

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT KAPSABET
ELCL MISC APPLICATION NO. E017 OF 2025

RICHARD KIPCHUMBA TANUI.....
APPLICANT

-VERSUS-

GABRIEL KIPKOSGEI SAINA.....
RESPONDENT

RULING

1. The Applicant through Duncan Tallam and Company Advocates originated an application by way of a Notice of Motion dated 13th May 2025 for the orders infra;

a) Moot

b) That the Honourable Court be pleased to grant the Applicant leave to appeal against the Ruling and Order of Honourable Kibet Sambu, Chief Magistrate delivered

on 17th April 2025 in **Kapsabet Magistrates' Court Environment and Land Case No. E075 of 2024.**

c) That the Honourable Court be pleased to grant leave and extend or enlarge the time within which to enable the Applicant to lodge an appeal against the ruling and order of Honourable Kibet Sambu, Chief Magistrate Kapsabet delivered on the 17th day of April, 2025 in **Kapsabet Magistrate Court Environment and Land Case No. E075 of 2024.**

d) That, this Honourable Court be pleased to issue an order for stay of execution of the ruling entered and delivered herein against the Applicant on 17th April 2025 pending the hearing and determination of the intended appeal.

e) That the cost of the application be provided for.

2. The application is anchored upon a 13 - paragraphed affidavit of thirteen paragraphs sworn on even date by the

applicant and a copy of the accompanying ruling delivered on 17th April 2025 in **Kapsabet MCELC NO. E075 of 2024** striking out the suit and upholding the Respondent's preliminary objection therein alongside six grounds set out on face of the same. The Applicant's lamentation is that he is aggrieved with the said ruling. That the delay to mount the application is not inordinate, it is excusable, brought in good faith and the Respondent shall not be prejudiced thereby as the Court had wide discretion and powers to grant the orders sought in the application.

3. The Respondent through Murgor and Company Advocates, opposed the application by way of his replying affidavit of thirteen paragraphs sworn on 21st May 2025. He averred in part that the application does not meet the criteria or principles enunciated by the Court in determining applications for extension of time to file appeals. That the Applicant has not filed an appeal from the trial Court's

decision and intends to use the intended appeal which has no chances of success, to deny the respondent his right over the suit land namely LR NO. NANDI/BARATON/686.

4. Also, the Respondent averred that the Applicant participated in the proceedings leading to the confirmation of grant and his objection in **Kapsabet PMC Succession Cause No. 91 of 2001**, was dismissed. That the Applicant never appealed from the said decision. That since it is a cardinal principle of law and practice that litigation has to come to an end, the application negates the said principle. That 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.
5. Further, the Respondent raised a preliminary objection dated 30th July 2025 against the competency of the application on the grounds thus;

- a) The application offends the mandatory provisions of Order 43 (1) (2) and (3) of the Civil Procedure Rules (The CPR herein).
- b) It follows that the Court has no jurisdiction to hear the intended appeal unless leave of the Court from which the order was made is sought and obtained.
- c) The application is fatally defective, incompetent an abuse of the Court process and ought to be struck out.

6. The Respondent's Counsel filed submissions dated 29th July 2025 in respect of the application and referred to the application, the replying affidavit and it was submitted in part that there is no automatic right to appeal of the orders sought to be appealed in the instant application. That the said orders are not among the orders listed in section 75 of the Civil Procedure Act Chapter 21 Laws of Kenya (The CPA) and there is no competent appeal to

clothe this Court with jurisdiction to entertain the application for leave to appeal out of time. That the application was not brought promptly within thirty days from the time of the ruling of the Magistrate's Court. Counsel cited the case of **Mbaya-vs-Kamau & another {2023} KEHC 24845 (KLR)**, and the case of **Nicholas Kiptoo Arap Korir Salat-vs-Independent Electoral and Boundaries Commission & 7 others (2014) eKLR** on the laid down principles that govern the exercise of the Court's discretion in considering the orders sought in such an application.

7. In the submissions dated 1st August 2025 regarding the preliminary objection, learned Counsel for the Respondent set out the orders sought in the application and referred to the relying affidavit as well as referred to **Order 43** and **Mbaya case (both supra)** and other case law. Counsel

urged the Court to dismiss the application and allow the preliminary objection.

