



**Munyao & another v Kariuki (Environment and Land Appeal
E013 of 2024) [2025] KEELC 5826 (KLR) (14 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5826 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND APPEAL E013 OF 2024**

LL NAIKUNI, J

JULY 14, 2025

BETWEEN

PETER NZEKI MUNYAO 1ST APPELLANT

ROBERT NJAGE 2ND APPELLANT

AND

SUSAN MICHAEL KARIUKI RESPONDENT

*(An appeal against the Judgment delivered from the Kwale MCCC Suit No.
66 of 2020 on 15th November 2023 by Hon. L.T. Lewa, Principal Magistrate)*

RULING

I. Introduction

1. The Honourable Court was tasked to make a determination unto a Notice of Motion application dated 6th March 2025 filed by Susan Michael Kariuki the Respondent/Applicant. It was brought under the provision of Sections 1A, 1B, 3A and 79G of the *Civil Procedure Act*, Cap. 21.
2. As a matter of background, the impugned appeal instituted before this Honourable Court originates from the Judgment delivered from the Kwale MCCC Suit No. 66 of 2020 on 15th November 2023 by Hon. L.T. Lewa, Principal Magistrate (Hereinafter referred to as “The Judgement”). Subsequently, the decree was issued on 23rd January 2024 and served upon the Appellants’ Advocates on 25th January 2024. Resultantly, on 27th September, 2024, the Appellants filed their Memorandum of Appeal approximately eight months (240 days) after the decree was issued thereof.
3. Despite of the service of the application being effected, there was no response elicited from the Appellant/Respondent. Thus, the application proceeded on unopposed. Nonetheless, the Honourable Court has still proceeded in making a Ruling on its own merit whatsoever.



II. The Respondent/Applicant's case

4. The Respondent/Applicant sought for the following orders: -
 - a. That this Honourable Court do hereby order that the Appeal and Memorandum of Appeal be struck off for failing to seek leave of the Court, to file an appeal out of time.
 - b. That the cost of the appeal and application be borne by the Appellants/Respondents.
5. The application was supported by the grounds, testimonial facts and the 13 Paragraphed annexed affidavit of Susan Michael Kariuki together with four (4) annexures marked as "SMK – 1 to 4" annexed thereto. She averred as follows that:-
 - a. She was a female adult of sound mind and understanding and the Respondent/Applicant herein and hence competent to swear this affidavit.
 - b. The Judgement in "Civil 66 of 2020 - Susan Michael Kariuki – Versus - Peter Nzeki & Another" was entered on 15th November 2023.
 - c. Thereafter, the Decree in the above was issued on 23rd January 2024.
 - d. On 25th January 2024, the Appellants, through their Advocates A.O Aminga & Co. Advocates and Odundo Duncan, were served with the Decree and Notice of Change of Advocates.
 - e. On the 27th September 2024, the Appellants filed an appeal in "ELC Appeal No. 13 of 2024, Robert Njage – Versus - Susan Michael Kariuki" challenging the afore - stated Judgment.
 - f. The appeal had been filed out of time, as the Decree was issued on 23rd January 2024 and served upon them through their Advocates on 25th January 2024.
 - g. There was no leave sought for the appeal to be filed out of time and thus the appeal is not properly in Court.
 - h. The provision of Section 79G of the *Civil Procedure Act*, Chapter 21 clearly stipulates that time to appeal from the sub - ordinate Court to the High Court (Environment and Land Court) to be thirty (30) days.
 - i. Therefore, the Applicant moved this Honorable Court for the Appeal and Memorandum of Appeal to be struck off for failure to bring an application for leave to file an appeal out of time.
 - j. There would be no prejudice suffered if the application was allowed as prayed herein.
 - k. There was neither collusion between a party nor any irregular fraudulent or illegal transaction in bringing this application.
 - l. It would be in the interest of justice that the application was allowed.

III. Submissions

6. On 27th March 2025, it was only Mr. Rono for the Respondent/Applicant who was present in Court. There was no appearance for the Appellant/Respondent. The Honourable Court directed that the preliminary objection be disposed of by way of written submissions. The court reserved the 14th July 2025 for delivery of the ruling.



