



**Kiniaru & another (As administrators of the Estate of Simon Kiniaru Gitau) v
Githinji & 2 others; Mihango (Interested Party) (Environment and Land Case
Application E047 of 2024) [2025] KEELC 3765 (KLR) (13 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3765 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE APPLICATION E047 OF 2024**

**JA MOGENI, J
MAY 13, 2025**

BETWEEN

**STEPHEN GITAU KINIARU 1ST APPLICANT
LUCY WANJIRU KINIARU 2ND APPLICANT
AS ADMINISTRATORS OF THE ESTATE OF SIMON KINIARU GITAU**

AND

**ONESMUS GACHUHI GITHINJI 1ST RESPONDENT
REGISTRAR OF LANDS, RUIRU 2ND RESPONDENT
THE HONORABLE ATTORNEY GENERAL 3RD RESPONDENT**

AND

JOSEPH MBURU MIHANGO INTERESTED PARTY

RULING

1. This Ruling is in respect to the Applicants' Notice of Motion Application dated 29/07/2024. The said Application is expressed to be brought under Article 40 and 159 of *the Constitution*, Sections 1A, 1B, 3A, Section 79G of the Civil Procedure Rules, Order 40 Rule 1, Order 51 Rule 1, Order 50 Rule 1 and 3 of the Civil Procedure Rules.
2. The Application is filed under Certificate of Urgency and seeks the following orders:
 - i. Spent



- ii. That pending inter parte hearing of this Application this Honorable Court be pleased to issue an order staying the Judgment of the Court and all Orders Emanating from the ELC Case No. 136 of 2019 – (In the Magistrate Court at Ruiru).
 - iii. That upon hearing this Application this Honorable Court be pleased to issue an order staying the Judgment of the Court and all Orders Emanating from the ELC Case No. 136 of 2019 – (In the Magistrate Court at Ruiru) until the intended Appeal is heard and determined.
 - iv. That this Honorable Court do grant an Order enlarging time for the Applicants to file A notice of Appeal and Appeal against the Ruling of the Court ELC Case No, 136 of 2019 - (In the Magistrate Court at Ruiru) delivered on the 2nd September 2023 and the Judgment of the Court in (In the Magistrate Court at Ruiru)
 - v. Any other Order that the Court may deem fit in the circumstances.
 - vi. That costs of this Motion be awarded to the Applicants.
3. The Application is based on the grounds on its face and supported by the Affidavit sworn by the Applicant, one Stephen Gitau Kiniaru. The Supporting Affidavit is sworn on the 29/07/2024.
 4. A brief background of the facts of this case will be useful in placing the Application in context. This suit was instituted vide a Plaint dated 8/10/2019 by the 1st Respondent against Simon Kiniaru (deceased who died on 26/12/2018). The Plaintiff sought the following orders:
 - a. A declaration that the Plaintiff is the legal proprietor of freehold title No. Ruiru/Kiu/Githunguri Block 2/2478,
 - b. A permanent injunction restraining the 1st Defendant, by themselves, servants, agents, employees from dealing with or in any other way interfering with Plaintiff's quiet possession of title to the suit property No. Ruiru/Kiu/Githunguri Block 2/2478,
 - c. Cancellation of all entries entered fraudulently in suit property No. Ruiru/Kiu/Githunguri Block 2/2478,
 - d. General damages for trespass and destruction of suit property by 1st Defendant and fraud by the Defendants, and
 - e. Costs of the suit with interest.
 5. Judgment was delivered in favour of the Plaintiff on 25/02/2021. The 1st Defendant/Applicant being aggrieved and dissatisfied with the said Judgment has filed the instant Application.
 6. The Applicants depose that they are the Administrators of the Estate of Simon Kiniaru Gitau who died on 26/12/2018. That sometime in 2019 there was a suit filed against the deceased over dispute for ownership of the suit property No. Ruiru/Kiu/Githunguri Block 2/2478, and the case was heard and determined Ex Parte and Judgment delivered on 25/02/2021.
 7. That the suit was heard and determined when Simon Kiniaru Gitau (deceased) was named first Defendant was deceased. They content that the hearing and final Judgment was a nullity since the 1st Respondent who was the Plaintiff in the lower Court case sued a party that was not in existence and so the proceedings are not tenable. Further that the estate of Simon Kiniaru Gitau has never been administered and the Applicants have only taken Letters of Administration for purposes of defending/ challenging these proceedings.



