



**Ngari v Mwangi & 2 others (Miscellaneous Application
E007 of 2025) [2025] KEELC 6923 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6923 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
MISCELLANEOUS APPLICATION E007 OF 2025
LG KIMANI, J
OCTOBER 9, 2025**

BETWEEN

ROBERT MOPHAT NGARI APPLICANT

AND

JAMES MACHARIA MWANGI 1ST RESPONDENT

PATRICK KARIUKI MUITA 2ND RESPONDENT

LAND REGISTRAR NYERI 3RD RESPONDENT

RULING

1. Before the Court is the Notice of Motion application dated 13th February 2025 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That the Honourable Court be pleased to grant leave and/or extend time within which to file an appeal against the ruling by Hon. Sandra Kosgei in Karatina CM ELC 10 of 2019 delivered on 10th September 2024.
 4. That upon such leave being granted, the court be pleased to stay the proceedings in Karatina CM ELC 10 of 2019 pending the hearing and determination of the appeal.
 5. That costs of this application be in the cause.
2. The Application is supported by the affidavit of the Applicant herein, in which he deposes that the dispute between the parties has a long and complex history involving the proprietorship of LR Konyu/Baricho/849.



3. The Applicant deposed that the suit property belonged to his father, Ngari Kabui (Deceased) and was bequeathed to him vide confirmation of grant dated 13th November 2009. However, the 1st and 2nd Respondents claim to have a title deed registered in their joint names under mysterious circumstances. The Applicant had placed a caution on the title, which the respondents attempted to have deregistered in Nyeri HC Misc 13 of 2014; however, the application was dismissed.
4. Subsequently, the 1st and 2nd Respondents filed a substantive suit, Karatina CM ELC 10 of 2019, which proceeded ex parte and judgment was issued lifting the caution and condemning the Applicant to pay costs.
5. The Applicant then lodged an urgent application to set aside the judgment and allow him to file his defence and counterclaim, which was allowed on 23rd April 2024. The 1st and 2nd Respondents herein raised a preliminary objection claiming that the counterclaim was time-barred due to the Applicant's allegation of fraud. The preliminary objection was sustained by the Court on 10th September 2024, and the Applicant's counterclaim was struck out.
6. The Applicant deposes that he has been advised by his Advocates on record that the cause of action related to the recovery of land limitation from the date the cause of action arose. The Applicant then applied for an extension of time to file the counterclaim, but the application was dismissed on 4th February 2025.
7. The Applicant feels that he has suffered miscarriage of justice on several occasions and now desires to appeal against the ruling delivered on 10th September 2024, stating that his appeal has a significant chance of success, though it is out of time for filing the appeal. He seeks an extension of time.
8. The Applicant deposed that the delay of five months is not inordinate and is explainable as he was pursuing all the remedies available in the lower court. He further added that no prejudice will be occasioned that cannot be compensated by costs.
9. The primary suit was at the time of filing set for hearing on 25th February 2025, and the Applicant claimed that should the proceedings in the suit be allowed to proceed to judgment, the appeal would be rendered otiose and an academic exercise and the outcome would not resolve the substantive issues on proprietorship. He thus seeks a stay of proceedings.

The 1st Respondent's replying affidavit.

10. The 1st Respondent filed an affidavit on 15th July 2025 in which he deposed that the intended appeal amounts to a gross abuse of the court process and an unwarranted misuse of judicial resources, as it is aimed at obstructing and delaying the fair administration of justice.
11. He denied that the Applicant was pursuing all available remedies before the trial court, as the only available remedy would have been review, which the applicant did not apply for.
12. He stated that the impugned ruling was delivered on 10th September 2025, and there is an inordinate delay in filing an application for extension of time.
13. Further, the 1st Respondent deposed that the Applicant has not demonstrated that the appeal raises triable issues and that it would be rendered nugatory if the proceedings are not stayed. He stated that the stay infringes the Respondents' right to a fair and timely trial.
14. The 1st Respondent refutes the advice given by the Applicant's counsel that the limitation period is 12 years from when the cause of action arose, deposing that the Applicant's claim of fraud attracts



a limitation period of three (3) years from the date the fraud was discovered under Section 4(2) and Section 26 of the *Limitation of Actions Act*.

15. The 1st Respondent, therefore, deposes that it would be prejudicial to grant the prayers sought by the Applicant to allow a claim that has lain dormant for a long time.

The Applicant's Written Submissions.

