



Cheruiyot v Onsando & another (Environment and Land Miscellaneous Case E010 of 2024) [2025] KEELC 6091 (KLR) (22 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6091 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND MISCELLANEOUS CASE E010 OF 2024
MN MWANYALE, J
SEPTEMBER 22, 2025**

BETWEEN

GABRIEL CHERUIYOT APPELLANT

AND

RICHARD ONSANDO 1ST RESPONDENT

ABEL MORONGA ONSANDO 2ND RESPONDENT

RULING

1. The application dated 5th November 2024 the subject of this Ruling seeks the following orders
 - i. Leave be granted to the Applicant to file an appeal out of time against the judgment and order of Hon. Robert Oanda SPM in Kilgoris MCEL 36 of 2018 delivered on 3rd March 2022.
 - ii. That the court be pleased to specify the time limit within which the appeal is to be filed.
 - iii. Spent.
 - iv. There be a stay of execution of judgment and decree in Kilgoris MCEL No. 36 of 2018 between the parties herein pending the determination of the intended Appeal.
2. Grounds in support of the application are that, the Applicant is aggrieved and/or dissatisfied with whole of the judgment and/or decree of the Honourable Magistrate court issued on 3rd March 2022.
3. Applicant intends to file a memo of Appeal against the decision. The intended Appeal raises salient and pertinent issues of law and fact that requires determination of this Honourable court.
4. The Appeal touches on Applicants property known as Transmara/Moyoi/403.



5. Applicant has been in occupation of suit land from 2014 pursuant to an Agreement for sale and the eviction orders shall result in demolition of the homestead standing on suit property; causing substantial loss and rendered the intended Appeal Nugatory.
6. Application has been made without unreasonable delay.
7. Application is further supported by the affidavit of the Applicant who deposes interalia; -
 - i. That he is the registered proprietor of L.R No. Transmara/Moyoi/490 having purchased the same from Respondent in 2014 and in occupation of the property.
 - ii. That he had filed an appeal ELC No. E006/2022 which he withdrew as it was filed out of time.
 - iii. The Applicant has annexed a copy of search on Transmara/Moyoi/490 showing that e is the registered proprietor thereof, as well as a draft copy of the Memorandum of Appeal.
8. A Replying Affidavit as well as Notice of Preliminary Objection were filed in response to the application. The Preliminary Objection was disposed off first vided the Ruling delivered on 8th May 2025.
9. In the said Ruling, the court reserved the issue of contravention of Orders 51 Rule 4 of the civil procedure Rules and Section 7 of the Civil Procedure Act to be dealt with as part of the Response to the application.
10. Thus, in addition to the Replying affidavit, the two legal issues raised in the foregoing paragraphs shall be considered as part of the Response.
11. In the Replying affidavit the Respondents depose as follows; -
 - i. That the application is meant to delay the enjoyment of the fruits of the judgment delivered in Kilgoris CMELC No. 36 of 2018; No sufficient reasons have been given on the intention to file an appeal out of time;
 - ii. Hence applicant intends to abuse discretionary powers.
 - iii. That the stay of execution application was already filed and considered before the trial court and hence offends section 7 of the limitation of Actions Act.
 - iv. That the Notice of Motion was filed without a supporting affidavit as required by law.
12. The Applicant was granted leave to file and serve a further affidavit, in which he deposes
 - i. That the application is not Resjudicata as the orders granted by the trial court were temporary in nature pending filing of this application.
 - ii. That the application will not prejudice the Respondent, and have an arguable appeal.
13. The Application proceeded by way of written submissions which are summarized as here follows; -

Applicant's Submissions

14. The Applicant submits that under Section 79 G of the Civil procedure Act the court can extend time to file an Appeal out of time, and relies on the decision in Stelcol Corporation limited and Susan Awour Mdembo (2021) eKLR as well as the decision in the cases of Edith Githungu Koine v. Stephen Njagi Thoithi.



Respondent's Submission

15. The Respondent submits that the Applicant has not the threshold for exercise of the discretion to enlarge time to file an appeal. They rely on the decision in the case of Paul Musili Wambua v. Attorney General and 2 Others.
16. They have submitted on all the prayers including the prayer for stay of execution and place reliance on the decision in James Wangalwa and Another v Agnes Naliaka Chesito [2012] eKLR. They submit that 4 years delay is inordinate, no reasons for the delay have been given.
17. The court notes that there are interim orders issued on 19.12.2024 when the matter was firstly fixed.

Issues for Determination

18. Arising from the application, the affidavits and rival submissions the issues for determination are as follows;
 - i. Whether or not the application meets the threshold for extension of time to file an appeal.
 - ii. Whether or not the application meets the threshold for grant of stay of execution orders.
 - iii. Whether the application is merited who bears the costs of the application.

Analysis and Determination

19. The principles on enlargement of time to file an appeal have been correctly submitted by the Applicant. The said principles were laid in the case of Leo Silla Mutiso v. Rose Hellen Wangari, where the court held inter alia “it is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also settled that in general the matters which the court takes into account in deciding whether to grant an extension of time are first the length of the delay, secondly the reason for the delay, the chances possibly of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the Respondent if the application is granted..”
20. This application was filed on 11th November 2024, while the Judgment was delivered on 3rd March 2022. There was thus a delay in filing the Appeal from April 2022 to November 2024 a period of about 30 months. That delay was inordinate.
21. The Applicant explained the delay to have been occasioned by unavailability of proceedings. This explanation fails in the face of the previous appeal that the applicant had filed but withdrew. The Applicant has not met the first two principles, and the court shall examine the remaining principles.
22. On the chances of the appeal succeeding, without going to the merits or otherwise of the Appeal, the Applicant exhibited in his supporting affidavit, a copy of a search of Transmara/Moyoi/490, as well as the decree in Kilgoris CMELC No. 36/2018 which shows that the injunction and eviction relate to Transmara/Moyoi/403, and if indeed the Applicant has settled on his suit property being 490 and the eviction relates to 403, he has established an arguable Appeal if the application is granted.
23. On prejudice, the court notes that there are already interim orders in existence, which stay any execution at the moment and there will be no further prejudice if the application is granted.
24. From the above analysis, the Applicant has not met the first two principles but has met threshold on the second two principles, and the court is inclined to exercise the discretion in his favour.



25. In relation to the stay of execution orders, sought, the Application has not brought timely, but substantial loss may be occasioned to the Applicant in view of the fact that he has exhibited ownership of Transmara/Moyoi/490 and the eviction relates to Transmara/Moyoi/403. If he is to be evicted from the said parcel; which he alleges ownership yet the decree relates to a different parcel, substantial loss would be occasioned to him.
26. The court thus finds that the Application is merited and allows the same in terms that
 - i. Leave is hereby granted to the Applicant to file and lodge an Appeal out of time.
27. The Memorandum of Appeal to be filed within 14 days from today while the Record of Appeal to be filed within 30 days from today.
28. Mention on 21st October 2025 to confirm compliance and take directions on the Appeal.

DATED AT KILGORIS THIS 22ND DAY OF SEPTEMBER, 2025.

HON. M.N MWANYALE

JUDGE

In the presence of

CA – Emmanuel/Sylvia/Sandra

Mr. Shira for the Applicant

Mr. Okemwa for the Respondent