8. That the estate of the deceased Simon Kiniaru Gitau only came to know about the proceedings sometime in September 2023 long after the Judgment had been delivered and then they instructed Counsel to file this Application.
9. An Application to set aside the Judgment in ELC No. 136 OF 2019 was dismissed despite the Court being informed of the demise of the 1st Defendant. Whereas the estate of Simon Kiniaru Gitau instructed the lawyer to file appropriate appeal and seek stay orders they realized that the Advocates did not do so. This they realized when in July 2023 they received eviction orders.
10. It is the Applicant's contention that Simon Kiniaru (deceased) holds a title to the suit property and the fact that proceedings were concluded while he was dead it violates the Applicants' and other beneficiaries of the estate the right to a fair hearing as protected under *the Constitution*.
11. In response to the Application, the Respondent filed Grounds of Opposition and a Replying Affidavit sworn by the 1st Respondent on 1/10/2024. The 1st Respondent avers that the Application is fatally defective and that the Interested Party is improperly and irregularly on record. Further that the Application has been made by undue delay, and that it has no merit and that it has been overtaken by events since the true copy of the Green Card as produced by the Land Registrar Ruiru has no entry in the name of the deceased. The deceased's representatives have therefore no claim over the land.
12. The 1st Respondent also stated that the delay in filing the intended Appeal is not excusable and no reasonable explanation had been provided.
13. The 1st Respondent also reiterated his testimony of how he purchased the suit property from one Daniel Mwangi Mwai on 19/06/2014 vide a Sale Agreement dated 22/05//2014. He averred that the deceased Simon Gitau Kiniaru fraudulently caused a second green card to be opened and an entry was made in his favour in 2015. That this led to the 1st Respondent reporting this action to the Directorate of Criminal Investigations which led to the arrest of the Land Registrar.
14. It is his contention that the Land Registrar vide her Replying Affidavit which she filed in the Judicial Review Application No. 267 of 2016 at Nairobi Milimani Law Courts confirmed that the Green Card entry showed Daniel Mwangi Mwai as the true legal owner and registered proprietor as per the annexure OGG4 attached to the Replying Affidavit. This led to the 1st Respondent filing Civil Case Number 136 of 2019 which led to cancellation of the deceased's title as per annexure 5 a & b.
15. It is the 1st Respondent's position that the deceased Simon Kiniaru Gitau has no legal interest in the suit property. He therefore seeks to have the Application dismissed.
16. He deposes that it is not in dispute that the Judgment was delivered on 25/02/2021 adding that the delay in making this Application is inordinate and inexcusable for the reason since this Application is dated 29/07/2024. She further deposes that she never sued a dead person but that she made all effort to serve the Defendant (deceased).
17. That the Applicants only instructed their Lawyer to lodge an Appeal in September 2023 yet the decision appealed from was made on 25/02/2021 and this shows that the delay by the Applicants is unexplainable.
18. That the Applicants should not be allowed to probate and reprobate since they claim that the deceased owned the suit property yet at paragraph 24 of their Supporting Affidavit they allege the property belongs to the Interested Party. Infact annexure OGG-7 show that the Interested Party had sought stay at the trial Court claiming to own the suit property.



19. The 1st Respondent reposes that the Applicants have not met the standards for granting of stay as per Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules. No irreparable harm or loss has been proved.
20. That in the Ruling of 2/11/2023 the Applicants' Application to set aside the Judgment was dismissed since the Court noted that the Applicants were duly served but failed to enter appearance and defend the matter. That the Applicants slept on their rights for too long. He therefore asked the Court to dismiss this Application with costs.
21. The 1st Respondent ended his deposition by praying that the Application be dismissed and the Applicants condemned to pay costs for the expenses incurred in defending the Application.

Issues For Determination.

