REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO 566 OF 2017

ITEMBE SENDI.....1ST PLAINTIFF /APPLICANT

PAUL MWITA ITEMBE.....2ND PLAINTIFF/APPLICANT

NKIRU MARWA ITEMBE..... 3RD PLAINTIFF/APPLICANTS

VERSUS

ROBI MWITA MACHERA.....DEFENDANT/RESPONDENT

RULING

The Application

1. The applicants' application dated 7th April 2025 and brought under Certificate of Urgency seeks the following reliefs:
    1. ...Spent
    2. That this Honourable court be pleased to enlarge/enlarge time for the applicants' application for

leave to appeal the honorable court's ruling delivered on 4/11/2024

3. That upon granting prayer 2 above, the applicants be granted leave to appeal the said ruling of this honorable court delivered on 23/3/2025.
4. That the annexed draft notice of appeal be deemed filed and properly before the court upon payment of the requisite fees
5. costs of this application be provided.

2. The application is premised on several grounds as set out on the face of the application and which grounds can be summarized that the court delivered a ruling on the applicants' application dated 28th May 2024 on 23rd March 2025. In the Ruling it held that its judgment date 27th April 2023 was irregular, a nullity and for being set aside.
3. The applicant's counsel stated that he informed the Applicants of the said ruling immediately after it was rendered on 23rd March 2025. The Applicants expressed their dissatisfaction on the said Ruling and instructed counsel to file an Appeal.

4. The application is further premised on the ground that the counsel for the applicants who was handling the matter inadvertedly forgot to institute an appeal within the requisite period. Learned counsel further stated that since the statutory mandated timelines for instituting appeals had lapsed, this court can exercise its discretion to enlarge time within which the applicants could file their appeal. Finally, the applicants counsel stated that it was in the interest of justice that leave be granted to file the appeal out of time.
5. In addition to the above stated grounds, the applicants' counsel annexed a supporting affidavit to the application, which almost replicates all the grounds contained in the application. Suffice to note is that the applicants' counsel in his supporting affidavit deponed that one of his associates Mr. Achola, advocate took the Ruling date and inadvertedly forgot or failed to seek leave to appeal the said Ruling.
6. The Applicants' counsel also annexed a copy of a Notice of Appeal in which the applicants expressed their intention to appeal against the decision of this court.

The Response

7. One Sofia Mogosi Giboma, an administrator of the Estate of the late Robi Mwita Machera, the deceased Respondent (herein after referred to as the administrator) filed a Replying Affidavit in response to the Applicants' application dated 7th April, 2025. She deponed that it was bad in law and legally untenable since it sought to retain a deceased Defendant as a party to the suit.
8. The administrator further deponed that the court delivered its ruling on 25th March 2025. By it, the court found that the suit against the deceased had abated at the time the court rendered its judgment. As such, she argued that the applicants were seeking to appeal against a non-existent suit.
9. Further, the administrator of the Estate of the deceased Defendant further deponed that the court did not render a ruling on 4th November, 2024 and dared the applicants to produce such a ruling if at all it existed.
10. Lastly, the administrator deponed that the period within which an appeal could be instituted had lapsed. No explanation had been given by the Applicants' for their

failure to institute the intended Appeal within the mandated timeline. She urged the court to strike out the applicants' application with costs.

11. Annexed to the administrator's Affidavit were letters of administration *ad litem* marked SMG-1, a certificate of death of Robi Mwita Machera marked SMG-2, the applicant's Notice of Motion application dated 28th May 2024 marked SMG-3 and this court's ruling delivered on 25th March, 2025 and marked SMG-4.

12. Parties did not file submissions. That notwithstanding, this court will determine the issues before it on merits. This is because this Court has the obligation to determine the application on merits since submissions are only a marketing tool for parties. This legal position been restated in many decisions, including **Moi, CGH v Muriithi & another (Civil Appeal 240 of 2011) [2014] KECA 642 (KLR) (9 May 2014) (Judgment)** wherein the Court of Appeal held;

> "Submissions are generally parties' "***marketing language***", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate,

do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

13. This then turns this analysis to the issues at the centre of the instant application.

Issues for Determination

14. This court having considered the application and the response is of the view that the issues for determination herein are whether the applicants' application is merited, and attendant to it is who to bear the costs of the application.

i. Whether the applicants' application is merited

15. The Applicants herein seek this court's intervention so as to enable the file their intended appeal out of time. They pray that this court enlarges the time within which they can file the said appeal. They equally seek leave to file the appeal out of time.

