



REPUBLIC OF KENYA



KENYA LAW
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**Mukangu v Mukangu (Civil Application E114 of 2025)
[2025] KECA 1690 (KLR) (24 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1690 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E114 OF 2025
K M'INOTI, JA
OCTOBER 24, 2025**

BETWEEN

FREDRICK KINYURU MUKANGU APPLICANT

AND

STEPHEN NDUMBA MUKANGU RESPONDENT

*(Application for extension of time to appeal from the judgment and decree of the Environment
& Land Court at Meru (Nzili, J.) dated 16th November 2022 in ELCC No. 88 of 2015)*

RULING

1. Having made a false start in his bid to exercise his right of appeal against the judgment of the Environment and Land Court (ELC) at Meru (Nzili, J.) dated 16th November 2022, the applicant, Frederick Kinyuru Ndumba is back in this Court for extension of time to enable him start the process all over again. The law does not bar him from starting afresh so long as he is able to sufficiently explain the delay occasioned in lodging the appeal.
2. The brief background to the application is as follows. The respondent, Stephen Ndumba Mukangu, filed ELC Case No. 88 of 2015 in the ELC at Meru against the applicant, who is his brother, for a declaration that the applicant holds the property known as LR No. Kiirua Naari 302 (the suit property) in trust for him and his family. He also prayed for an order for subdivision the suit property into two equal portions for each of them.
3. After hearing the dispute, the ELC, by the judgment that the applicant intends to appeal, found in favour of the respondent and issued the following decree:
 - “i. A declaration be and is hereby issued that the defendant holds half share of LR No. Kiirua Naari 302 in trust for the plaintiff;
 - ii. The land shall be divided into two equal shares in favour of the two parties;



- iii. The defendant to sign the subdivision, land control board and land transfer forms in favour of the plaintiff within two months from the date hereof, in default the Deputy Registrar to effect the forms;
 - iv. Permanent injunction do issue restraining the defendant from interfering with the plaintiff's quiet possession of the aforesaid half share out of LR No. Kiirua Naari 302; and
 - v. Costs to the plaintiff.”
4. The applicant was aggrieved and filed a notice of appeal on 21st November 2022, which was well within the time prescribed by rule 77(2) of the Court of Appeal Rules (the Rules). He subsequently filed the record of appeal on 2nd April 2024.
 5. On 30th May 2024, the respondent applied to strike out the applicant's notice and record of appeal on the grounds that the applicant had failed to serve upon the respondent both the notice of appeal and the record of appeal within the prescribed time. As regards the notice of appeal, the respondent contended that it was served on 28th May 2024 in breach of rule 79 and, as regards the record of appeal, that it was served on 28th May 2024 in violation of rule 84.
 6. In its ruling dated 18th July 2025, the Court noted that the singular issue in the application was the late service of the notice of appeal and the record of appeal, which were not disputed. Accordingly, the Court allowed the respondent's application and struck out the applicant's notice and record of appeal with costs.
 7. Having hit a dead end, the applicant went back to the drawing board and lodged a draft notice of appeal and a draft memorandum of appeal dated 26th July 2025. He followed up the same day with the present application, in which he prays for extension of time to re-start the appeal process.
 8. The application is supported by the applicant's affidavit sworn on 26th July 2025 and his supplementary affidavit sworn on 14th August 2025 in which he sets out the background I have traced above and adds that his counsel erroneously and by oversight failed to serve the notice and record of appeal within the prescribed time and that he has learnt his lesson. He further states that he has all the requisite documents and is able to file the appeal immediately he is allowed by the Court to do so.
 9. It is the applicant's further averment that his intended appeal is not frivolous and that on 1st March 2023 this Court issued an order for maintenance of the status quo pending the hearing and determination struck out appeal. Further, that upon the appeal being struck out, the order for status quo was vacated and there was imminent danger of execution of the judgment of the ELC. He avers that his family lives on the suit property, which he has developed.
 10. The above points are reiterated in the his written submissions dated 18th August 2025 in which he adds that as regards the appeal which was struck out, he was not indolent and had diligently taken all the required steps within the prescribed time, and only erred in the service of the notice and record of appeal, which error he states was genuine mistake on the part of his counsel. He also argues that upon the striking out of the appeal, he moved post-haste to make the present application for extension of time, to start all over again. In support of his submissions the applicant cites Sokoro Savings & Credit Co-operative Society Ltd v. Mwamburi [2023] KECA 381(KLR).
 11. The respondent opposes the application vide a replying affidavit that he swore on 13th August 2025 and written submissions dated 26th August 2025 where he takes issue with the applicant's failure to



