



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Choge v Choge (Environment and Land Miscellaneous Application
E011 of 2023) [2025] KEELC 6664 (KLR) (2 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6664 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E011 OF 2023
LA OMOLLO, J
OCTOBER 2, 2025**

BETWEEN

FRED KIPKIRUI CHOGE APPLICANT

AND

SAMMY CHOGE RESPONDENT

RULING

1. This ruling is in respect of the Applicant's Notice of Motion application dated 14th December, 2022. The application is expressed to be brought under Sections 3, 3A & 79G of the [Civil Procedure Act](#), Orders 42 & 51 of the Civil Procedure Rules and Article 159 of [the Constitution](#).
2. The application seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That there be an order of stay of execution of the judgement delivered on 10th August, 2022 in Kericho CMELC No. 13 2018; (sic) Fred Kipkirui Choge versus Sammy Choge and the subsequent decree and or any other order in execution thereto pending the hearing of the intended appeal.
 - d. That the Honourable Court be pleased to extend time to allow the Applicant file his appeal out of time.
 - e. That costs of this application be provided for.
3. The application is based on the grounds on its face and the supporting affidavit of one Fred Kipkirui Choge sworn on 14th December, 2022.



Factual Background.

4. The application under consideration first came up for hearing on 13th March, 2023. The Court directed that it be served upon the Respondent.
5. The application also came up for hearing on 27th April, 2023 when the Court directed that it be canvassed by way of written

Submissions.

6. The matter was mentioned on 26th October, 2023 to confirm filing of submissions. On 25th January, 2024 the said application was dismissed for want of prosecution.
7. Subsequently, the Applicant filed an application dated 11th May, 2024 seeking that the Court sets aside orders issued on 25th January, 2024.
8. The Court delivered a ruling on the said application on 6th March, 2025. Vide the said ruling, the orders issued on 25th January, 2024 were set side. In effect, the application dated 14th December, 2023 was reinstated for hearing.
9. The application dated 14th December, 2023 was mentioned on 28th April, 2025 to confirm filing of submissions and was then reserved for ruling.

The Applicant's Contention.

10. The Applicant contends that he filed Kericho CMELC Case No. 13 of 2018 against the Respondent herein.
11. The Applicant also contends that the subordinate Court delivered its judgement on 10th August, 2022 wherein it dismissed his suit. He goes on to state that the said judgement was unjust and unfair and he intends file an appeal.
12. The Applicant further contends that he has prepared a Memorandum of Appeal which raises numerous triable issues.
13. It is his contention that if the orders sought are not granted then his appeal will be rendered nugatory.
14. It is also his contention that he was not informed that the subordinate Court had delivered judgment and that is why there was a delay in filing the appeal and in filing the application seeking leave to file the appeal out of time.
15. It is further his contention that he will suffer irreparable loss and harm if the application is not allowed as he is likely to be deprived of his land without being given an opportunity to exhaust all the judicial avenues available.
16. He contends that he is ready and willing to abide by any conditions set out by this Court.
17. He further contends that it is a requirement of the law that prior to delivery of judgement, parties be notified of the date to avoid any miscarriage of justice and to allow parties to make appropriate applications and/or informed decisions.
18. It is his contention that the Respondent will not suffer any prejudice as he will have an opportunity to defend the appeal.



19. It is also his contention that it is only fair and just that he is accorded an opportunity to exhaust all the avenues set out in *the Constitution*.
20. It is further his contention that the principle of fair hearing and determination of matters is enshrined in *the Constitution*.
21. He ends his deposition by stating that the Court has the discretion to allow the prayers sought and he prays that the Court exercises the said discretion judiciously.

The Respondent's Response .