8. By the Applicant's submissions dated 17th September 2025, reference was made to the orders sought in the application, the replying affidavit and the preliminary objection and brief facts and background of the matter including the Applicant's purchase of the whole suit land with original registered land owner, Chepkelat Arap Yego (Deceased) and the subsequent succession proceedings over the estate of the Deceased. That leave to appeal is a discretionary relief and the Applicant must provide to the Court justifiable reason and strong arguable case thereof. Counsel relied on, inter alia, section 75 of the CPA, the case of **Kenya Shell Ltd-vs-Kobil Petroleum Ltd (2006) eKLR**, the decision in **Rene Dol-vs-Official Receiver of Uganda (1954) 21 (1) EACA 116** and

implored the court to dismiss the preliminary objection and allow the application accordingly.

9. In the supplementary submissions dated 7th October 2025, the Respondent stated that the applicant misinterpreted the facts in **Kapsabet PMC Succession Cause No. 91 of 2001**. That the true position was that the Respondent was the petitioner while the Applicant was the objector and the Court dismissed the objection hence, a certificate of confirmation of grant was issued to the Respondent. That the Applicant did not appeal from the said determination but filed Kapsabet PMCC No. 245 of 2010. That thus, the intended appeal is without merit.

10. Having taken into account the application, the replying affidavit, the preliminary objection and the rival submissions with case law in entirety, the issues for determination are as follows;

a) Whether the preliminary objection is sustainable.

b) Subject to issue (a) above, is the application is meritorious?

c) The orders to issue for the ends of justice herein.

11. I bear in mind that the application was commenced under, inter alia, **Order 43 of the CPR (supra)** and **Sections 3, 3A, of the CPA**. No doubt, the Court can exercise its special and inherent powers for the ends of justice.

12. It is trite law that a preliminary objection must be based on a pure point of law and cannot involve questions of evidence; see **Mukisa Biscuit Manufacturing Co. Ltd-vs-West End Distributors Ltd (1969) EA 696.**

13. This Court is guided by sections 75 and 79G of the CPA on orders from which appeal lies and time limit for filing appeals from Subordinate Courts respectively.

14. It was the Respondent's contention that the application was not brought within thirty days after

delivery of the ruling while the applicant asserted that the delay is excusable. **Order 50 of the Civil Procedure Rules** governs time. The magistrate's court delivered the ruling on 17th April 2025 and the present application was filed on 13th May 2025.

15. This court subscribes to the decision of the Supreme Court of the Republic of Kenya in **Salat case (supra)** that;

'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....is a consideration to be made on a case to case basis.....'

16. In the case of **Butt-vs-Rent Restriction Tribunal (1979) KECA 22 (KLR)**, the Court of Appeal remarked;

'.....The court will grant a stay where special circumstances of the case so require, per Lopes LJ

in the Attorney General-vs- Emerson and others 24 QBD (1889) 56 at p 59.....and the appellant has an undoubted right of appeal.'

17. The Applicant's interest over the suit by way of purchase is discerned in paragraphs 2 and 4 of his supporting affidavit to the application alongside the background given at paragraph 8 hereinabove. Plainly, those are some of the special circumstances in favour of the instant application

18. Moreover, it is established law that the right to be heard is fundamental and permeates our entire justice system; see **Butt case** (supra) and **James Kanyiita Nderitu and another-vs-Marios Philotas Ghikas and another (2016) eKLR**

19. Article 48 of the Constitution of Kenya 2010 provides for access to justice. The unlimited right to fair hearing is enshrined in Article 50 (1) as read with Article 25 (c) of the

same Constitution. So, the Applicant deserves the fundamental right to access and be heard on the prospective appeal having taken into account, inter alia, **Salat, Mbaya, Kenya Shell and Nderitu cases** (supra).

20. It is therefore, my considered view that the preliminary objection dated 30th July 2025 is not sustainable. The application dated 13th May 2025 is meritorious

21. A fortiori, the preliminary objection is hereby dismissed while the application is hereby allowed in terms of prayers 2, 3 and 4 as stated in paragraph 1 (b) 1(c) and 1 (d) hereinabove.

22. Costs to abide the outcome of the intended appeal.

23. The Applicant's Counsel to file and serve the intended appeal within the next fourteen days from this date failure of which the orders granted herein shall lapse automatically without any further orders.

24. It is so ordered.

DATED and **DELIVERED** at **KAPSABET** this **11th** day of
NOVEMBER 2025.

HON. G M A ONGONDO

JUDGE

In the presence of;

1. Mr. D. Tallam learned Counsel for the Applicant
2. Mr. B. Murgor learned Counsel for the Respondent
3. Walter, Court Assistant