comply with directions relating to the present application and what are clearly typographical errors in the application, easily confirmed as errors by the other documents on record.

12. The substance of the response is that the application is frivolous and calculated to delay the respondent from the fruits of his judgment. He adds that extension of time is an equitable remedy rather than a right of a party and that the applicant has not given sufficient explanation for the delay involved in this matter, nor has he demonstrated the prejudice he stands to suffer. In the respondent's view, the applicant is merely craving a second bite of the cherry so as to keep this litigation going in perpetuity. Citing the decision of this Court in *M s Portreitz Maternity v James Karanga Kabia*, CA No 63 of 1997, he submits that the applicant's right of appeal must be balanced with the respondent's right to enjoy the fruits of his judgment.
13. I have considered this application. The respondent is right to emphasise that although the discretion of the Court under rule 4 of the Rules to extend time is unfettered, extension of time is not a right of a party, but is an equitable remedy that is only available to a deserving party. Indeed in *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others* [2014] eKLR, the Supreme Court emphasised, among others, the following aspects of extension of time:
 - i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis..."
14. The factors that the Court takes into account in determining whether or not to extend time are well settled. In *Imperial Bank Ltd (In Receivership) & Another v. Alnashir Popat & 18 Others* [2018] eKLR, those factors were stated as follows:

"Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity."

(See also *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi*, CA No. Nai. 255 of 1997 and *Fakir Mohamed v. Joseph Mugambi & 2 Others*, CA. No. Nai 332 of 2004).
15. In the application before me, the applicant's appeal was struck out for the sole reason of failure to serve the notice and record of appeal within the time prescribed by the Rules. Before that, it is common ground that he had met the prescribed timelines. When the appeal was struck out on 18th July 2025 for late service, the applicant promptly filed this application for extension of time within seven days, on 26th July 2025, which by any stretch of imagination cannot be described as inordinately long.
16. On the reason why there was failure to serve the notice and record of appeal within the prescribed time, I am persuaded that the applicant has been candid and owned up to the error and lapse. I think this is



the kind of error that the late Madan, J.A (as he then was) had in mind when uttered his famous words in *Belinda Murai & 9 Others v. Amos Wainaina*, CA. No. Nai. 9 of 1978, Madan, JA.:

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so requires. It is all done in the interests of justice."

17. I haven not perceived a deliberate intention on the part of the applicant to steal a match or to deliberately delay resolution of this dispute. I would, accordingly, go along with Lakha, JA in *Tononoka Steels Ltd*

v. The PTA Bank, CA No. 295 of 1998: when he stated:

"Broadly speaking, my view of the matter is that unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court's discretion, the Court should, in so far as it may be reasonable, prefer, in the wider interests of justice, to have a case determined on its merits."

18. I also do not think the intended appeal is frivolous. At least this Court, with the consent of the parties, had previously ordered the parties to maintain the status quo until the appeal was heard and determined. That in itself would indicate that prima facie the appeal is not frivolous. In addition, I am not persuaded that, other than for the period pending the hearing and determination of the appeal, the respondent will suffer any great prejudice, in so far as both the applicant and the respondent continue in occupation of different parts of the suit property.

19. For the foregoing reasons, I allow this application and direct the applicant to file and serve the notice of appeal within SEVEN (7) DAYS from the date of this ruling and the record of appeal within TWENTY ONE (21) DAYS from the date of the notice of appeal.

20. In default, this application shall stand dismissed. Costs of the application will abide the outcome of the intended appeal. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF OCTOBER, 2025.

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

