



**Ojwang & another v Adero & 2 others (Miscellaneous Application
E019 of 2024) [2025] KEELC 7437 (KLR) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7437 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
MISCELLANEOUS APPLICATION E019 OF 2024**

AE DENA, J

OCTOBER 30, 2025

BETWEEN

ALPHONCE ODHIAMBO OJWANG 1ST APPELLANT

BENARD OKEYO OJWANG 2ND APPELLANT

AND

SAMSON WANDOLO ADERO 1ST RESPONDENT

DISTRICT LANDS ADJUDICATION OFFICE, BONDO 2ND RESPONDENT

**THE HON. ATTORNEY GENERAL (SUED ON BEHALF OF THE CHIEF LAND
REGISTRAR) 3RD RESPONDENT**

RULING

1. The application the subject of this ruling is dated 18/12/2024 and seeks the following verbatim orders;-
 1. Spent
 2. That this Court be pleased to grant the applicant leave to appeal out of time against the judgment of Hon. J.P. Nandi (SPM) delivered on the 24th September 2024 in MCELC No E013 of 2023
 3. That the Memorandum of Appeal annexed herewith be admitted and deemed to be properly on record and to have been so filed within the stipulated time.
 4. That the Honourable Court be pleased to issue an Order of stay of execution of the Judgment of Hon. J.P. Nandi (SPM) delivered on the 24th September 2024 in MCELC No E013 of 2023 pending the hearing and determination of this Application.



5. That this Honourable Court be pleased to issue an Order of stay of execution of the Orders of Hon. J.P. Nandi (SPM) delivered on the 24th September 2024 in MCELC No E013 of 2023 pending the hearing and determination of this Appeal.
6. That the costs of this application be provided for.
2. The application is premised on the grounds on its face and the supporting affidavit of Christopher Ochieng counsel on record for the applicant. It is deponed that the subordinate court on the 24th September 2024 delivered a judgment in Bondo MCELC E13 of 2023 dismissing the Appellants suit. A copy of the judgement is annexed.
3. Counsel avers that upon reviewing the judgement with the Appellants he received instructions to proceed and prefer an appeal against the decision of the subordinate court within prescribed time. That despite receiving clear instructions and intending to file the appeal, he inadvertently failed to file the Memorandum of Appeal within the prescribed 30 days due to an inadvertent mistake on his part. The error is regretted as it was neither intentional nor deliberate. Counsel took full responsibility for the delay in filing the appeal.
4. The court is informed that a Draft Memorandum of Appeal has been prepared which is annexed. It is stated that the intended appeal raises arguable and weighty issues which are summarised. It is disclosed that proceedings in the matter have been requested from the subordinate court. A copy of the letter is attached. That the delay occasioned in filing the appeal is not inordinate, and no prejudice will be suffered by the Respondent if this application is allowed.

Response

5. The application is opposed by the 1st respondent by way of the replying affidavit sworn on 3rd April 2025. It is averred that there has been inordinate delay of three (3) months which has not been sufficiently explained. That it has not been disclosed where the "review" of the judgement was done and when he was instructed to prefer an appeal so that this court can be enlightened on the timelines he ought to have been working with. That this amounts to concealment of timelines by the deponent. It is observed that the applicant's themselves have not made any deposition in support of the present application.
6. It is urged that no good and/or sufficient cause has been placed before this court to warrant the exercise of discretion in favour of the applicant.

Submissions

7. The application was canvassed by way of written submissions. The applicants submissions are dated 26/05/2025. The respondents' submissions are dated 13/06/2025. I have taken into consideration the issues raised and authorities cited both for and against the grant of the orders sought.

Determination

8. The main issue for determination is whether the application has merit.
9. The power of the court to enlarge time for filing an appeal is donated under the provisions of Section 79G of the [Civil Procedure Act](#) which provides 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.

