

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISII
ELCLMISC E021 OF 2024

COUNTY GOVERNMENT OF KISII APPLICANT

VERSUS

ELIJAH KIBAGENDI TENGENYA (Legal Administrator of the estate of the late JONES TENGENYA NYAMWARO) 1ST RESPONDENT

JAMES OBARA ONDARI 2ND RESPONDENT

JAMES MIRUKA ONYANCHA 3RD RESPONDENT

RULING

1. The application before me is that dated 24 July 2024. It will be observed that it is being determined more than one year since it was filed and this is because it had earlier been dismissed for non-attendance on 30 January 2025, and later in the month of May 2025 an application to reinstate was filed and allowed on 2 October 2025. The subject application seeks leave to appeal out of time against the ruling of Hon. P.N Sindani in the suit Ogembo SRMELC No. 48 of 2019 which ruling was delivered on 16 January 2024. In the application it is averred that part of the reason why the appeal was not filed in time is because the applicant had filed a Miscellaneous Application No. E004 of 2024 and a Miscellaneous Application No. E011 of 2024.
2. I do not have much material regarding this suit Ogembo CMCCELC No. 48 of 2019. From the limited material before me, particularly the judgment which copy is annexed, I see that the subject matter in dispute is a Plot No. 23 in Ogembo Town. I see that the 1st respondent filed suit respectively against the 2nd and 3rd respondent and the applicant (the defendants) seeking a declaration of ownership of the plot, a permanent injunction and eviction of the defendants. It was said that the suit plot was owned by one Jones Tengenya Nyamwaro, the deceased father of the 1st respondent, and that the defendants had trespassed into the land, demolished a building, and were in the process of constructing. The judgment notes that no appearance was entered and after a hearing, judgment was delivered in favour of the 1st respondent on 28 September 2023.

3. There followed an application by the applicant, dated 8 November 2023, seeking to set aside the judgment. Ruling on that application was delivered on 16 January 2024 vide which the application was dismissed. It is this ruling that the applicant wishes to appeal against but she is out of time.
4. The 2nd and 3rd respondents are not opposing the application.
5. The 1st respondent has opposed the application through grounds of opposition raising two grounds i.e :
 - (i) That the applicant is guilty of deliberate and inordinate delay in making the application for enlargement of time to lodge appeal out of time.
 - (ii) That the instant application is misconceived, frivolous, vexatious and otherwise an abuse of the court process.
6. I have considered the application alongside the submissions made by counsel.
7. The time for filing an appeal is provided for in Section 79G of the Civil Procedure Act, Cap 21, Laws of Kenya, which provides as follows :

79G. Time for filing appeals from subordinate courts

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.
8. From the foregoing, it will be seen that an appeal needs to be filed within 30 days of the decision, though the court has discretion to allow an application to file an appeal out of time if good and sufficient cause for not filing the appeal within time is provided. The applicant is of course out of time in lodging her appeal. She has offered the explanation that she filed a multitude of other applications which consumed time and thus the appeal was not filed within the stipulated period. It is explained that the applicant first filed Kisii ELC Miscellaneous Application No. E004 of 2024 for stay of execution which was withdrawn and there had also been filed another application

Miscellaneous Application for stay of execution which was struck out by court.

9. What I see is a cacophony of errors on the part of counsel for the applicant. Instead of straight away filing an appeal and subsequently seeking stay of execution pending appeal on such appeal file, the applicant's counsel went on a frolic that is alien to procedure, seeking stay without an appeal in a miscellaneous application, then filing other miscellaneous suits. I think the applicant was simply let down by her counsel who failed to understand the right procedure to employ. I would not wish to shut out the applicant for the mistakes of her counsel.
10. I am also alive to the litigation which appears to be of public interest as the applicant claims that the suit land is public land. I think the applicant deserves a chance to be heard on her appeal as to whether the ex parte judgment ought to be set aside.
11. For the above reasons, I allow this application. I direct that the appeal be filed and be served within the next 7 days.
12. The costs of the application will however be to the 1st respondent as the appellant was not impeded in any way from filing the appeal within time. It was an error of the applicant's counsel and the applicant will need to pay for that error by shouldering the costs of this application to the 1st respondent who was within his rights to oppose it.
13. Orders accordingly.

DATED AND DELIVERED THIS 13 DAY OF NOVEMBER 2025

JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT KISII

Delivered in the presence of :

Mr. Mokaya for the applicant

Mr. Begi for the 1st respondent

N/A for the 2nd & 3rd respondents

Court Assistant : Michael Oyuko