22. The Applicant filed submissions on 24/02/2025. In their submissions, they gave the background of this suit and identify the following issues for determination; a. Whether the 1st Defendant/Applicant is entitled to a stay of execution of the Judgment/decree in Nakuru No. 279 of 2016. b. Whether the 1st Defendant/ Applicant is entitled to extension of time to file her Appeal out of time. c. Who shall pay the costs of this Application?
23. On the first issue, they categorically state that the 1st Defendant/ Applicant is not entitled to an order of stay of execution for the reason that the 1st Defendant/Applicant has not proved she will suffer irreparable loss. They support this position by citing the decision in *Masisi Mwita v Damaris Wanjiku Njeri* (2016)eKLR.
24. In further support of this first question, the Respondents submit that the orders issued by the Learned Judge are negative orders incapable of execution and/or stay. In support of this, they rely on the decision in *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v. Milliomo Muthomi and Co. Advocates & 2 Others and Kaushik Panchamatia & 3 Others v. Prime Bank Limited & Another*.
25. On the second question, they state that the 1st Defendant/Applicant is not entitled to orders for extension of time to file her Appeal out of time. They submit that while the Court has discretion to extend time, this discretion should be exercised judiciously. They submit that the Applicant is not deserving of the orders.
26. They further submit that the 1st Defendant/Applicant received notice of Judgment as this was sent to all parties six (6) weeks before the date of Judgment. They submit that the delay is therefore inordinate and inexcusable. They further submit that they served the Decree on the 1st Defendant/Applicant's Counsel on 14th June, 2022.
27. The Plaintiffs/Respondents also submit that the 1st Defendant/Applicant have failed to attach the draft Memorandum of Appeal and as such, it is not possible to establish whether the Appeal is arguable. On account of this, they pray that the Application be dismissed.
28. Finally, the Plaintiffs/Respondents submit that no prejudice will be suffered by the 1st Defendant/Applicant if the orders of stay are not granted. They explain that the orders issued in the Judgment are negative in nature and are incapable of execution. They end their submissions by praying for dismissal of the present Application and award of costs to them.
29. The 1st Defendant/Applicant did not file submissions.



Analysis and Determination

30. I have considered the Application, the Affidavits in support of the Application, the Replying Affidavit and submissions filed.
31. In my view, the questions that arise for determination are:-
- a. Whether this Honourable Court should grant orders of stay of execution of the Judgment and decree in Ruiru ELC 136 of 2019;
 - b. Whether this Honourable Court should enlarge time within which to file an Appeal against the Judgment and decree in Ruiru ELC 136 of 2019;
 - c. Who shall bear costs of this Application?

a. Whether this Court should grant orders of stay of execution of the Judgment and Decree in Ruiru ELC 136 of 2019.

32. The decision in *RWW v EKW* [2019] eKLR is insightful in reminding us of the purpose of an order of stay of execution pending Appeal. It stated that:

“The purpose of an Application for stay of execution pending an Appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her Judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

33. Another decision that speaks to the purpose for grant of an order of stay pending Appeal is *Cotton LJ in Wilson v Church (No 2)* [1879] 12ChD 454 at page 458. Hancox JA stated,

“I will state my opinion that when a party is appealing, exercising his undoubted right of Appeal, this Court ought to see that the Appeal, if successful, is not rendered nugatory. As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed Appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a Judgment in his favour without just cause.”

34. In *Absalom Dova v Tarbo Transporters* [2013] eKLR it was stated:

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation ...”

35. In *Butt v Rent Restriction Tribunal* [1979], the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending Appeal. The Court stated thus:



- i. The power of the Court to grant or refuse an Application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.
 - ii. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an Appeal may not be rendered nugatory should the Appeal Court reverse the Judge's discretion.
 - iii. Thirdly, a Judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 - iv. Finally, the Court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances of the case and its unique requirements.
36. The principles guiding the grant of a stay of execution pending Appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which states as follows:
- “No order for stay of execution shall be made under sub rule (1) unless—
- a. the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and
 - b. such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”
37. In *Victory Construction v BM* (a minor suing through next friend one PMM) [2019] eKLR , the Learned Judge stated that the Court in deciding whether or not to grant a stay of execution, the overriding objective stipulated in Sections 1A and 1B of the *Civil Procedure Act*, should also be taken into consideration. He stated that the Court is no longer limited to the provisions of Order 42 Rule 6 adding that the Courts are now enjoined to give effect to the overriding objectives of the Act and Rules in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
38. Section 1A of the *Civil Procedure Act* provides that:-
1. The overriding objective of the Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of Civil Disputes governed by this Act.
 2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in Sub Section (1).
39. Section 1B of the *Civil Procedure Act* explains some of the aims of the overriding objectives as:
- a. the just determination of the proceedings;
 - b. the efficient disposal of the business of the Court
 - c. the efficient use of the available judicial and administrative resources;
 - d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties and
 - e. the use of suitable technology.