16. Counsel for the Applicant herein submitted that extension of time is a discretionary equitable remedy guided by established principles requiring the court to consider the length and explanation of delay, prospects of success on appeal, and prejudice to parties and relied on the cases of *Mwambora & 9 others v Spire Properties (K) Limited & SO others (Petition (Application)(E031) of 2022)* [2023] KESC 12 {KLR} (Civ) {17 February 2023} (Ruling) and *Seven L. General Trading Ltd & another v Karau (Miscellaneous Application 42 of 2024)* [2024] KEHC 3979 (KLR) (24 April 2024) (Ruling).
17. Secondly, it is submitted that a delay of five(5) months is not inordinate, that courts have granted extension of time for delays longer than that, citing the cases of: *Masese v Hellen & another (Civil Miscellaneous E981 of 2024)* [2025] KEHC 3693 (KLR), *Chuaga v Grivin ((suing as administrator of the estate of Silas Waraba (Dcd)) (Miscellaneous Case E048 of 2022)* [2022] KEHC 14011 (KLR) (17 October 2022) (Ruling), *Rachuodho v Akoo (Civil Application E183 of 2024)* [2025] KECA 1169 (KLR) (20 June 2025) (Ruling)
18. Counsel also submitted that the reason for the delay was to pursue available remedies and that it is an arguable appeal with a good chance of success, and relied on the following authorities for this point: *Kamau v Macharia & 5 others (Civil Application E075 of 2021)* [2022] KECA 969 (KLR) (26 August 2022) (Ruling), *Carnavale Vincent Michael & 2 others v Mohamed Hanif Majothi (Suing through his Proxy) Abdul Azim Anwarali Kassam Ismail* [2021] eKLR
19. Regarding whether a stay of proceedings should be granted pending appeal, Counsel for the Applicant submitted that if the prayer for stay is not granted, the primary suit will proceed to determine only the narrow issue of caution removal. This limited relief will not resolve the fundamental ownership dispute between parties holding competing title deeds for the same property. On this point, Counsel relied on the following cases: *Kinatwa Sacco Cooperative Ltd & another v Lavies Ngui Joel & 14 others* [2021] KEHC 1311 (KLR), *Njiwa Housing Cooperative Society Limited v Okwiri (Civil Appeal 635 of 2022)* [2024] KEHC 3003 (KLR) (Civ) (20 March 2024) (Ruling)
20. The Applicant concluded that no substantial prejudice accrues to Respondents from a brief postponement while preserving the Applicant's constitutional right of appeal and property protection under Article 40.

1st and 2nd Respondents' Written Submissions

21. Counsel for the 1st and 2nd Respondents submitted that the instant application filed by the Applicant is yet another backhanded attempt at obstructing and delaying the fair administration of justice. That instead of seeking a review or an appeal of such a decision, the Applicant filed Miscellaneous Application No. E024 of 2024 for extension of time within which to file the counterclaim. This application amounted to an appeal as the learned Magistrate, Hon. Sandra Kosgey, pointed out in her ruling on 4th February 2025
22. It is their submission that the Court's power of extension of time in which to file an appeal is conferred under Order 50 rule 6 of the Civil Procedure Rules, wherein the terms of such enlargement are as the justice of the case may require, as they cited the case of *Bartilol & 3 others Vs. Bartilol & another (Civil*



Application 001 of 2024) [2024] (Ruling) and Paul Wanjohi Methane v Duncan Gichane Mathenge [2013] eKLR

23. Counsel submitted that the Applicant has not shown that the application was brought without undue delay, nor has he explained that there was a reasonable reason for such delay, and therefore has not accounted sufficiently to warrant an extension of time.
24. The Respondents submit that they stand to suffer prejudice if the application is granted, because, since they filed the main suit in 2019, the Applicant has consistently undermined its expeditious resolution, initially by failing to file a defence, then by attempting to set aside a properly entered ex parte judgment in favour of the 1st and 2nd Respondents. The Applicant then introduced a frivolous and vexatious counterclaim barred in law due to being filed out of the limitation period, and compounded this delay by initiating multiple interlocutory applications, each serving as a procedural detour aimed at frustrating the course of justice and as a dilatory tactic.
25. It is further submitted that the intended appeal does not raise any issues of public importance or interest whatsoever and has not met the threshold crystallised in law to exercise this discretion as given in the authority of Paul Wanjohi Methane v Duncan Gichane Mathenge [2013] Eklr.
26. Regarding stay of proceedings, it was submitted that it is a rare and exceptional remedy issued by the Courts, as it is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case. They relied on the authority in Access Bank Kenya PLC Vs. Mengich & another (Civil Appeal E003 of 2024) [2024] (Ruling), which cited the findings in William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others [2019] eKLR on the principles for stay of proceedings.
27. It is therefore the Respondents' conclusion that the Applicant herein has not demonstrated that the appeal raises triable issues and therefore establishes an arguable appeal, and that such appeal will be rendered nugatory if the proceedings in the Trial Court are not stayed during the pendency of this application, and subsequently the appeal. In the Trial Court, the Court made a finding that a counterclaim is a cross-suit and only exists out of the defence fronted by the Applicants in the main suit, and therefore these interlocutory proceedings do not affect the original suit as they prayed for the instant to be dismissed with costs to themselves.

