



Kabete Dam Limited & another v Ng'ang'a & another (Civil Application E009 of 2023) [2025] KECA 1969 (KLR) (21 November 2025) (Ruling)

Neutral citation: [2025] KECA 1969 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E009 OF 2023
DK MUSINGA, JA
NOVEMBER 21, 2025**

BETWEEN

KABETE DAM LIMITED 1ST APPLICANT

PINNACLE PROJECTS LIMITED 2ND APPLICANT

AND

CATHERINE WAMUYU NG'ANG'A 1ST RESPONDENT

JOSHUA N HEGE 2ND RESPONDENT

(Being an application for stay of execution and extension of time to file and serve a memorandum and record of appeal out of time from the Judgment of the Environment and Land Court at Nairobi (K. Bor, J.) dated 16th January 2020 in ELC Case No. 12 of 2019)

RULING

1. The applicants' notice of motion dated 13th January 2023 seeks six orders, but this ruling is in respect of only one prayer, that is, enlargement of time for filing the notice of appeal, which has already been filed and which is dated 17th February 2020. The application is supported by an affidavit sworn by David Kabubii Kuria, a director of the 2nd applicant and agent of the 1st applicant, Kabete Dam Limited. Mr. Kuria states, inter alia, that on 16th January 2020 K. Bor, J., delivered a judgment in Milimani Environment and Land Court (ELC) Suit No. 12 of 2019. On 17th February 2020, the applicants instructed their advocates to file an appeal against the said judgment, and they proceeded to file a notice of appeal on the same day, although by then it was out of time by about 17 days.
2. The applicants state that the delay in filing the notice of appeal was occasioned by their former advocate as they did not properly and decisively advise them following delivery of the judgment. They accuse their former advocates of being indecisive as to whether to pursue an appeal or a review of the impugned judgment. Their former advocates conduct necessitated the applicants' withdrawal of instructions and



proceeded to engage the firm of Messrs. Sichangi A. Nyongesa & Associates, who are currently on record on behalf of the applicants. Their new advocates proceeded to apply for typed copies of the proceedings for purposes of lodging an appeal. At the time of filing the application for extension of time the proceedings had not been supplied.

3. The applicants believe that their intended appeal has high chances of success and have attached their affidavit in support of the application and a copy of a draft memorandum of appeal.

The applicants urge this Court to exercise its discretion in their favour so that they can pursue an appeal, pointing out that the respondents have commenced execution proceedings against them.

4. The respondents oppose the application. Catherine Wamuyu Ng'ang'a, the 1st respondent, swore a replying affidavit stating, inter alia, that she had been informed by her advocates that the applicants' application is a grave abuse of the Court process in that there is a similar application filed by them, namely, Civil Application NAI. 111 of 2020 which is pending before this Court; that the current application is bad in law because it contains a multiplicity of prayers, some of which can only be granted by a full bench and not a single judge; that the notice of appeal that was filed out of time was not served upon the respondents' advocates until 28th February 2020; and that there has been inordinate delay in filing the application, which delay has not been properly explained.
5. The respondents further state that the intended appeal has no chances of success; that by a letter of offer dated 7th February 2012 the 2nd applicant on behalf of the 1st applicant made an offer to the respondents for an off-plan sale of House No. 7 on LR 2951/36 (the suit property), at a price of Kshs.47 million, and on the terms set out therein; that the respondents accepted the said offer and made an advance payment of Kshs. 31,500,000 to the 1st applicant's advocates.
6. The respondents set out in great details how the applicants violated the sale agreement and stated that one of the orders in the impugned judgment is for a refund of the sum of the Kshs. 31,500,000 which they had paid, and further award of Kshs. 38,000,000 as damages for loss of bargain since as at the time of filing the suit against the respondents the value of the suit property had gone up to Kshs. 85 million.
7. The application came up for hearing on 29th October 2025. It was heard by way of written submissions only as directed by the Court. I have carefully considered the submissions filed by both parties. In an application of this nature, the Court exercises unfettered discretion, but in doing so, the Court must consider the period of the delay, the reason for the delay, possibly the chances of success of the intended appeal, and the degree of prejudice the respondent may suffer if the application is granted. See *Fakir Mohamed v Joseph Mugambi & 2 Others* [2005] KECA 340 (KLR).
8. It is not disputed that the impugned judgment was delivered on 16th January 2020. It is also not in dispute that the applicants did not file a notice of appeal within 14 days of delivery of the said judgment. It was not until 17th February 2020 when the notice of appeal was filed.
9. Although the applicants fault their former advocates for delay in filing the notice of appeal, there is no evidence that they promptly instructed their former advocates to institute an appeal shortly after delivery of the impugned judgment. The applicants did not annex to their affidavit any correspondence that they had with their former advocates regarding filing of an appeal. It was not until 17th February 2020 when the applicants' former advocates applied for typed copies of proceedings.
10. But even if the former advocates were to blame for the aforesaid delay, no explanation was given for the delay between 17th February 2020 when the notice of appeal was belatedly filed and 13th January 2023 when the applicants' omnibus application was made. The applicants' advocates, Sichangi A. Nyongesa & Associates, filed a notice of change of advocates on 29th October 2021 and they ought to have known



that by then, the applicants were out of time and move with speed to file an application for extension of time with haste. Between 29th October 2021 and 13th January 2023 is a period of nearly 15 months, which amounts to an inordinate delay, for which there is no explanation at all. This unexplained inordinate delay in itself disentitles the applicants of this Court's discretion in their favour.

11. Secondly, having looked at the draft grounds of appeal and perused the impugned judgment as well as the respondents' replying affidavit, I do not agree that the intended appeal has good chances of success.
12. The respondents paid a considerable amount of money to the applicants several years ago and have a decree in their favour, and it will be highly prejudicial to grant the orders sought by the applicants when it is plainly clear that the intended appeal is frivolous.
13. All in all, I find this application unmeritorious and dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2025.

D. K. MUSINGA, (PRESIDENT)

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