22. In response to the application, the Respondent filed a Replying Affidavit sworn on 18th April, 2023.
23. He deposes that the Applicant's application is fatally defective and frivolous. He goes on to state that the application is premised on Order 42 Rule 6 (2) of the Civil Procedure Rules which is misplaced and incapable of being granted as there is no appeal filed.
24. He also deposes that leave to appeal is not automatic.
25. He further deposes that the Applicant has failed to show that there is an appeal with chances of success and therefore, the application should fail.
26. It is his deposition that the Applicant has not demonstrated that he will suffer any substantial loss if the orders sought are not granted. He adds that no affidavit has been sworn by the Applicant to show the loss he is likely to suffer.
27. It is also his deposition that it is a principle of law that material particulars of loss must be placed before the Court together with information on the loss to enable the Court make the determination that the Applicant is at risk of suffering substantial loss.
28. It is further his deposition that it is not merely enough for the Applicant to state that he will suffer loss. He goes on to state that the Applicant ought to specifically give details and particulars of loss.
29. He deposes that where no pecuniary or tangible loss is shown, stay should not be granted.
30. He also deposes that judgement of the lower Court was delivered on 10th August, 2022.
31. He further deposes that all the parties herein participated in the proceedings and were aware of the judgement date soon after the matter was heard.
32. It is his deposition that the Applicant was the Plaintiff in the lower Court and he therefore ought to have been aware of the judgement date so as to notify him (Respondent).
33. It is also his deposition that the Applicant has not shown sufficient cause and reason for him to be allowed to appeal out of time.
34. It is further his deposition that a period of four months lapsed before the Applicant filed the application under consideration. He reiterates that the Applicant has not shown sufficient reason to warrant extension of time.
35. He deposes that the Applicant's application has been made in bad faith and is only meant to deny him the fruits of his judgement.
36. He ends his deposition by stating that both the Applicant's application and intended appeal lack merit as they are misleading and brought in bad faith. He adds that the present application should therefore be dismissed with costs.



Issues for Determination.

37. The Applicant filed his submissions on 22nd April, 2025 while the Respondent filed his submissions on 8th July, 2025.
38. The Applicant relies on Order 42 Rule 6 (2) of the Civil Procedure Rules, the judicial decisions of *Butt v Rent Restriction Tribunal* [1982] KLR 417, *Elena D. Korir v Kenyatta University* [2014] eKLR and submits on the following issues;
 - a. Whether the Applicant has satisfied the conditions for leave to file an appeal out of time.
 - b. Whether substantial loss may result to the Applicant unless the order is made.
 - c. Whether the Applicant has given security for due performance. (sic)
 - d. Whether the Application has been made without unreasonable delay.
39. On the first issue, the Applicant relies on Section 79G of the *Civil Procedure Act*, the judicial decisions of *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR, *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR and submits that he was not notified of the date of delivery of the judgement.
40. He also submits that he has attached to his affidavit in support of the application a copy of the judgement of the subordinate Court which shows that he was not present.
41. He reiterates that he has also attached a draft Memorandum of Appeal which raises arguable points that prima facie demonstrates high chances of success.
42. The Applicant submits that had he been informed of the date of delivery of the judgement, he would have filed the intended appeal within thirty days.
43. The Applicant relies on the judicial decisions of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018] eKLR, *Lasertech (K) Limited & Amin Sherali Mawani v Jimcab Services Limited* [2020] eKLR, *Nancy Wangari Kinyua v Rose Wambui & Another* [2019] eKLR and reiterates that unless he is granted leave to appeal, he stands to suffer irreparable loss as he stands to lose his land which he has extensively developed.
44. The Applicant urges the Court to exercise its discretion under Article 159(2)(d) of *the Constitution* of Kenya, Section 79(G) of the *Civil Procedure Act* and enlarge the time within which to file an appeal.
45. On the second issue, the Applicant submits that he has demonstrated that he will suffer substantial loss unless an order of stay of execution is granted.
46. The Applicant relies on the judicial decisions of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, *RWW v EKW* [2019] eKLR and reiterates that he is likely to be deprived of his land without exhausting all the available judicial avenues.
47. He also reiterates that the Respondent will not suffer any prejudice if the application is allowed and submits that this Court should ensure that the subject matter of the appeal is preserved to avoid rendering the intended appeal nugatory.
48. On the third issue, the Applicant relies on Order 42 Rule 6 (b) of the Civil Procedure Rules, the judicial decision of *Peter Ngugi Kainamia & another v Tabitha Wambui Munyao & 7 Others* [2020] eKLR and submits that he is ready to abide by any conditions set by the Court on the mode of security if the Court grants him orders of stay.



