

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**

**ELC APPEAL NO. E018 OF 2025**

**NICHOLUS ODHIAMBO**

**ODAWA.....APPELLANT/APPLICANT**

**VERSUS**

**JOHN PETER MUDHUNE ONGINJO.....1ST**

**RESPONDENT**

**BENARD OLEYO RADIDO.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is placed before me is a Notice of Motion application dated 14<sup>th</sup> April 2025. The application is brought under the provisions of sections 1A, 1B and 3A and 95 of the Civil Procedure Act, Order 50 Rule 6 and Order 51 of the Civil Procedure Rules, 2010. The motion seeks the following orders:
  - i. This Honorable court be pleased to enlarge the time for filing an appeal from the judgment of the lower court in Ukwala PMELC No. 21 of 2020 delivered on 28/02/2025.
  - ii. That costs of the application be provided for.
2. The application is supported by an affidavit sworn by Eric O. Ojuro the Applicant's Counsel herein.

3. The deponent averred that the trial magistrate gave a judgment in favor of the Respondent on 28/02/2025 and the Applicant was entitled to file an appeal by 28/03/2025.
4. He averred further that due to the confusion on the part of the counsels representing the Appellants at trial who were two, he thought that the other counsel had filed the appeal. (see copy of judgment marked E001)
5. It was his further averment that the appeal raises a weighty issue and has high chances of success. Finally, the deponent averred that the application has been brought without undue delay. He thus prayed that the court allows the application.
6. The 1<sup>st</sup> Respondent has rebutted vide grounds of opposition dated 5<sup>th</sup> June 2025.
7. In the grounds, the 1<sup>st</sup> Respondent averred that an applicant seeking enlargement of time to appeal must show that he has good cause for doing so, which the applicant has not.
8. The 1<sup>st</sup> Respondent further indicated that the application offends the dictates of section 79G of the Civil Procedure Act, which requires that before the court orders enlargement of time to appeal the applicant must show sufficient cause why he did not file the appeal on time.
9. The 1<sup>st</sup> Respondent finally stated that the applicant having failed to show sufficient cause, he urged the court to dismiss the application with costs to the Respondent.

### **SUBMISSIONS**

10. The application was canvassed by way of written submissions, and both parties have complied.

**11.** On his part, the Applicant submitted that a matter of extension of time to appeal is discretionary. On whether or not to exercise the said discretion in favor of the applicant, the applicant should demonstrate that the cause of the delay to file an appeal within stipulated time was reasonable. On his part, the applicant explained that he was represented by two counsels at the trial court, and confusion arose where each counsel had in mind that the other counsel had already filed the appeal. It was explained that it is when the applicant called one of the counsels on 10/04/2025 to inquire whether they had filed appeal that counsel realized they had not. The Appellant placed reliance on the case of **Salat vs IEBC & 7 Others [2014] KESC 12 KLR.**

**12.** Further, it was the Applicant's submission that no prejudice has or is likely to be suffered by the Respondent should the court grant the extension of time to appeal. On this he relied on the case of Leo **Sila Mutiso vs Rose Wangari Mwangi (Nairobi Civil Appeal No.255 of 1977)** unreported. Lastly, he submitted that the intended appeal has high chances of success. He therefore implored the court to grant the orders sought.

13. On his part, the Respondent submitted that “an extension of time is an indulgence requested from the court by a party in

default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one.”

14. The 1<sup>st</sup> Respondent submitted further that 17 days delay after the statutory 30 days may not be monumental in length, but the law does not operate on arithmetic alone. He added that the period of delay as well as a satisfactory explanation thereof, is among the key considerations in an application of this nature; concluding that the explanation for the delay as proffered by the Applicant is wanting.

15. In conclusion, the 1<sup>st</sup> Respondent submitted that the Applicant’s motion is misconceived and lacks sufficient grounds to satisfy the requisite threshold for this for this Honourable Court to grant the orders sought. To grant an enlargement of time would be to reward indolence and undermine the principles of finality and judicial discretion. As such, we respectfully urge this Honourable Court to dismiss the Applicant’s Application with costs.

### **ANALYSIS AND DETERMINATION**

16. I have considered the application, the supporting affidavit, the grounds of opposition, and the well thought out and well-articulated submissions filed as well as the authorities relied upon.

17. Section **79G of the Civil Procedure Act** 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.**

18. Arising from the above provisions the key test for the court to consider is whether the applicant had good and sufficient cause for not filing the appeal in time. The power to enlarge time under Section 79G herein is discretionary.
19. It is now established that discretion must be exercised judiciously. The Supreme court of Kenya in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others Application No 16 of 2014 (2014) eKLR** had this to say; -

“The underlying principles a court should consider in exercise of such discretion should include: -a.Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis; d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; e.

Whether there will be any prejudice suffered by the respondent if the extension is granted; f. Whether the application has been brought without undue delay.'

20. Has the applicant demonstrated sufficient reason and or cause to warrant the exercise of the court discretion in his favor? I have noted the main reason was caused by confusion there having been two counsel each thinking the other had filed the appeal only to be discovered that neither had filed. I think this is understandable as such lapses occur especially in the absence of good coordination. It is my finding that there is reasonable cause for the delay.
- 21 I'm also emboldened by the following the holding in **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22** that:  
"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."
22. Has the application for enlargement of time been brought without unreasonable delay. The judgement of the trial court was delivered on 28<sup>th</sup> February 2025 and therefore based on

the law the appeal ought to have been filed by March 2025. The application for enlargement of time herein was filed on 28/4/2025 which is about 17 days from the date of the delivery of the judgement. Is a delay of 17 days excusable. To me it is excusable as it is not inordinate.

23. What is the prejudice that will be suffered by the respondent should the orders for enlargement of time issue? Is the prejudice to be suffered one that cannot be compensated by way of costs? The respondent has urged that a respondent suffers some degree of prejudice when an appeal is filed out of time such as loss of finality and increased costs. I have not seen any prejudice that cannot be compensated by way of costs.
24. 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 or 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.**
25. The upshot of the foregoing is that the application is merited and must be allowed.
26. Costs of the application are awarded to the Respondent

27. The appeal shall be filed within the next 14 days of this ruling.

28. The present file shall be closed.

It is so ordered.

**Delivered and Dated at Siaya This 13<sup>th</sup> Day of November 2025**

**HON. LADY JUSTICE A.E. DENA**

**JUDGE**

**13/11/2025**

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

Mr. Ojuro for the Applicant

Mr. Otieno for 1<sup>st</sup> Respondent

No appearance for 2<sup>nd</sup> Respondent

Court Assistant: Ishmael Orwa

ORIGINAL