40. On the first criterion as set out in Order 42 Rule 6 (2) i.e. the Applicant/Appellant should bring his Application without unreasonable delay. Judgment in this matter was rendered on 25/02/2021. The Application declining to set aside the Judgment is dated 2/09/2023 and this Application was filed on 29/07/2024.
41. It is not in dispute that this Application was filed about three and a half years (3½) years after Judgment and eleven months after the Ruling. It is also not in dispute that by the time the suit was filed the 1st Defendant Simon Kiniaru Gitau who was deceased and so the substituted service was against a dead person. For purposes of the orders of stay pending appeal and taking into account the explanation by the Applicants that they had no notice of the delivery of Judgment in this matter, I am satisfied that although there was delay, it has been satisfactorily explained.
42. The second criterion is that the Applicant/Appellant must demonstrate that he is bound to suffer substantial loss if orders of stay of execution are not granted. The question that follows is what comprises substantial loss. In *Silverstein v Chesoni* [2002]1 KLR 867 it was held that;
- “The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
43. Regarding the issue of substantial loss, the Court in *Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited* [2014] eKLR held that:-
- “The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of Court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his Judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High Court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the Judgment requires, he will become a pious explorer in the judicial process.”
44. Similarly in *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd* (in liquidation) [2004] 2 EA 331, the Court stated that:-
- “Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”
45. The Applicants have demonstrated the loss that will be occasioned to them if orders of stay are not granted. It is the Applicants’ submissions that the beneficiaries of the estate of Simon Kiniaru Gitau (deceased) are on the verge of being evicted from the suit property. A copy of the Decree was annexed as proof of the Application for execution.



46. The third criterion is that the Applicants must furnish security for the due performance of the decree. Regarding security for the performance of the Decree, Gikonyo J in the persuasive case of Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others (2014) eKLR held that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the Judgment debtor. Civil process is quite different because in civil process the Judgment is like a debt hence the Applicants become and are Judgment debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

47. Similarly in Gianfranco Manenthi & Another v Africa Merchant Assurance Co. Ltd [2019] eKLR Nyakundi J. observed:-

“The Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower Court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his Judgment in case the appeal falls. Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a Court which has delivered the matter in his favour. This is therefore to provide a situation for the Court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the Plaintiff to initiate execution proceedings where the Judgment involves a money decree. The Court would order for the release of the deposited decretal amount to the Respondent in the appeal.... Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that Courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the Applicant but for the Court to determine”

48. The Court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the Applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the Respondent who has a Decree in his favour should not, if the Applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the Decree. This is the cornerstone of the requirement for security.

49. Evidently, the issue of security is discretionary and it is upon the Court to determine the same. The Applicants have not addressed this question in their submissions.

50. Now I will place reliance on the case of African Safari Club v Safe Rentals Ltd, CA at Nairobi Civil Appl. No. 53 of 2010, to support the proposition that the Overriding Principles which was introduced in the amendments to the *Civil Procedure Act* and the *Appellate Jurisdiction Act* in 2009, have resulted in modification of the principles governing the granting of a stay of execution.



51. The Court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the 1st Respondent his right of enjoying his Judgment. I have perused the Grounds of Appeal and without going into the merits of the Appeal noted that they raise arguable points of law. Therefore, it is my considered view that the Applicants have met the threshold of granting stay of execution pending Appeal.

52. I therefore grant an order of stay pending Appeal.

b) Whether the Applicants are entitled to orders of extension of time within which to file their Appeal.

53. Section 79G of the *Civil Procedure Act* provides that:

“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.”

54. From reading of Section 79G it is evident that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is a matter that calls for exercise of discretion. Judicial discretion must be exercised judiciously. This means that the discretion must be based on legal principles and not, by way of example, on the whims and other non-legal considerations.

55. One of those judicial principles is that the Applicant must satisfy the Court that he/she has good and sufficient cause for not filing the Appeal in time. In *Mbukoni Services Limited & Another v Mutinda Reuben Nzili & 2 Others* [2021] eKLR, the Learned Judge cited with approval the decision in *Daphne Parry v Murray Alexander Carson* [1963] EA 546 where it was held that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the Appellant, its interpretation must be in accordance with judicial principles. If the Appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the Court must guard itself against the danger of being led away by sympathy, and the Appeal should be dismissed as time-barred even at the risk of injustice and hardship to the Appellant.