49. On the fourth issue, the Applicant submits that once he became aware that the subordinate Court had delivered judgement, he filed the present application.
50. The Applicant also submits that the application under consideration was filed within three months of the date of the delivery of the impugned judgement and the delay was therefore not inordinate.
51. The Applicant concludes his submissions by urging the Court to allow his application as prayed.
52. The Respondent relies on the judicial decisions of *Equity Bank Kenya Ltd v Thairu & Co. Advocates* [2020] eKLR, *Nairobi City Council v Winnie Wanjiru Mwangi* [2020] eKLR and submits on the following issues;
 - a. Whether Counsel for the Applicant is properly on record.
 - b. Whether the Application meets the threshold for enlargement of time to file an appeal.
 - c. Whether there are sufficient grounds to warrant this Court to stay the execution of the decree pending the aforesaid appeal.
53. On the first issue, the Respondent relies on Order 9 Rules 9 & 10 of the Civil Procedure Rules, the judicial decisions of *Lalji Bhimji Sanghani Builders & Contractors v City Council of Nairobi* [2012] eKLR, *John Langat v Kipkemoi Terer & 2 Others* [2013] eKLR and submits that the Applicant's advocates have filed a consent for change of advocates without obtaining the requisite Court order to authorize such a change.
54. The Respondent also submits that this constitutes a fundamental procedural irregularity that renders the entire application incompetent.
55. On the second issue, the Respondent relies on Section 79G of the *Civil Procedure Act*, the judicial decisions of *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others* [2015] eKLR, *Leo Sila Mutiso v Rose Hellen Wangari Mwangi Nairobi Civil Application No. 255 of 1997* and submits that the application under consideration was filed under Certificate of Urgency on 14th December, 2022 (sic).
56. The Respondent also submits that as at July, 2025, a period of over two years and seven months had lapsed.
57. The Respondent further submits that this prolonged delay in the hearing of the application has exposed fundamental dishonesty in the Applicant's claim of urgency and has demonstrated an abuse of the Court process which should be severely sanctioned.
58. It is the Respondent's submissions that a Certificate of Urgency is a sacred procedural tool designed to expediate genuine urgent matters.
59. It is also the Respondent's submissions that its abuse constitutes an abuse of Court processes and undermines the integrity of the judicial system.
60. The Respondent relies on the judicial decisions of *Trusted Society of Human Rights Alliance v Attorney General & 2 Others* [2012] eKLR, *Kenya Commercial Bank Ltd v Njuguna Ndung'u & 2 Others* [2018] eKLR and submits that the application under consideration was filed four months after the subordinate Court delivered its judgement and yet the statutory period for filing an appeal is thirty days as per Section 79G of the *Civil Procedure Act*.
61. The Respondent also submits that there has been inordinate delay in the filing of the application under consideration which demonstrates complete disregard for timelines and procedural requirements.



62. The Respondent relies on the judicial decisions of Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR, Berber Alibhai Mawji v Sultan Hasham Lalji & 2 Others [1990-1994] EA 337, Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR and submits that the Applicant contends that there was a delay in filing the appeal because he was unable to trace the Court file and he was unwell.
63. On failure to trace the Court file, the Respondent submits that no correspondence with the Deputy Registrar has been provided by the Applicant in support of the said contention.
64. The Respondent also submits that the Applicant has supplied uncertified medical records which violate Section 83(e) of the *Evidence Act*.
65. The Respondent relies on the judicial decision of Abdul Ngoma v Mungai Mathayo [1976] Kenya LR 61 (sic) and submits that the Applicant has not demonstrated that the intended appeal is arguable.
66. The Respondent also submits that the Applicant has further not demonstrated any prospects of success of the intended appeal or any substantial questions warranting appellate intervention.
67. The Respondent submits that he will suffer temporal prejudice because the prolonged litigation has caused him emotional and financial strain.
68. The Respondent also submits that he has been financially prejudiced because of the legal costs in opposing the application under consideration.
69. The Respondent further submits that he has been procedurally prejudiced because the Applicant has abused the Court process through dilatory tactics.
70. The Respondent relies on the judicial decision of Michael Muriuki Ngubuini v East African Building Society Ltd [2015] eKLR and submits that the Applicant has failed to satisfy the requirements for extension of time.
71. On the third issue, the Respondent relies on Order 42 Rule 6(1) & (2) of the Civil Procedure Rules, the judicial decisions of Butt v Rent Restriction Tribunal (no citation given), Equity bank Ltd v Taiga Adams Company Limited (citation not given), Silverstein v Chesoni [2002] 1 KLR 867 and submits that the Applicant has not established any substantial loss that he would suffer if orders of stay of execution are not granted.
72. The Respondent relies on the judicial decisions of Elena D. Korir v Kenyatta University [2014] eKLR, Hassan Guyo Wakalo v Straman EA Ltd [2013] eKLR, Carter & Sons Ltd v Deposit Protection Fund Board & 3 Others [1997] eKLR, Machira T/A Machira & Co. Advocates v East African Standard (citation not given) and submits that the Applicant has not provided any security for due performance of the decree.
73. It is the Respondent's submissions that execution of a lawful decree does not amount to substantial loss and reiterates that the application for stay of execution has been brought after a long and inordinate delay.
74. The Respondent concludes his submissions by urging the Court to dismiss the Applicant's application.