A. The Written Submissions by the Respondent/Applicant

7. Learned Counsel for the Respondent/Applicant through the Law Firm of Rono Donald and Company Advocates filed their written submissions dated 5th April 2025. Mr. Rono Advocate commenced the submissions based on two (2) key issues for determination. These were:-
8. Firstly, whether the appeal filed out of time should be dismissed for having been instituted without leave of Court for enlargement of time. The Counsel for the Respondent submitted that appeals from subordinate courts to the Environment and Land Court are governed by the provision of Section 79G of the *Civil Procedure Act*, Cap. 21 which mandates 30 - days filing period. It bears the mandatory term “shall,” and unless leave was granted for good cause. The provision of Order 42 of the Civil Procedure Rules, 2010, required a Memorandum of Appeal with concise, numbered grounds. The Learned Counsel averred that the Appellants’ Memorandum of Appeal dated 8th March 2024 although it was procedurally correct but filed on 27th September 2024. This was 240 days after the decree was issued on 23rd January 2024, and 214 days past the deadline of 25th February 2024.
9. To buttress on this point, the Learned Counsel referred Court to the decision of:- “Diplack Kenya Limited – Versus - William Muthama Kitonyi [2018] KEHC” which held that a five-month delay without explanation was inordinate, emphasizing the need for sufficient cause. Similarly, in the cases of:- “Njirati – Versus - Diamond Trust Bank [2024] KEHC” and “Paul Musili Wambua – Versus - Attorney General [2015] eKLR” highlighted the court’s discretion to extend time based on the delay’s length, reason, appeal’s merits and prejudice to the Respondent. Additionally, the Learned Counsel submitted that in the cases of:- “Gichuhi – Versus - Munyambu [2025] KEHC” and “Nicholas Kiptoo Korir Arap Salat – Versus - IEBC [2014] eKLR” outlined the principles requiring a reasonable explanation, no undue delay, and minimal prejudice. The Counsel prayed that the Appellants provided no evidence of seeking leave or justifying the delay, rendering the appeal incompetent.
10. Secondly, the Learned Counsel asserted that the Appellant should be made to pay the costs of the application and the appeal herein.
11. In conclusion, the Counsel urged for the dismissal of the Appeal, as the Appellants failed to meet Section 79G’s mandatory requirements.

IV. Analysis and Determination

12. I have keenly considered the Notice of Motion application dated 6th March 2025 by the Respondent herein, the written submissions, the numerous authorities cited, the relevant provisions of the *Constitution* of Kenya, 2010 and statutes.
13. In order to reach at an informed, reasonable and fair decision on the matter, the Honorable Court wishes to be guided by the following three (3) salient issues for its determination. These are: -
 - a. Whether the appeal filed by the Appellant should be entertained having been out of time and for having been instituted without leave of Court for enlargement of time.
 - b. Whether the Respondent is entitled to the relief sought from the Notice of Motion application dated 6th March, 2025
 - c. Who will bear the Costs of the Notice of Motion dated 6th March 2025?



Issue No. a) Whether the appeal filed by the Appellant should be entertained having been out of time and for having been instituted without leave of Court for enlargement of time.

14. Under this Sub – heading, there is only a single issue for the consideration by this Court. Essentially, that is on striking the entire appeal as instituted by the Appellants herein for filing to instituted within the required time. Besides of this, failure to seek for leave for the enlargement of time as required by certain provisions of the law.
15. The striking out of the suits are governed under the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010. It does allow a party to apply for the striking out of a suit. The same is drawn as follows: -

Striking out pleadings [Order 2, rule 15.]

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- (a) It discloses no reasonable cause of action or defence in law; or
 - (b) It is scandalous, frivolous or vexatious; or
 - (c) It may prejudice, embarrass or delay the fair trial of the action; or
 - (d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
16. From the myriads of authorities, it is settled law that the power and Jurisdiction of the Court to strike out pleadings is discretionary. It must be exercised judicially and be used sparingly and cautiously. That is the case as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. The leading and still very relevant case on this front was that of “D.T. Dobie & Company (Kenya) Limited – Versus - Muchina [1982] KLR 1”. Madan JA, stated:
- “No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”
17. Further to that, in the case of: - “Co - operative Merchant Bank Limited – Versus - George Fredrick Wekesa (Civil Appeal No. 54 of 1999)” the Court of Appeal stated:
- “Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.”



18. Additionally, in the case of: - “Yaya Towers Limited – Versus - Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)” the same court expressed itself thus: -

“ A Plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant (Plaintiff) can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial.....It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

19. Having well established the jurisprudence on striking out of pleadings, the Honourable Court will then proceed to examine the reasons advanced by the Respondents for seeking such serious reliefs to be granted by Court.