Analysis & Determination

28. The Court has considered the application herein, the reply to the same, and submissions by Counsel for the parties and considers that the issues for determination arise from the two substantive prayers in the application dated 13th February 2025.

Whether to grant leave to file an appeal out of time.

29. Section 79 G of the [Civil Procedure Act](#) provides for appeals from Subordinate Courts and states 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.”



30. The above section requires that a party seeking to have an appeal admitted out of time must satisfy the court that the Applicant has good and sufficient cause for not filing the appeal on time. Principles that guide any court in the exercise of its mandate to extend time have been crystallised in case law. In the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231, the Court of Appeal 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.”

31. In the case of *Aviation Cargo Support Limited v St. Mark Freight Services Limited* [2014] eKLR, the Court of Appeal stated that:

“The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily, including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.”

32. It is clear, therefore, that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and, like any other judicial discretion, it must be fixed on principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion must be exercised based on evidence and sound legal principles, with the burden of disclosing the material falling squarely on the applicant.

33. Following the law and authorities set out above, the Court has considered the length of delay in filing the present application. As stated by all parties, the delay runs from the date of the ruling subject matter of the intended appeal on 10th September 2024 and the date of filing the present application on 14th February 2025, about five months.

34. On this, I am guided by the persuasive case of *Chuaga v Grivin* ((suing as administrator of the estate of Silas Waraba (Dcd)) (Miscellaneous Case E048 of 2022) [2022] KEHC 14011 (KLR) (17 October 2022) (Ruling), to find that the delay of five months is not excessive or inordinate. The Court held that:

“The court was satisfied that, based on the material placed before it, the 7 months delay was not inordinate or unreasonable, and the court went further to find that, in the circumstances, failure to establish sufficient cause or reason was not a reason for the court to fetter its discretion to lock the door of justice to the applicant.

35. The Court finds that even though this court would not condone or forgive inordinate delays, it must do whatever is necessary to do justice to the parties. It is found that the period of delay was not inordinate or unreasonable in the circumstances of this case.



36. On the cause and/or reason for the delay, the applicant explained that the trial court heard the preliminary objection raised by the Respondents and rendered its ruling on 10/9/2024 by upholding it and striking out the Applicant's counterclaim. The Applicant explained that he was advised by his counsel to apply for an extension of time to file a counterclaim under the belief that this would save judicial time and help the parties resolve the substantive issues surrounding proprietorship of the suit land. The Applicant filed Nyeri MCCCmisc. E024/2024, where he sought leave to file a counterclaim in ELC 10 of 2019.
37. In a ruling dated 4/2/2025, the court dismissed the application, stating that the issue had already been heard and determined through the ruling that dealt with the preliminary objection. The court further observed that entertaining such an application would be to unprocedurally and unlawfully determine an appeal against the ruling dated 10th September 2024. Subsequently, the Applicant filed the present application on 14/2/2025.
38. I wish to quote the finding of the Court in Aviation Cargo Support Ltd (Supra) in stating that "in normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous." Odunga, J(as he then was) in the Machakos Miscellaneous Application NO. 77 OF 2021 stated as follows concerning extension of time for appeal:
- "The broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default
- That can be put right by payment of costs, which ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high-handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See Philip Chemwolo & Another vs. Augustine Kubende [1986] KLR 492; (1982-88) KAR
- Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible to be determined on their merits rather than on technicalities of procedure. In this case, I did not hear the Respondents contend that if the application is allowed, they will suffer such prejudice that cannot be compensated by an award of costs. It has been said there is one panacea which heals every sore in litigation, and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage that it cannot be cured by the application of that healing medicine. See Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.
39. In this case, the Plaintiff followed the advice of his counsel and, instead of appealing, filed an application to extend the time to file the counterclaim. The Applicant genuinely believed this to be the best cause and had a reason that if the orders of extension of time were granted, it would save the court's time and the substantive dispute would be heard and determined. The court finds that the applicant has adequately explained the cause and reason for the delay in filing the present application and the Court is satisfied that he had good and sufficient cause for not filing the appeal in time.
40. The Court has also considered whether the proposed appeal has a chance of success. The Applicant claims that his appeal has high chances of success in that the counterclaim involves recovery of land whose limitation period is twelve years from the date the cause of action arose or twelve years from the date when the fraud was discovered. The Applicant attached to his application a draft Memorandum of Appeal, where he set out his grounds of appeal.