Analysis and Determination.

75. I have considered the Applicant's application, the response thereto and the rival submissions.
76. It is my view that the following issues arise for determination;



- a. Whether Applicant’s Counsel is properly on record.
- b. Whether time within which to file an appeal should be extended.
- c. Whether an order of stay of execution of the judgement and decree issued in Kericho CM ELC Case No. 13 of 2018 on 10th August, 2022 should be granted pending hearing of the intended appeal.
- d. Who should bear costs of the application.

A. Whether Applicant’s Counsel is properly on record.

77. The Respondent contends that Counsel for the Applicant is not properly on record as he has only filed a consent for change of advocates without obtaining the requisite Court order.
78. The Applicant did not submit on this issue.
79. Order 9 Rule 9 of the Civil Procedure Rules provides as follows;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
80. In the judicial decision of *Muchungo v Gitau* [2023] KEELC 19907 (KLR) the Court held as follows;
 14. It is not in dispute that the Appellant had been represented by the law firm of Milimo & Co Advocates before and currently the new firm is that of Bryan Khaemba Kamau & Co Advocates. The Court has seen a consent on record filed on the 19th October, 2022 allowing the new firm to come on record for the Respondent in place of the former law firm of Milimo & Co Advocates. The Court agrees with the Respondent that he complied with the provisions of Order 9 rule 9(b) by filing the consent of change of Advocates.
 15. To the extent that the Applicant complied with Order 9 rule 9(b) the issue is now moot.”
81. The Respondent admits that the Applicant’s Counsel filed a consent to allow them to come on record.
82. A perusal of the Court record shows that there is a “Consent for Change of Advocates” attached to a “Replying Affidavit to the Preliminary Objection dated 18th April, 2023”
83. The Consent for Change of Advocates was filed in Kericho CM ELC Case No. 13 of 2018 Fred Kipkirui Choge v Sammy Choge.
84. The consent states that the firm of W.K Ngenoh Lessan & Co Advocates has no objection to the firm of Obondo Koko & Co. Advocates acting for the Applicant.
85. In the present matter, a consent was filed and therefore Counsel for the Applicant complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules.



B. Whether time within which to file an appeal should be extended.

86. The Applicant is seeking extension of time within which to file an appeal. The Applicant contends that he was not notified of the date of the delivery of judgement and once he realized that judgement had been delivered, time within which to file an appeal had lapsed.
87. In response, the Respondent contends that there has been inordinate delay in the filing of the present application.
88. The Respondent also contends that the Applicant was the Plaintiff before the subordinate Court and therefore he ought to have followed up to find out the date of delivery of the said judgement.
89. The Respondent submits that he will be prejudiced if the application under consideration is allowed.
90. 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.”

91. Under Section 79G of the *Civil Procedure Act*, time for filing an appeal from a judgement of a subordinate Court to the High Court and Courts of equal status is thirty days.
92. In the present matter, the subordinate Court delivered its judgement on 10th August, 2022. It follows that any appeal challenging the said decision ought to have been filed on or before 10th September, 2022.
93. In the judicial decision of *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR the Court held as follows;

“ 15. In *Charles Karanja Kiiru v Charles Githinji Muigwa* [2017]eKLR where the Respondent had delayed for 41 days before filing an appeal and where the High Court enlarged time to enable the respondent file an appeal out of time, the appellant was aggrieved by the order enlarging time claiming that the learned Judge erred in law and fact by exercising his discretion and extending time for filing an appeal out of time yet no sufficient reason had been offered to justify the same, the Court of Appeal cited this Court’s decision in *Wanjiru Mwangi & Another* [2015]eKLR and *APA Insurance Co. Ltd v Michael Kinyanjui Muturi*[2016]e KLR in dismissing the appeal.