10. The law requires that an appeal is filed within 30 days of the judgement being appealed against. However, where an applicant shows sufficient reasons for failure to meet the above timeline the court may allow an appeal to be filed out of time.
11. Extension of time is not a right. It is an equitable remedy available to a deserving party at the discretion of the court.
12. The applicant referred the court to the case of Nicholas Kiptoo Arap Korir Sala Vs IEBC & Others (2014) where the Supreme Court of Kenya laid out the criteria as the length of the delay, reasons for the delay, the chances of success of the intended appeal and the degree of the prejudice.
13. In *First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65* the Court enunciated the principles to be considered in exercising the discretion whether or not to enlarge time and whether or not to grant such an application as follows:
 - (i). the explanation if any for the delay;
 - (ii). the merits of the contemplated action, whether the matter is an arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
 - (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
14. In the present case the main explanation given through counsel for the plaintiff is that he was instructed to file the appeal within good time but he failed to do so due to sheer inadvertence on his part.
15. It has been submitted by the respondent that the applicants have not given a detailed chronology of events to demonstrate diligence or steps taken to pursue their appeal and the case of *Habo Agencies Ltd vs. Wilfred Odhiambo Musingo (2015)* eKLR is cited. It has also been stated that the parties to the intended appeal have not filed an affidavit to confirm how and when they instructed counsel to appeal the decision.
16. I think for me the key criteria is sufficient reason and this depends with circumstances of each case. It can also mean an adequate or enough explanation. The person who confesses inadvertence is the counsel who has been seized of the matter even during the trial court proceedings. He has clearly stated he was instructed in good time, meaning he would have made it to file an appeal within the time frame given. It took him three months to act owing to his inadvertence. It is not his client who forgot.
17. Should the court punish the litigant for the mistake of counsel? The respondents urge that not all mistakes made by counsel are excusable. That granting the orders sought would be rewarding negligence and undermining the principle that litigation must come to an end.
18. The court respectfully agrees considering that there could be a mistake that goes to the root of a matter and are not salvageable. In the present case a window is available for the court to exercise powers for extension. Had there been no such power, then in my view the courts hands would be tied. I will not shut out the applicant from the seat of a right of appeal on the basis that litigation must come to end.



19. But of utmost importance is if there will be any prejudice that will be suffered by the respondent decree holder were the application to be allowed. The respondent submits that litigation must come to an end and I respectfully I disagree in view of the existence of a litigants right to appeal.
20. It has been further submitted that respondent has legitimate expectation to enjoy the fruits of his judgment which was the dismissal of the Applicant's suit. That being entitled to costs prejudice will be suffered in the absence of security. Further the applicant is occasioning the respondent to suffer financial and emotional hardship in defending a matter already concluded.
21. Is the prejudice stated above capable of being adequately compensated by costs? In my view yes and these should be the costs of the present application. I therefore do not find any prejudice that would be occasioned to the respondent that is not compensable.
22. I have noted the arguments for and against the arguability of the appeal. I think I will keep off any discourse geared towards making a pronouncement on the merit of the intended appeal. I think the issues sought to be raised therein, as set out in the motion,deserve to be canvassed during the appeal.
23. The applicant also sought for orders of stay of execution of the Orders of Hon. J.P. Nandi (SPM) delivered on the 24th September 2024 in MCELC No E013 of 2023 pending the hearing and determination of the Appeal. The court notes that the applicant has not addressed the court on the same and shall treat the prayer as abandoned.
24. The following orders therefore issue to dispose of the application dated 18/12/2024; -
 1. That leave to appeal out of time against the judgment of Hon. J.P. Nandi (SPM) delivered on the 24th September 2024 in MCELC No E013 of 2023 be and is hereby granted.
 2. That the Memorandum of Appeal annexed herewith be admitted to have been so filed within the stipulated time.
 3. That the appeal be filed within 10 days of today's date.
 4. That the costs of this application and proceedings be granted to the 1st respondent.
 5. The file shall be closed

DELIVERED AND DATED AT SIAYA THIS 30TH DAY OF OCTOBER 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

30/10/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Ochieng for the Applicant

Mr. Siwolo Holding Brief for Mr. Odongo for 1st Respondent

No appearance for the rest of the parties

Court Assistant: Ishamel Orwa

