of costs. [see the holding in the case of *Philip Keipto Chemwolo v Augustine Kubende and another* [1986] eKLR, per Appaloo, JA [as he then was].

**Final disposition:**

34. Having analysed the two [2] thematic issues, [which were highlighted in the body of the ruling], it suffices to underscore that the applicant herein has established and demonstrated that the application beforehand is meritorious. In this regard, the application ought and should to be allowed.
35. In the premises, the final orders that commend themselves to the court are as hereunder;
  - i. The Application be and is hereby allowed in terms of prayer Four [4] thereof.
  - ii. For coherence, Leave be and is hereby granted to the applicant to file an appeal out of time
  - iii. The intended appeal shall be filed and served within Fourteen [14] days from the date hereof.
  - iv. The intended appeal shall be filed in a separate [substantive appeal] file and not in the current Miscellaneous Application file, which stands closed.
  - v. Costs of the application be and hereby awarded to the Respondent.



- vi. The costs under reference are assessed and certified in the Kshs. 15,000 only and same [costs] shall be paid within 14 days from the date hereof.
- vii. In default, the Respondent shall be at liberty to execute in the conventional manner.

36. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 11TH MARCH, 2025.**

**OGUTTU MBOYA,**

**JUDGE.**

In the presence of;

Mr. Mutuma – Court Assistant

Ms. Kiruai for Applicant.

Mr. Mutuma for Respondent.