16. The considerations that must be borne by courts when determining whether or not to enlarge time for purposes of appealing out of time have been enunciated in various

judicial decisions. The Supreme Court in **Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)** determined as follows:

> *"It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider "all the circumstances of the case" including:*
>
> a) *the interests of the administration of justice;*
>
> b) *whether the application for relief has been made promptly;*
>
> c) *whether the failure to comply was intentional;*
>
> d) *whether there is a good explanation for the failure;*
>
> e) *the extent to which the party in default has complied with other rules, practice directions and court orders;*
>
> f) *whether the failure to comply was caused by the party or his legal representative;*

g) *the effect which the failure to comply had on each party; and*

h) *the effect which the granting of relief would have on each party.*

17. In **Edith Gichungu Koine v Stephen Njagi Thoiti [2014] eKLR,** the Court of Appeal reasoned that courts 'discretion to enlarge time for purposes of appeal should be guided by several factors, including a consideration of the period of delay, the reasons for the delay, the degree of prejudice to the suffered by the respondent if the application is allowed and the whether issues of public importance are involved.

18. I have carefully analyzed the application, the affidavit in support of the application as well as the copy of the Notice of Appeal annexed thereto. The court has also considered the documentary evidence by way of annextures to the Respondent's affidavit. With the factual evidence in mind, then whether or not the applicants' application is merited turns on the court record. The 2nd prayer in the applicants' application seeks this court's discretion to enlarge time to

enable the applicants appeal the court's ruling delivered in 4th November 2024.

19. The administrator of the estate of the deceased defendant deponed that there was no ruling rendered by the court on 4th November 2024. I have reviewed carefully the court record. My conclusion is that the ruling that the applicants allegedly intend to appeal in prayer 2 of their application is non-existent as this matter was never before this court on 4th November 2024. Instead the Ruling was delivered on 19th November, 2024.

20. For avoidance of doubt, this matter came up before the court on 24th September 2024 for a mention in relation to submissions dated 11th September 2024 and the court fixed the ruling of the application on 19th November 2024. When the matter came up on 19th November 2024, it did not proceed but the Ruling was delivered. The court then directed that the proceedings be typed. It fixed a mention date for 29th January, 2025. On 29th January 2025, the court confirmed that the proceedings had been typed and fixed another ruling date on 25th March, 2025 for the application

dated 28th May, 2024. The court delivered its ruling on the said date and not on 23rd March 2025. Accordingly, prayer 2 on the applicants' application lacks merit as there is not ruling of the court as to warrant an extension of time to allow an appeal out of time.

21. Prayer 3 of the applicants' application seeks leave of this court to appeal the court's ruling delivered on 23rd March, 2025. I have also perused the copy of the annexed Notice Appeal. Interestingly, it indicates that the applicants are dissatisfied with the courts ruling delivered on 23rd March, 2025 and wish to appeal against it. Even if this court were to be magnanimous to allow the application as prayed, there would be no valid Notice of Appeal to be paid for and be deemed duly filed. This could bring this applicant to this Court for another application some day and keep the court clogged with matters that ought not to be in the system.

22. A review of the court record as noted above does not indicate that this court rendered a ruling on 23rd March 2025. It is trite that parties are bound by their pleadings and when the applicants seek the intervention of this court to appeal

against a ruling that does not exist in the court record, the same prayer must be found to be without merit. In **Mutwol v Mutwol & 4 others (Environment & Land Case 37 of 2020 [2024] KEELC 1433 (KLR),** the court relied on held as follows:

> *In the Tanzanian case of Salim Said Mtomekela Versus Mohamed Abdallah Mohamed, Dar-es-salaam Court of Appeal Civil Appeal No. 149 Of 2019 (Mugasha. J.A. Kihwelq. J.A., Rumanyika. J.A p the court held: - "Pleading in law means, written presentation by a litigant in a lawsuit setting forth the facts upon which he/she claims legal relief or challenges the claims of his opponent. It includes claims and counterclaim but not the evidence by which the litigant intends to prove his case ... That said, since the pleading is a basis upon which the claim is found, it is settled law that, parties are bound by their own pleadings and that any evidence produced by any of the parties which is*

not supportive or is at variance with what is stated in the pleadings must be ignored.

23. Having so established, it is my finding that prayer 3 of the applicants' application is not merited as this court did not deliver a ruling on 23rd March, 2025. As such, this court cannot grant leave to appeal against a non-existent ruling.

24. Since prayer 4 is anchored on prayers 2 and 3, the same also fails as annexed copy of notice of appeal relates to an intended appeal against this court's ruling delivered on 23rd March 2025, which I have already found to be non-existent.

ii. Who should bear the costs of the application

25. Section 27 of the Civil procedure Act grants courts the discretion award costs and provides that costs follow event. In **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014]** KESC 31 (KLR) the Supreme Court held that:

14. So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for

the trouble taken in prosecuting or defending the suit. In Justice Kuloba's words [Judicial Hints on Civil Procedure, at p 94]: "[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."

26. The Applicants having not succeeded shall bear the costs of the instant application.
27. It is so ordered.

RULING Dated, **SIGNED** and **DELIVERED** virtually via the Teams Platform this **20th day of November, 2025.**

HON. DR. IUR NYAGAKA

JUDGE

In the presence of

Court Assistant Md. Lola

Mr. Kerario Advocate for the Applicant

Owino Advocate for Abisai Advocate for the Respondent