Issue No. b). Whether the Respondent is entitled to the relief sought from the Notice of Motion application dated 6th March, 2025

20. Under this sub – heading, as stated above the Honourable Court will be dealing on aspects on the statutory adherence with time in instituting pleadings under the various statutes particularly the Limitation of Actions Act, Cap. 22 and the of enlargement of time. The main reason why the applicant has sought for this appeal to be struck out is the failure to seek leave of the Court, to file an appeal out of time.

21. The provision of Section 79G of the Civil Procedure Act, Cap 21, provides:

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 applicant 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.

22. Critically, this provision is couched in mandatory terms. Procedurally, the provision of Order 42 Rule 1 of the Civil Procedure Rules, 2010, stipulates that an appeal to the High Court shall be in the form of a Memorandum of Appeal, signed as a pleading, setting out concise grounds of objection without argument or narrative.

23. However, this provisions of the Law are not cast on stone. Although its not a right but an equity remedy, the Law envisages that there would be certain sufficient cause that may lead an Applicant from adhering to the statutory time. For instance medical, death of parties, logistical aspects of not being able to avail the Court records on time among others. In such a circumstance the Law makes provisions for the enlargement of time upon formally moving Court. In that case, the Courts have the discretion to enlarge and/or extend time based on facts by facts of each case. These provisions are Section 95 of the



Civil Procedure Act Cap. 21 and Order 50 Rules 6 and 7 of the Civil Procedure Rules, 2010. Section 95 provides thus: -

“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.

24. Further, the provision of Order 50 Rules 6 holds.

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 appointed or allowed.

25. While Order 50 Rules 7:-

The time for delivering, Amending, or filing any pleading, answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or their Advocates without application to the Court.

26. The issue of the enlargement of time has been extensively deliberated by Courts and thus there will be no need to re – invent the wheel whatsoever. However, the Honourable Court will make reference to a few in order to lay emphasis on legal basis towards this issue. The Supreme Court of Kenya (M.K. Ibrahim & S.C. Wanjala SCJJ) in Nicholas Kiptoo Arap Korir Salat (Supra) provided thus: -

- “(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.”

27. Similarly, the Court of Appeal in the case of: “Thuita Mwangi – Versus - Kenya Airways Limited (2003) eKLR”, provided the following grounds to be considered by the Court when allowing or disallowing appeal to be filed out of time;

- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;



- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest if any is involved.
28. The Court in the case of: “Kamlesh Mansukhalal Damki Patni – Versus - Director of Public Prosecution & 3 Others [2015] eKLR, further opined on the issue. It provided thus: -
- “It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld. For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”
29. Similarly, in the case of: “Paul Musili Wambua – Versus - Attorney General 2 Others [2015] eKLR, the Court of Appeal held that the court’s discretion must be exercised based on reason, considering the length of delay, the reason for delay, the chances of the appeal succeeding, and the prejudice to the Respondent.
30. Now applying these principles of law to the instant case. As a matter of relevant information, the suit before court was initiated through a Memorandum of appeal dated 8th day of April 2024 by the Appellants/Respondents herein through the Law firm of A.O Aminga & Co Advocates as follows that:-
- a. The Appellants Peter Nzeki Munyao & Robert Njage above named appeal to the Environment and Land Court at Kwale (ELC Division) from the Judgment of the Honourable Principal Magistrate in Kwale MCCC NO. 66 of 2020 delivered on 15th November, 2023 and set forth the following grounds namely THAT: -
 - b. The Hon. Magistrate erred in law and fact in failing to consider and or appreciate that the property involved was a private property.
 - c. The Hon, Magistrate erred in Law in granting an injunction against the appellants and in favour of the Respondent who does not have a superior entitlement and/or any ownership documents.
 - d. The Hon. Magistrate erred in law in disregarding the trite principles of granting injunctions enshrined in the case of “Giella – Versus - Cassman Brown.
 - e. The Hon. Magistrate erred in law and in fact in dismissing the Surveyor’s report dated 14th November, 2018.



