

**IN THE COURT OF
APPEAL AT
KISUMU**

**(CORAM: KIMARU, JA (IN
CHAMBERS) CIVIL APPLICATION NO.
E133 OF 2025 BETWEEN**

BENSON OCHIENG OPIYO.....APPLICANT

AND

ELIZABETH AKINYI OMONDI

(Suing as the Administrator of the Estate of

Joshua Omondi Obuor (deceased).....**RESPONDENT**

(Being an application for extension of time to lodge and serve the notice of appeal out of time from the Judgment of the Environment and Land Court of Kenya at Siaya (A.Y. Koross, J) dated 13th October, 2022

in

ELCA No. 24 of 2021)

RULING

1. **Benson Ochieng Opiyo**, the applicant herein, moved the Court substantially under **Rule 4** of the **Court of Appeal Rules** seeking to be granted extension of time to file appeal out of time from the decision rendered by the Environment and Land Court (ELC) Siaya on 13th October, 2022. The present application was filed on 10th September, 2025. The applicant has given the reason for the delay in lodging the

appeal in time to be the

attempted out of court settlement with the 1st respondent which dragged on until he came to the realization in August 2025 that the 1st respondent was unwilling to have the matter amicably settled out of court. It was then that the applicant moved to the Court with the present application. The application is supported by the annexed affidavit of the applicant and other grounds stated on the face of the application.

2. The application is opposed. The 1st respondent **Elizabeth Akinyi Omondi**, opposed the application. She confirmed that indeed she was engaged in an out of court negotiations with the applicant with a view to amicable settlement. She, however, denied the applicant's assertion that she was the one who initiated the engagement. She stated that it was the applicant who approached her after the judgment of the ELC. She deposed that the negotiations did not go far and was abandoned in 2023. The 1st respondent denied that she had acquiesced to the applicant's occupation of the suit land. She urged the Court to disallow the application.
3. Both the applicant's and the 1st respondent's respective counsel filed written submission in support of their

respective client's

opposing position. They both appreciated that jurisdiction of this Court under **Rule 4** of the **Court of Appeal Rules** which is essentially the exercise of judicial discretion. They also appreciated that in exercising its discretion, the Court is required to consider the length of delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted.

(See **Leo Sila Munyao Mutiso v. Rose Hellen Wangari Mwangi [1999] 2EA 231.**

4. In the present application, the applicant gave the reason for the delay to be on account of out of court negotiations which ultimately did not bear fruit. The respondent does not deny that indeed such engagement took place. It was apparent to the Court that the applicant was lulled into inaction when he was made to believe that the out of Court negotiations will result in an amicable settlement hence he did not file the appeal in time.

5. When it became apparent that no settlement would be reached, he filed the present application before Court. Although it has been three (3) years since the Judgment of

the ELC was rendered, this Court is persuaded that the applicant has made

a case for the Court to exercise its discretion in his favour. He entered into an out of court negotiations with a view to settlement in good faith not expecting that the negotiations would fail. He is currently in possession of the suit land. Disputes related to land, where appropriate, must be ventilated before the Court until the parties exhaust all avenues of appeal.

6. In the premises therefore, the application has merit and is allowed. The applicant is granted extension of time to lodge and serve the notice of appeal out of time. The notice of appeal shall be filed and served within **seven (7) days** of today's date. The record of appeal shall be filed and served within **thirty (30) days** of today's date. The respondent shall have the costs of the application in any event.

Dated and delivered at Kisumu this 19th day of November, 2025.

L. KIMARU

.....
**.... JUDGE OF
APPEAL**

**I certify that this is
a true copy of
original.**

Signed

DEPUTY REGISTRAR.