

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLICATION NO. E018 OF 2025

ALICE NJOKI NDUNGU:.....:PLAINTIFF/RESPONDENT

VERSUS

OLIVE KANGENDO NJOKA:.....:DEFENDANT/APPLICANT

RULING

The application is dated 18th March 2025 and is brought under Order 42 Rule 6, Order 50 Rule and 1 of the Civil Procedure Rules, 2010, Section 1A, 1B, 3, 3A, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya seeking the following orders;

1. THAT this Application be certified urgent and heard ex-parte in the first instance in view of its urgency.
2. THAT this Honourable Court be pleased to stay further proceeding in Machakos MCELC No. E102 of 2024, Alice Njoki Ndungu -vs- Olive Kagendo Njoka pending the hearing and determination of this Application inter-parties.
3. THAT this Honourable Court be pleased to grant the Applicant leave to Appeal out of time against the Ruling of Honourable Charity Oluoch (C.M) delivered on 24th January, 2025 in Machakos MCELC No. E102 of 2024, Alice Njoki Ndunqu -Vs- Olive Kagendo Njoka.

4. THAT this Honourable Court be pleased to extend time for the Applicant to file and serve Memorandum of Appeal and Record of Appeal against the Ruling of Honourable Charity Oluoch (C.M) delivered on 24th January, 2025 in Machakos MCELC No. E102 of 2024, Alice Njoki Ndungu -Vs- Olive Kagendo Njoka.
5. THAT this Honourable Court be pleased to stay further proceeding in Machakos MCELC No. E102 of 2024, Alice Njoki Ndungu -Vs- Olive Kagendo Njoka pending the hearing and determination of the Applicant's intended Appeal.
6. THAT cost of this Application be provided for.

It is based on the following grounds that the Applicant filed a Notice of Preliminary Objection dated 29th October, 2024 in the suit being Machakos MCELC No. E102 of 2024, Alice Njoki Ndungu -Vs- Olive Kagendo Njoka challenging the pecuniary and territorial jurisdiction of the Subordinate Court to adjudicate over the suit labelling the suit as *being res judicata*. However, a Ruling was delivered on 24th January, 2025 in the Subordinate Court dismissing the Applicant's Notice of Preliminary Objection dated 29th October, 2024. The Applicant is greatly aggrieved with the Ruling of the Subordinate Court which is misleading, contains errors in both law and fact with the Subordinate Court suit being a mockery of the Court process. The Applicant intends to Appeal against the whole Ruling of the Subordinate Court with the intended Appeal being meritorious, arguable, raising serious questions of law worthy of

consideration by the court with overwhelming prospects of success. However, the Applicant is yet to secure typed and certified Proceedings of the Subordinate Court requisite in lodging an Appeal. The thirty days (30) days allowed by Law to lodge an Appeal have inadvertently lapsed. The Subordinate Court has not given any indication when certified proceedings of the Court will be available for collection. The Subordinate Court suit is now scheduled for hearing on 4th June, 2025. Continued hearing of the Subordinate Court suit will render the Applicant's intended Appeal nugatory further to subject the Applicant to suffer the inconvenience of multiplicity of suit, great prejudice, irreparable loss and damage. There is thereby urgent need that the proceedings of the Subordinate Court be stayed and time to file an Appeal be extended to pave way for filing and hearing of the Applicant's intended Appeal in the interest of justice and equity. This Application has been filed without any inordinate delay. No party stands to suffer any prejudice by grant of the Orders sought that cannot be put right by an Order of payment of costs. A party ought not to be shut out from Court. Sufficient and good cause has been shown for grant of the Orders sought in the interest of Equity and Justice.

This court has considered the application and the submissions therein. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. 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.”

From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of town. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & Others vs Wanjiru & Another* (1970) EA 482 the court stated as follows;

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

The Court of Appeal in the above case guided that whenever an application for extension of time is before a court, the court ought to take into account several

factors as observed by Odek JJA in *Edith Gichungu Koine vs Stephen Njagi Thoithi* (2014) eKLR thus;

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court. In *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* (2013) eKLR the court held as follows;

“(1) 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.

(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.

(6) Whether the application has been brought without undue delay; and

(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

I have given due consideration of the record in light of the pleadings, submissions, and principles that guide the court. The reason given for the delay in filing the appeal is that the Applicant filed a Notice of Preliminary Objection dated 29th October, 2024 in the suit being Machakos MCELC No. E102 of 2024, Alice Njoki Ndungu vs Olive Kagendo Njoka challenging the pecuniary and territorial jurisdiction of the Subordinate Court to adjudicate over the suit labelling the suit as *being res judicata*. However, a ruling was delivered on 24th January, 2025 in the Subordinate Court dismissing the Applicant’s Notice of Preliminary Objection dated 29th October, 2024. The Applicant being aggrieved intended to Appeal against the ruling of the Subordinate Court. However, the Applicant is yet to secure typed and certified Proceedings of the Subordinate Court requisite in lodging an Appeal. The thirty days (30) days allowed by Law to lodge an Appeal have inadvertently lapsed. The Subordinate Court has not given any indication when certified proceedings of the Court will be available for collection. The Applicant has annexed the draft Memorandum of Appeal. I find that this application was filed on 19th March 2025. I find that the applicant does have an arguable appeal. I also find that the applicant is not guilty of

inordinate delay in the circumstances. I find this application is merited and I grant prayer 3,4 &5 on condition that the appeal is filed and served within the next 30 days. Costs of the application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY
OF NOVEMBER 2025.**

N.A. MATHEKA

JUDGE