16. I will therefore entirely rely on the above binding Court of Appeal decision in determining the merits of this application which is two pronged namely:- whether the prayer for extension of time is merited and whether this Court can validate an appeal which was filed out of time.

17. Under Section 79G of the *Civil Procedure Act*:

“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 a good and sufficient cause for not filing the appeal in time.”[Emphasis added].

18. The Court of Appeal in the above Case guided that whenever an application for extension of time is before a Court, the Court ought to take into account several factors as observed by Odek JJA in *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014]eKLR thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision (sic) of this Court including, but no (sic) limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

19. The Court of Appeal further guided that there is also a duty imposed on Courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.”

94. In the judicial decision of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR the Court of Appeal found 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.” (Emphasis mine)

95. In the above cited judicial decisions, certain factors have been set out which the Court takes into consideration when considering applications for extension of time.
96. They include the length of the delay, the reasons for the delay, the chances of the appeal succeeding if the prayers sought are granted and the degree of prejudice to the Respondent if the application is allowed.
97. On the length of the delay, the Applicant submits that immediately he became aware of the delivery of the said judgement, he filed the application after consideration.
98. The Applicant also submits that this was after a period of about three months.
99. The Respondent on the other hand submits that the subordinate Court delivered judgement on 10th August, 2022 while the Applicant filed his application on 14th December, 2022.
100. The Respondent therefore submits that the application under consideration was filed after a period of over four months had lapsed.
101. It is not disputed that the subordinate Court delivered judgement on 10th August, 2022.



102. The application under consideration was filed on 7th March, 2023 after a period of over six months had lapsed.
103. This Court has established that the parties herein begun to calculate the period of delay from the date of the application that is 14th December, 2022 instead of the date the application was filed.
104. The second issue for consideration is the reasons given for the delay. As stated in the preceding paragraphs, the Applicant contends that he was not notified when the subordinate Court was to deliver judgement.
105. The Respondent on the other hand contends that the Applicant was the Plaintiff before the subordinate Court and he ought to have followed up to find out when judgement was to be delivered.
106. The Respondent also submits that the other reasons the Applicant has given for the delay are that he (Applicant) could not trace the file at the Registry and that he was unwell. I note that no such reasons have been given by the Applicant in the application under consideration.
107. The Applicant has attached a copy of the judgement delivered in Kericho CMELC Case No. 13 of 2018 to his affidavit in support of the application.
108. From the said copy of the judgement there is no indication that Counsel for the Applicant and the Respondent were present during its delivery.
109. In the judicial decision of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] KECA 701 (KLR) the Court held as follows;

“(12) The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.” (Emphasis mine)

110. My view is that the Applicant has given sufficient explanation for the delay in filing the appeal and the present application.
111. The third issue for consideration is whether the Applicant has an arguable appeal.
112. The Applicant submits that he has attached to his affidavit in support of the application a copy of a draft Memorandum of Appeal which shows that his intended appeal is arguable and has high chances of success.
113. The Respondent on the other hand submits that the Applicant has not demonstrated that his intended appeal is arguable and that it raises issues that warrant appellate intervention.
114. In Paul Njage Njeru v Karija K Mugambi [2021] eKLR the Court while considering a similar application held as follows;

“15. On the chances of the appeal succeeding, the Applicant has annexed a draft Memorandum of Appeal raising 3 grounds of appeal which challenge the trial Court’s exercise of discretion to grant leave to file a claim which was already time barred. The Court considers that an appeal on the question of whether or not the Court could grant leave to appeal out of time and therefore, whether the Court has jurisdiction to entertain the claim is arguable. The



Court considers that an arguable appeal is not one which must necessarily succeed and it is not for this Court, at this stage to go into the merits of the appeal, to avoid embarrassing the Court that will sit on appeal, if leave is ultimately granted and the appeal is filed.” (Emphasis mine)