- f. Reasons wherefore the Appellants pray for the appeal to be allowed with costs and the Respondent's suit be dismissed or such Orders as may be expedient be made.
31. From the records there will be need to undertake the computation of time as required by Law. Undoubtedly, the Judgment in Kwale MCCC Suit No. 66 of 2020 was delivered on 15th November 2023, with the decree issued on 23rd January 2024 and served on 25th January 2024. Applying the provision of Section 79G, the Appellants had until 25th February 2024 to have filed their appeal, excluding any certified delay for obtaining the decree. Despite of this, the appeal was filed on 27th September 2024, which was 240 days after the decree was issued and 214 days beyond the statutory period. The Court fully concurs with the Learned Counsel for the Respondent to the effect that the provision is couched in mandatory terms - the term "shall" in Section 79G imposes a mandatory 30-day filing requirement. The proviso allows for an extension if the Appellant demonstrates good and sufficient cause. However, the Appellants have neither sought leave to file out of time nor provided any explanation for the delay. To support this point, the Honourable Court has sought refuge from the case of:- "Diplack Kenya Limited – Versus - William Muthama Kitonyi [2018] eKLR", whereby the court emphasized that an applicant must show good cause, and in the absence of an explanation, no indulgence should be granted. The Appellants' failure to respond to the application or provide any justification for the delay leaves the court with no basis to exercise its discretion in their favor.
32. On this legal position, the Respondent further cited the case of:- "Gichubi – Versus - Munyambu [2025] KEHC 1080 (KLR)", which I am in agreement with, reinforced that a delay of over two months, without sufficient reason, is inordinate in the context of modern technological advancements. Here, a delay of eight months is significantly more egregious, and no evidence of attempts to seek leave or address the delay has been presented. The Memorandum of Appeal, while procedurally correct in form under the provision of Order 42 of the Civil Procedure Rules, 2010, is rendered incompetent the Appellant never moved Court seeking leave of Court to file the said Appeal out of time.
33. The court also considers the merits of the appeal, as per the case of "First American Bank of Kenya Limited – Versus - Gabba P Shah 2 Others [2002] 1 EA 65", which include the explanation for delay, the appeal's arguability, and potential prejudice. The grounds of appeal challenge the magistrate's findings on property ownership, injunction principles, and the dismissal of a surveyor's report. However, without leave or an explanation for the delay, the court cannot assess the appeal's merits, as its filing is procedurally defective. The Respondent would be prejudiced by allowing an improperly filed appeal to proceed, as it delays the enjoyment of the lower court's Judgment.
34. Moreover, in the case of: "Nicholas Kiptoo Arap Korir Salat (Supra), the Supreme Court emphasized that extension of time is an equitable remedy only available to a diligent and deserving litigant, and the burden of proving good cause lies with the party seeking enlargement of time. In the present matter, the Appellants failed to demonstrate any diligence. They neither filed a formal application for extension of time nor explained the delay. The appeal was therefore filed contrary to mandatory legal provisions.
35. In a nut shell, therefore, based on the foregoing deliberation herein I strongly discern that the Notice of Motion application dated 6th March 2025 has merit and the appeal is hereby struck out.

Issue No. c) Who will bear the Costs of the Notice of Motion dated 6th March 2025?

36. It is now well established that the issue of Costs is the discretion of Courts. Costs mean the award that a party is awarded at the conclusion of any legal action or proceeding of any litigation. According to the Black Law Dictionary, "Cost" is defined to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".



37. The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter.

38. Further, these legal principles were upheld in the Supreme Court case of: “Jasbir Rai Singh – Versus – Tarchalans Singh, (2014) eKLR” and the Court of Appeal cases of “Cecilia Karuru Ngayu – Versus – Barclays Bank of Kenya & Ano. (2016) eKLR” the Courts held: -

“..... the basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”.

39. In the instant case, the Notice of Motion application dated 6th March 2025 raised by the Respondent has succeeded and the appeal struck off. It follows that the Respondent is entitled to the costs thereof.

V. Conclusions & Disposition

40. Consequently, upon causing an in-depth analysis to the framed issues herein, the Honourable Court on Preponderance of Probabilities and the balance of convenience reaches at the following findings. These are: -

- a. That the Notice of Motion application dated 6th March 2025 be and is hereby found to be merited and thus the appeal is struck out.
- b. That the costs of the Notice of Motion application dated 6th March 2025 together with the costs to the appeal are hereby awarded to the Respondent.

It is ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 14TH DAY OF JULY 2025

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**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT AT KWALE.**

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. Mr. Rono for the Respondent/Applicant
- c. No appearance for the Appellant/Respondent