41. The trial court considered the provisions of Section 4 (2), 7 and 26 of the Limitations of Actions Act and concluded that since the Applicant pleaded in his counterclaim fraud over the suit property, the limitation period of 12 years as provided under Section 7 of the Limitations of Action Act does not apply. The said sections provide as follows;

42. Section 4 (2) provides for Actions of contract and tort and states as follows;

- (1) 1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
 - (a) actions founded on contract
 - (b) actions to enforce a recognisance
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law
- (2) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

43. Section 7 provides for Actions to recover land and states as follows;

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

44. Section 26 provides for the Extension of the limitation period in case of fraud or mistake and states as follows;

Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) The right of action is concealed by the fraud of any such person as aforesaid; or
- (c) The action is for relief from the consequences of a mistake; the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- i. In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.



45. From the foregoing, the court, without making any determination or giving any views on the merit of the appeal, finds that the intended appeal cannot be said to be frivolous or unfounded. The court is of the view that it will be in the interests of justice that the Applicant be allowed to pursue the appeal on merit to its conclusion.

46. On the question of prejudice to the Respondent, the court adopts the views of Odunga, J(as he then was) in Machakos Miscellaneous Application No. 77 of 2021 (supra), where he stated that:

“Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure”

47. The Court will thus exercise its discretion in this matter and allow prayer 2 of the application herein

Whether to grant an order of stay of the proceedings before the Trial Court

48. An order for stay of proceedings is provided for under Order 42 Rule (6) of the Civil Procedure Rules (2010), which states as follows:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

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.

49. . It is noted that under the above Order 42 Rule 6 of the Civil Procedure Rules, though Sub-rule 1 mentions both the stay of execution and stay proceedings, the conditions given under Sub-rule 2 apply solely to the stay of execution pending appeal and not the stay of proceedings. In the case of William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 others[2019] eKLR, a 5-judge Bench of the High Court, after scanning through various decisions on the question of stay of proceedings, laid down the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR; Global Tours & Travels Limited (Nairobi HC Winding Up Cause No 43 of 2000); David Morton Silverstein v Atsango Chesoni [2002] eKLR, where the following six principles were laid down by the Court:-

a. First, there must be an appeal pending before the higher Court;



- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been led, and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly.
 - c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
 - e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
 - f. Sixth, the Applicant must demonstrate that the application for stay was led expeditiously and without delay.
50. All these factors must be considered, in a given case, as concisely expressed in Halsbury's Laws of England, 4th Edition, Vol. 37 at p. 330, that:

The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue.

51. From the foregoing, this is a power which ought to be exercised sparingly and only in exceptional cases. In other words, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. Ringera J (as he then was), in *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No 43 of 2000)* had this to say on this matter of stay of proceedings:

“I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice. The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilisation of judicial time and whether the application has been brought expeditiously.”

52. What emerges from the discussion above is that the grant of a stay of proceedings pending the hearing of an interlocutory appeal in civil matters is a rare and exceptional remedy. As a general rule, an appellate court will only exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter before a magistrate's Court or Tribunal only in exceptional circumstances.



