

Applicant averred that the trial court (Hon A.G. Ndung'u) rendered a judgment in the following terms: -

- 1) The Defendant/Applicant shall vacate Plot Number 1172 Nguu Ranch Settlement Scheme within six months from the date of this judgment.
 - 2) In default of (1) above the Defendant/Applicant shall be evicted from Plot Number 1172 Nguu Ranch Settlement Scheme in compliance with mandatory provisions of Section 152G of the Land Act.
4. The Applicant averred that being dissatisfied with the said judgment, he filed an application for review of judgment on 4th January, 2024 and a ruling was delivered by the court (Hon E. Mbicha) dismissing the application for review in the following terms: -
- 1) That the issue of review in the judgment dated 29/6/2023 does not arise.
 - 2) That the Defendant/Applicant be granted stay of execution of the judgment herein dated 29/6/2023 and all consequential orders emanating therefrom for a period of one (1) year in the first instance to pursue the necessary leave application if at all and appeal to the superior court.
 - 3) That there shall be no order as to costs as to the application dated 4/1/2024.
5. The Applicant averred that he is aggrieved by the ruling delivered by Hon. E. Mbicha and that according to the applicable provisions of the Civil Procedure Act, the prescribed time for appeal has lapsed. He further averred that on 22nd October, 2024 he filed a Notice of appeal together with an application for stay of execution. He added that he also applied for certified copies of proceedings of the trial court.
6. It is the Applicant's contention that the application herein had been filed without unreasonable delay. He further contends that his appeal is meritorious with an overwhelming chance of success. The Applicant averred that no

prejudice would be suffered by the Respondent if leave is granted whereas on the other hand, the Applicant would permanently lose the entire parcel of land through eviction.

7. Opposing the application, the Respondent filed a replying affidavit sworn by himself on 20th March, 2025. He averred that the application herein has no merit and that it is meant to delay the enjoyment of the fruits of judgment of the Respondent. He contended that the delay in filing the instant application is inordinate and that no explanation has been provided by the Applicant. He urged the court to dismiss the application accordingly.
8. The application was canvassed by way of written submissions.
9. In the Applicant's submissions dated 29th May, 2025, Counsel contended that the time for filing an application for leave to appeal out of time started to run on 19/9/2024 when the trial court delivered its ruling on the Applicant's review application. Counsel argued that the application herein is in line with the provisions of Section 79G of the Civil Procedure Act.
10. Submitting on the Applicant's reasons for the delay, Counsel opined that trial court did not pronounce itself on the merits of the review application but instead granted the Applicant leave to file a formal application for extension of time before this court.
11. Submitting on whether the intended appeal is arguable, Counsel argued that the eleven grounds of appeal in the Applicant's memorandum of appeal raise triable issues. It was contended that the court ought to exercise its discretion in favour of the Applicant.
12. Counsel further submitted that the Applicant stands to suffer irreparable loss without recourse to any other known legal remedy whereas the Respondent stands to suffer no prejudice which cannot be recompensed by way of costs. Counsel urged the court to allow the application with costs.

13. In the Respondent's submissions dated 27th May, 2025, Counsel contended that the Applicant had slept on their right of appeal for nearly sixteen months from the date of judgment and only opted to appeal after the failure of his review application.

14. Counsel went on further to submit that having chosen to apply for review of the judgment that was delivered on 29/6/2023, and the same having been dismissed, the Applicant is now barred from attempting an appeal on the same grounds that were advanced in the review application.

15. Counsel further asserted that the Applicant had failed to explain the reason for the delay in between 29/6/2023 when judgment was delivered and 4/1/2024 when the application for review was filed. It was submitted that the delay caused by an unsuccessful choice of review cannot amount to sufficient cause and that the present application amounts to abuse of process. Counsel urged the court to dismiss the application with costs.

16. After a perusal of the application, the replying affidavit and the rival submissions, the apparent issue arising for determination is as follows: -

a) Whether this court should grant the Applicant an order for leave to appeal out time;

17. The power to enlarge such time that has been prescribed by this court for taking any action and complying with any directions is discretionary. Section 95 of the Civil Procedure Act outlines as follows: -

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.

18. The considerations to be made when deciding upon such an application for enlargement of time were aptly set out by the Court of Appeal in the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** as follows: -

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

“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”.”