56. The principles to be taken into consideration in exercising the discretion on whether or not to enlarge time were enumerated in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No. Nai. 255 of 1997) (unreported), the Court expressed the following view:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this 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: thirdly (possibly), the chances of the appeal succeeding if the Application is granted: and, fourthly, the degree of prejudice to the Respondent if the Application is granted.” (Emphasis is added)

57. On the question of length of delay and prejudice to the 1st Respondent, there is delay, no doubt, in filing the Appeal. The Applicants filed this Application three (3) years after they became aware of the Judgment in this matter, by which time, the statutory period for filing the Appeal had lapsed. In all consideration, a period of three (3) years does prejudice the 1st Respondent. Whereas the Applicants



claim that the 1st Respondent sued a dead person the question is why did they not enter appearance themselves? Three years is inordinately long but then again the person sued was long dead so who was to ventilate his case? The Applicants had to make an Application for a Limited Grant ad Litem to enable them file the instant Application for the estate of the deceased.

58. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the Court considers extension of time, the Applicant must satisfy the Court that she has good and sufficient cause for filing the Appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018]eKLR an Applicant seeking enlargement of time to file an Appeal or admission of an already filed Appeal must show that he has a good cause for doing so.
59. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an Application for leave to Appeal out of time. The Court stated inter alia that:-

“The underlying principles a Court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
- c. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
- f. Whether the Application has been brought without undue delay.”

60. Similarly in the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an Application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“... It is now settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the Court must act upon reason(s) not based on whim or caprice. In general, the matters which a Court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the Application is granted, the degree of prejudice to the Respondent if the Application is granted.”

61. The Applicants have faulted their Advocates Righa & Mburu Advocate who despite assuring them after the lower Court dismissed on 2/11/2023 their Application seeking to set aside what they are referring to as the null ex parte proceedings and Judgment against Simon Kiniaru (deceased). That they failed to file the appeal. That they only came to learn that the Appeal was not filed when the 1st Respondent commenced eviction process. It is their submission that the Advocates then became evasive and so the Applicants had to instruct another law firm which filed the current Application.



62. It is my considered view that although the delay of three (3) years was inordinate, the Applicants have given a plausible explanation on the cause of that delay. Accordingly, I find that the Applicants have in my view established to the satisfaction of the Court extension of time should be granted.
63. On the question of the chances of the Appeal succeeding if the Application is granted, I have perused through attached Memorandum of Appeal. A perusal of the aforesaid Memorandum of Appeal shows that the intended Appeal is not frivolous or vexatious. It is arguable as the question before the Appellate Court is whether or not the lower Court made a justified finding in light of the circumstances of the case given that the Judgment was an ex parte one.
64. I am also of the view that since the Judgment was ex parte a party should not be denied a right to ventilate his claim and by extension to exhaust all the legal avenues available to him/her. The overriding objective of the Civil Procedure Act is to facilitate a just resolution of civil disputes. I am also reminded that under the not so new constitutional dispensation, Courts should be concerned with substantive justice rather than procedural technicalities.
65. In *Samvir Trustee Limited v. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997*, The learned Judge held as follows;
- “Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the Defendant”
66. Taking all these into consideration, I find that the Applicants have satisfied this Court that they are deserving of this Court’s discretion in extending time within which to file the Appeal.

c) .Who should bear the cost of this Application?

67. On the question of costs of the Application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise. This was the holding in *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287*.

Disposition.

68. In the end result, the Application dated 29/07/2024 is allowed in the following terms;
- i. An order is hereby issued staying the Judgment of the Court and all Orders emanating from the ELC Case No. 136 of 2019 (In the Magistrate Court at Ruiru) until the intended Appeal is heard and determined.
 - ii. Leave is hereby granted to the Applicants to file an Appeal out of time.
 - iii. The Memorandum of Appeal attached to the Application is deemed as properly filed upon payment of the requisite fees and should be served within 10 days from the date hereof.
 - iv. In default of (iii) above, the orders for leave in (ii) shall stand vacated.
 - v. The costs of this Application shall be in cause. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF MAY 2025
VIA MICROSOFT TEAMS.**



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MOGENI J

JUDGE

In the presence of:

Mr. Gwaro for the Applicants

1st, 2nd and 3rd Respondents – Absent

Interested Party - Absent

Mr. Melita – Court Assistant

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MOGENI J

JUDGE