53. While it is difficult to determine with mathematical precision when the Court will use this power, it is only to be sparingly used where, in the words of Gardiner and Lansdown (6th Ed. Vol. 1 p. 750), “grave injustice might otherwise result or where justice might not by other means be attained.” As the authors correctly write, the Court will generally “hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the Court below.” Hence, the propriety of granting a stay of proceedings pending an appeal over interlocutory matters is decided on the facts of each case and with “due regard to the salutary general rule that appeals are not entertained piecemeal.” (Walhaus & others v Additional Magistrate, Johannesburg & another, 1959 (3) SA 113(A) at 120D; S. v Western Areas Ltd & others 2005 (5) SA 214 (SCA) at 224D.
54. In the present case, the court has granted the applicant an extension of time to file an appeal out of time and it intends to make timelines to supervise the prosecution of the appeal to prevent abuse of the orders granted.
55. The court has also noted that the present application is a multi-pronged application wherein the Applicant seeks orders of extension of time for filing an appeal and an order of stay of proceedings. The trial court has no jurisdiction to hear and determine the question of extension of time to file an appeal. The court finds that filing the application for a stay of proceedings pending appeal in the first instance was in order.
56. The court further finds that the Applicant has demonstrated that the appeal raises substantial questions to be determined or is otherwise arguable; as discussed earlier, the proposed appeal calls for interpretation of Sections 4(2), 7 and 26 of the *Limitation of Actions Act* and how the said provisions of the law applied to the Applicant’s counterclaim. Further, the appellate court will be required to consider whether or not the Applicant’s claim, as contained in the counterclaim, was a claim for recovery of land and whether the claim was time-barred under the *Limitation of Actions Act* or whether the said claim was a claim based on fraud whose time had lapsed under the same law.
57. On numerous occasions, courts have held that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. See *Kuko & another v Ali & another; Robinson (Interested Party) (Civil Application E023 of 2023) [2024] KECA 305 (KLR) (22 March 2024) (Ruling)*. (Court of Appeal at Eldoret).
58. Arising from the documents filed, the court has gathered that the Respondent’s case pending before the trial court is a suit seeking the removal of the caution existing on the suit land LR. Konyu/Barich/849. The Applicant claims that there exist two original title deeds to the suit land and that the Respondents herein obtained the title to the said suit land through fraudulent means. He further claims that the suit land was registered in the name of Ngari Kabui (deceased) and the same was bequeathed to him through a succession cause, and that he holds the original title deed in the name of the deceased.
59. The court has considered the ruling of the Hon. Lady Justice Waithaka dated 20/1/2016 in Nyeri Misc Application No. 13 of 2014, where she stated with regard to the existence of the two tile deeds that:-

“Therefore, what happened between 4/11/1976 and 22/1/1988 cannot be understood unless the matter is substantially heard and determined as a suit and not an application.”
60. The court is of the view that the Respondent’s suit before the trial court and the counterclaim are claims that are closely tied to each other. It is in the interests of justice that the appeal herein is heard before the trial court suit proceeds to determine whether the Applicant’s counterclaim is truly time-barred as found by the trial court.



61. In the court's view, the Applicant has demonstrated that in the circumstances of this case, stay of proceedings is warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal. The court envisages that if the Respondent's claim were to proceed for hearing and determination, and the Applicant's appeal were to succeed, it would mean that the suit is taken back to the trial court for rehearing. This, in the court's view, would be an unnecessary and imprudent use of judicial time.
62. Further to this, if the Respondent's suit were to proceed for hearing and the caution is removed, the suit land would be open to be used and/or transacted in ways that would not preserve the land awaiting determination of this appeal.
63. From the foregoing, the court finds that to refuse to grant an order of stay to the applicant, would cause Applicant such hardship as would be out of proportion to any suffering the Respondent might undergo while waiting for the applicant's appeal to be heard and determined.
64. The court thus finds that the Application dated 13th February 2025 has merit and the same is hereby allowed in the following terms;
 1. Leave is hereby granted to the Applicant to file an appeal within seven days against the ruling by Hon. Sandra Kosgei in Karatina CM ELC 10 of 2019 delivered on 10th September 2024.
 2. The Applicant is to file and serve the Memorandum of Appeal within seven days from the date of this ruling, and the full record of the appeal and written submissions within 21 days from the date of filing the Memorandum of Appeal.
 3. The Respondents are to file their submissions within 14 days from the date of service.
 4. This matter will be mentioned to confirm filing and for directions on 17th December 2025.
 5. An order of stay of the proceedings in Karatina CM ELC 10 of 2019 pending the hearing and determination of the appeal is hereby granted.
 6. The Applicant will pay the cost of this application.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF OCTOBER 2025

HON. LADY JUSTICE L.G. KIMANI

JUDGE

In the Presence of:-

C. Kendi: Court Assistant

M/S Kimani H/B for Ndichu for the Applicant

Makura for the 1st and 2nd Respondents

No attendance for the 3rd Respondent