19. The Applicant contended that a judgment was delivered by the lower court (Hon. A.G. Ndungu) on 29/6/2023 against him making orders inter alia, that the Applicant vacates Plot No. 1172 Nguu Ranch Settlement Scheme within six months of the judgment. Being dissatisfied with the decision, the Applicant filed an application for review of the judgment on 4/1/2024 before Hon. E. Mbicha.

20. He contended that Hon. E. Mbicha dismissed the application for review vide the ruling delivered on 19/9/2024 save that the lower court granted one year stay of execution of the earlier judgment.

21. The Respondent argued that the Applicant had chosen the route of appeal and thus, the intended appeal amounts to a re-litigation of the issues which were

dismissed by the lower court in the review application. It was submitted that the application herein is an abuse of the court process.

22.G.V. Odunga J. (as he then was) in the case of HA v LB [2022] eKLR at paragraph 12 held as follows: -

“Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequently appealing against the same, it must be noted that the Rules are subject to the provisions of the Civil Procedure Act under which section 3A empowers the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. To allow parties who have in the past unsuccessfully attempted to review a decision, to attack the very decision of review on appeal would in my view open several fronts in litigation since the possibility of the applicant also appealing against the decision refusing the review cannot be ruled out. The provisions of Order 45 rule 1 are meant to assist genuine litigants and not to assist parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. In my considered view the wording of the provisions of Order 45 rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of “any person considering himself aggrieved”. An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so. But to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts, in my view, to an abuse of the process of the Court. It would also contravene the overriding objective as provided under sections 1A and 1B of the Civil Procedure Act whose aim is the

disposal of cases expeditiously and avoidance of multiplicity of proceedings. To find otherwise would amount to giving the Court's seal of approval to persons who wish to play lottery with judicial process. Accordingly, I associate myself with the decision in The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi (supra) that both options cannot be pursued concurrently or one after the other."

23. Similarly, in **Kemboi (Represented by Noah Cheruiyot Kemboi and Selly Cherop Kemboi as his personal representatives of the Estate of the Deceased) v Keino alias Hezekiah Kipchoge Keino [2024] KEELC 13825 (KLR)**, the Court aptly held as follows: -

"Guided by the above case law and from my reading and understanding of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules; it is my considered opinion that a party cannot apply for review from the same decree or order, in this case the order issued on 16/8/2023 by Hon. D. Mikoyan. The same in my view would be akin to having a second bite at the cherry.

In this case, the Appellant having sought to review the order made on 16/8/2023 cannot now purport to appeal against the same orders he sought review of. He can only appeal against the decision on review issued on 29th February, 2024."

24. The ruling on review of the judgment was delivered on 9th September, 2024. Though the magistrate granted stay of execution of the judgment for one year, to allow the Applicant file an application of extension of time to file an appeal out of time, the Applicant did not file the application for extension of time until 19th March, 2025. Judgment was delivered on 26th June, 2023. The application for review was made on 4th January, 2024. The delay in filing the application

for extension of time was not explained. The Applicant appears to have gone to slumber because of the one year stay granted.

25. The Applicant was not keen on appealing against the judgment of 26th June, 2023. This is because he filed an application dated 22nd October, 2024 in which he sought orders which are totally unrelated to an appeal. He also filed a memorandum of appeal on the same date. The application has remained unprosecuted. If the application dated 22nd October, 2024 is anything to go by, the dispute between the Applicant and the Respondent was one of boundary dispute and encroachment. The Applicant and Respondent have their own parcels which are adjacent to each other. The Applicant owns parcel 1171 and the Respondent owns parcel 1172. The Judgment ordered the Applicant to move out of parcel 1172. This being the case, the intended appeal may not succeed.

26. The Applicant intends to attack both the ruling on review and the judgment. This amounts to an abuse of the process of court as was stated in the case of **H. A. –vs- L. B. (Supra)**. I therefore find that the Applicant’s application is devoid of merit. The same is dismissed with costs to the Respondent.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS
THIS 16TH DAY OF OCTOBER, 2025.**

IN THE PRESENCE OF:

Ms. Okinyi for Mr. Kivindyo for Applicant.

Mr. Kayoka for Respondent.

Court assistant Nelima

ORIGINAL