



**Ogisiri v Mwita (Miscellaneous Civil Application E003 of 2023)  
[2025] KEELC 5309 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 5309 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
MISCELLANEOUS CIVIL APPLICATION E003 OF 2023**

**MN KULLOW, J**

**JUNE 30, 2025**

**BETWEEN**

**MOSOBA MASABA OGISIRI ..... APPLICANT**

**AND**

**MAGRATE NYANGI MWITA ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 9<sup>th</sup> October 2023 the applicant sought for the following orders
  1. Spent.
  2. Leave be granted to the applicant to file an appeal out of time against the Judgement and decree of Hon. John Munguti delivered on 10th May 2023 in Migori Chief Magistrate's court, ELC No. 24 of 2020.
2. The Application is based on the grounds on the face of the application and the supporting affidavit sworn by the applicant on 9th October 2023.
3. The applicant avers that Judgement was delivered in the matter on 10th May 2023 whereupon he requested for and paid for certified copies of the Judgement and court proceedings.
4. Consequent to the above, the applicant instructed the firm of E. Kisia & Associates to handle this matter on his behalf. However, the said advocates inadvertently failed to file the memorandum of Appeal in time.
5. The applicant further avers that he a good appeal with high chance of success and that the mistake of his advocate ought not to be visited upon him.
6. The application was opposed by the respondent by way of a Replying Affidavit sworn on 27th November 2023, in which he contends that the Applicant had not given any good or sufficient reason



- for the delay in filing the appeal, and further states that the application is an afterthought and an abuse of judicial process and is meant to delay the execution of his decree.
7. I have read and considered the application, the Replying Affidavit in opposition, the submissions filed by the applicant and various authorities filed in support of his case, and the sole issue for determination is:-
    - i. Whether leave can be granted to file an appeal out of time.
  8. Section 79G of the *Civil Procedure Act* provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. Section 95 of the said Act gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired.
  9. Section 79G of the *Civil Procedure Act* provides as follows;

“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.”
  10. Section 95 of the *Civil Procedure Act* 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.”
  11. The principles to be considered in exercising the court’s discretion on whether or not to enlarge time to file appeal were set out in the case of *Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi* Civil Appeal 255/ 1997, the court, in considering the exercise of discretion to extend time, held as follows: -

“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.”
  12. These principles were also reiterated in *First American Bank of Kenya Ltd -vs- Gulab P. Shah & Others* HCC 2255/2000 [2002] IEA 65 as follows: -
    - 1) The explanation if any, for the delay;
    - 2) The merits of the contemplated action, whether the appeal is arguable;
    - 3) Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.
  13. It the applicant’s contention that the delay in filing his appeal was as a result of his advocate who he instructed to file the appeal failed to do so.



14. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. See *Andrew Kiplagat Chemaringo V Paul Kipkorir Kibet* [2018] eKLR.
15. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. Having that in mind, I wish to state that from the Draft Memorandum of Appeal, one of the issues the Applicant intends to raise is on the validity of the title in respect of L.R No. Bukira/Bwisaboka 5586 which he alleges it was improperly transferred to the Respondent and consequently, the Respondent will not suffer any prejudice if this application is allowed.
16. Guided by the principle stated hereinabove, the application for leave to file appeal out of time is merited and will thus allow the application in the following terms:-
  - i. The Applicant do file his Memorandum of Appeal within 15 days of this Ruling.
  - ii. The Applicant do file his Record of Appeal within 30 days of filing the Memorandum of Appeal.

It is so Ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE, 2025.**

**HON. JUSTICE MOHAMED N. KULLOW**

**JUDGE**

In the virtual presence of:

N/A for the Applicant

N/A for the Respondents

Ms. Philomena W. Court Assistant

