

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

MISC. ELC APPLICATION NO. E004 OF 2025

OKELO OKOTH.....1ST
APPLICANT

SINO OKOTH.....2ND
APPLICANT

-VERSUS-

ROSELINE AWUOR WAMAUA.....
RESPONDENT

RULING

1. The applicant filed the Notice of Motion application dated 7/02/2025 seeking the following verbatim orders;
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 - a) That leave be granted to the Applicants to Appeal against the decision and/or Decree and/or Judgment made in the original ***Siaya C.M.E.L.C No. E040 of 2023*** dated **15th May, 2024** by **Hon. L. SIMIYU (SPM)** out of time.
 - b) That there be stay of taxation and execution of the Defendants to the Plaint dated 9th March 2023 of Siaya C.M.E.L.C No. E040 of 2023 pending the hearing and determination of the appeal.

- c) That there be stay of Siaya C.M.E.L.C No. E040 of 2023 pending the hearing and determination of the appeal.
- d) That costs be in the cause.
2. The application is premised on the grounds on its face and the joint supporting affidavit of Okelo Okoth and Sino Okoth on 7/2/2025.
 3. The deponents applicants were the Defendants in the trial court. It is deponed that whereas they filed a defense in opposition to the suit the matter proceeded for mention and hearing of the Plaintiff's case without the defendants neither being served or being called out to attend the court.
 4. The deponents aver that the Defendants were never given time to file their submissions in respect to the case neither were they served by any dates, further pleadings or whatsoever as required by the Civil procedure Rules. That thereafter on 15th May, 2024 the court delivered a judgment. A copy of the same is annexed.
 5. It is deponed that they could not file an appeal after delivery of the Judgment on 15th May, 2024 because leave to appeal was a prerequisite to the filing of an appeal. According to them there is no inordinate delay in filing the instant application. That they have an arguable appeal and have annexed a copy of the draft Memorandum of Appeal.

6. The application is not opposed despite service as evidenced by the Affidavit of service sworn by Joshua Juma Kajuma.
7. The application was heard by way of written submissions. The applicants submissions are dated 18/6/2025 and which I have considered.

ANALYSIS AND DETERMIANTION

8. The main issue for determination is whether the applicants have met the threshold for the grant of the orders sought.
9. The application is filed under the provisions of section 79G of the Civil and 1A, 1B & 2A of the Civil Procedure Act.
10. Section 79G of the Civil Procedure Act is on Time for filing appeals from subordinate court and 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.

11. 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.
12. It is now established that discretion must be exercised judiciously. The applicants have referred this court to decisions of the Supreme court of Kenya in [Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others Application No 16 of 2014 \(2014\) eKLR](#) where the Apex court 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.’
13. Applying the above criteria to the present case I will consider whether the cause of the delay has been sufficiently explained to warrant the exercise of this courts

discretion in favor of the applicant. The court must also consider the period of delay.

14. The appeal was to be filed within 30 days of the judgement which was delivered on 15th May, 2024. The present application was filed in February 2025 a delay of approximately 9 months. The applicants just state they have an arguable appeal. It is not clearly deponed where they were for a period of 9 months. My perusal of the supporting affidavit does not disclose exactly when they discovered that judgement was delivered in the matter. The applicants are silent. It is not enough to simply depone that they could not file the appeal because extension of time was a prerequisite.
15. I have further noted that additional explanation was given but, in the submissions, and not under oath. These are namely that the applicants lost track of the suit believing that Mr. Ooro F their counsel would direct them. Inquiry from the registries on 7/2/2025 which appears to be the date of discovery of the judgement. It is trite that submissions do not take the place of evidence -see the Court of Appeal dictum in **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** . I will therefore disregard the explanation rendered.
16. Even assuming I was to disregard technicalities and consider the above for me there is no good or sufficient explanation that has been given for the delay in discovering there was judgement prompting the present

application. I find the delay of approximately 9 months equally inordinate.

17. Moreover, what I see is applicants who have been indolent. An indolent party must reckon with the consequence of inaction see **Muriti Kimonde versus Kenya Commercial Bank Ltd. (2006) Eklr.** In **Rukenya Buuri versus Marimi Minyora and 2 others (2018) Eklr** the court held that a litigant must be diligent enough to follow up how his case is being handled by his advocate.
18. Having declined to extend time I will not delve into the other prayer. The upshot of the foregoing is that the application is dismissed. Parties to bear their own costs.
19. Leave to appeal this decision is granted if required.

**Delivered and Dated at Siaya This 4th Day of
December 2025**

HON. LADY JUSTICE A.E. DENA

JUDGE

04/12/2025

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

Okello Okoth 1st Applicant in person
Sino Okoth 2nd Applicant in person
No appearance for the Respondent
Court Assistant: Ishmael Orwa

ORIGINAL