115. I have perused the draft Memorandum of Appeal. Among the various grounds on the draft Memorandum of Appeal is whether the Learned Trial Magistrate erred in taking into consideration issues that were not pleaded. My view is that this single ground makes the intended Appeal arguable.
116. The other issue for consideration in making a finding in favour of extension of time within which to file an appeal is whether prejudice may be caused to the Respondent. By prejudice we mean the injustice the Respondent is likely to suffer if time within which to file an appeal is extended.
117. The Applicant submits that the Respondent will not suffer any prejudice if time is extended while the Respondent submits that he will suffer temporal prejudice because of the prolonged litigation that has caused him emotional and financial strain.
118. The Respondent also submits that he will suffer financial prejudice because of the additional costs in opposing the application and procedural prejudice as the Applicant is abusing the Court process through dilatory tactics.
119. The Court of Appeal in *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] KECA 485 (KLR) held as follows;

“I find that the respondent shall not be prejudiced if the Applicant gets her day in Court to challenge the judgment of the learned judge. The respondent can be compensated by an order for costs in the event intended appeal is not successful. For these reasons, I hereby exercise my discretion in favour of granting leave to file a fresh Notice of Appeal and record of appeal out of time.” (Emphasis mine)
120. Even though the Respondent has extensively submitted on the nature of prejudice he is likely to suffer, it is my view that the Respondent will not suffer any prejudice that cannot be adequately compensated by an award of costs if the application is allowed.
121. In conclusion, the Court acknowledges that there has been delay in filing the appeal but the Applicant has shown sufficient cause for the delay. Further, I have found that the intended appeal is arguable and also found that the Respondent will not suffer any prejudice that cannot be adequately compensated by an award of costs. I have no reason not to exercise my discretion in favour of extending time within which to file an appeal.

C. Whether an order of stay of execution of the judgement and decree issued in Kericho CM ELC Case No. 13 of 2018 on 10th August, 2022 should be granted pending hearing of the intended appeal.

122. The Applicant is seeking that the Court issues orders of stay of execution of the judgement and decree issued in Kericho CM ELC Case No. 13 of 2018.
123. The Applicant submits that he stands to suffer substantial loss in the event the Court does not issue orders of stay of execution as he is likely to lose the suit parcel which he has extensively developed.
124. The Applicant further submits that he is willing to abide by any conditions given by the Court with regards to security.



125. The Respondent submits that the Applicant has not demonstrated that he will suffer substantial loss and he has not provided any security for due performance of the decree.
126. The law relating to stay pending Appeal is Order 42 Rule 6 (2) of the Civil Procedure Rules which provides as follows;
- “(2) 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.”
127. The Applicant has attached to his affidavit in support of the application a copy of the judgement delivered in Kericho CM ELC Case No. 13 of 2018 on 10th August, 2022.
128. In the said judgement, the Learned Trial Magistrate dismissed the Applicant’s suit with costs.
129. In *Joseph Muthuri & 32 others v Cooperative Bank Limited & 15 others* [2018] eKLR the Court cited with approval the judicial decision of *Raymond M Omboga v Austine Pyan Maranga Kisii HCCA Number 15 of 2010* where the Court expressed itself thus:
- “The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order.”
130. In the present matter, the dismissal of the Applicant’s suit is in the nature of a negative order and it cannot therefore be stayed.
131. Before penning off, this Court notes that the Respondent extensively submits on the delay in the hearing of the application under consideration.
132. The Respondent submits that as at July, 2025, the application under consideration has been pending for two years and seven months.
133. The Applicant did not submit on this issue.
134. As afore stated in the preceding paragraphs, the application under consideration was dismissed for want of prosecution on 25th January, 2024 and reinstated for hearing on 6th March, 2025. This is sufficient explanation for the delay in the hearing of the application.

D. Who should bear costs of the application.

135. The general rule is that costs follow the event. This is 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.



Disposition.

136. Taking the foregoing into consideration, the Applicant's application dated 14th December, 2022 is allowed in the following terms;

- a. Leave is hereby granted to the Applicant to lodge an appeal out of time against the judgement and decree in Kericho CMELC Case No. 13 of 2018.
- b. The costs of this application shall abide the outcome of the Appeal.

137. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 2ND DAY OF OCTOBER, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Kipkorir for Respondent

Mr. Morata for Mwita for the Applicant

Court Assistant; Mr. Joseph Makori

