

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ELC MISC APPLICATION NO. E001 OF 2025

BENEDICT OWOUR NYAMWAYA.....
APPLICANT

VERSUS

DAVID OBARA 1ST
RESPONDENT

EDWIN OBARA..... 2ND
RESPONDENT

JOHN TERESI OBARA..... 3RD
RESPONDENT

JUDITH OBARA..... 4TH
RESPONDENT

PHENEAH OBARA 5TH
RESPONDENT

EVE OBARA..... 6TH
RESPONDENT

RULING

**(On whether the Applicant should be granted leave to
appeal out of time)**

The application

- 1.** The Applicant filed a Notice of Motion Application dated 14th January 2025 under a certificate of urgency. The application is expressed to be brought under Order 42, Order 43 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, 2010 as well as Sections 1A, 1B, 75 and 79 G of the Civil Procedure Act.
- 2.** The Applicant seeks ORDERS THAT:

1. Spent.
2. This Honourable court be pleased to grant leave to the Applicant to file an appeal out of time against the judgment and decision of Hon. Wairimu SPM, delivered on 9th April, 2024.
3. Costs of the application be provided for.
- 3.** The application is premised on grounds set out on the face the application as well as the supporting affidavit of Benedict Owour Nyamwaya, the Applicant. Herein. The Applicant's contention is that the trial court, on 9th April 2024 delivered a judgment in Migori ELC case no. 26A of 2024 in favour of the Respondents. He further stated that the reason for the delay in filing an appeal against the above stated judgment was occasioned by the fact of his brother and another third-parties filing applications to be joined in the proceedings shortly after the court delivered its judgment. Consequently, the Applicant stated that he could not file an appeal while the said proceedings in the said applications were ongoing since he was waiting for the trial court to render itself in the said applications.
- 4.** Further to the above, the Applicant stated that he is desirous of prosecuting his appeal, having been dissatisfied by the judgment of the trial court. The Applicant also maintained the statutorily mandated time for instituting an appeal had lapsed and prayed that he be granted leave to appeal the judgment of the trial court out of time. He further stated that

his application had been brought timeously and that granting the prayers sought would not prejudice the Respondents.

5. Lastly, the Applicant stated that his application had been brought in good faith and that it was in the interest of justice that the prayers sought therein be granted.
6. The Applicant, in his supporting affidavit, reiterated that the trial court rendered its judgment on 9th April 2024 and that his brother and other third parties made applications to be joined in the matter. He annexed the judgment as well as the said applications to his application as annexures marked BON-1 and BON-2A, BON-2B and BON-2C respectively).
7. The Applicant stated that he waited for the trial court to determine the applications, which were eventually determined vide a ruling dated 5th December 2024 which dismissed the said applications. He annexed the said ruling as annexure marked BON-3.
8. It was the Applicant's further deposition that he now wishes to appeal the trial court's judgment dated 9th April 2024, the applications that he claimed to have prevented him from appealing the said judgment having been heard and dismissed. He deponed that his intended appeal is meritorious and annexed a copy of the draft Memorandum of Appeal as annexure marked BON-4.

The Response

9. The Respondents filed a Replying Affidavit dated 6th March 2025 deponed by David Obara, the 1st Respondent herein.

He deponed that the Applicant filed suit against the Respondents. The latter entered appearance, and filed a defense and counter-claim against the Applicant. He annexed a copy of the plaint as well as the defense and counter-claim as annexures marked D0-01 and D0-02. The Respondents further stated that the matter proceeded to trial and was determined in their favour and annexed the trial court's judgment and decree as annexures marked D0-03 and D0-04.

10. Following the court's judgment, the 1st Respondent deponed that the Respondent proceeded to execute the court's decree by resurveying the land and consequently issued with a new title deed. Besides, he deponed that his family had buried their family member on the disputed parcel of land. He annexed a copy of the title deed as annexure marked D0-05.

11. The 1st Respondent further deponed that the Applicant's brother filed his application on 16th September 2024, long after the statutory period for launching appeals had lapsed. He deponed that no reason had been advanced for the delay in filing the intended appeal.

12. Equally, the 1st Respondent maintained that, had the Applicant been honest in placing reliance on the intended interested party's application as an excuse to his failure to file his appeal in time, he would have waited for the determination of the interested party's application seeking to appeal out of time, which application is still pending

before court. He annexed the interested party's stay of execution application as annexure marked DO-05.

13. The 1st Respondent lastly deponed that the Applicant's application is an afterthought, brought only after the trial court dismissed the interested party's application seeking to be joined in the matter. To buttress this point, he deponed that the Applicant filed a replying affidavit in response to their application to execute the decree of the trial court and the Applicant never indicated that he intended to file an appeal depending on the outcome of the application.

Parties' Submissions

14. The application was canvassed by way of written submissions. The Applicant filed undated submissions in support of his application. He framed a single issue for determination, being whether the Applicant should be granted leave to file his appeal out of time.

15. In his analysis of the above identified issue, the Appellant submitted that this court is clothed with jurisdiction to enlarge time for purposes of filing appeals out of time by dint of section 79G of the civil procedure Act. The Applicant cited county executive of **Kisumu v county government of Kisumu & 8 others [2017] eKLR** to argue that the whole period of delay as well as the reason for the delay should be explained satisfactorily to the court so as to aid it in exercising its discretion to enlarge time for purposes of appealing out of time.

- 16.** The Appellant submitted that he has satisfactorily explained to the court the reason for the delay in filing his intended appeal, which reason he stated to be the fact of the application filed seeking to re-open the case after judgment had been rendered by the trial court.
- 17.** The Respondents on their part filed their submissions dated 25th November 2025. They framed two issues for determination, namely: whether this court should exercise its discretion to grant the Applicant leave to appeal out of time; and, who should bear the costs of the application.
- 18.** As to whether this court should exercise its discretion and grant the Applicant leave to appeal out of time, the Respondents submitted that Section 79 G of the Civil Procedure Act empowers the court to exercise its discretion in allowing appeals out of time, except that the reason for the delay in filing the Applicant's appeal should be explained to the satisfaction of the court. Reliance was placed on **Diplack Kenya Limited vs William Muthama Kitonyi [2018] eKLR** to emphasize that an Appellant seeking enlargement of time to appeal out of time must show good cause for his delay in instituting the appeal within time.
- 19.** The Respondents also relied on the Supreme Court decision in **Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR** as well as the Court of Appeal decision in **Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR** to highlight the principles that must guide courts when determining whether or not to grant leave to

appeal out of time. These considerations include, among others, the discretionary power of the court in extending time to appeal out of time, the period of delay, the prejudice to be suffered by the Respondent (s), and the chances of the appeal being successful if time is enlarged.

20. The Respondents argued that the Applicant's application does not meet the test established in the *Kiptoo arap Salat* and **Paul Musili** (supra), owing to a delay of 240 days in filing his appeal. They further submitted that, whereas the Applicant attributes the delay in filing his appeal to applications filed seeking to re-open the case, these applications were filed by persons who were total strangers to the suit and had nothing to do with the decision of the court. The Respondents further submitted that the Applicant did not demonstrate how the said applications barred him from filing an appeal. In the circumstances, the Respondents argued that 240 days delay was such a long time, and the same having not been explained by the Applicant, warrants a dismissal of the application.

21. As to who should bear the costs of the application, the Respondents relied on section 27 of the Civil Procedure Act to argue that they should be granted the costs of the application since the application is not meritorious.

Issues, Analysis and Determination

22. The issues for determination in this application are:

- a) Whether the Applicant should be granted leave to file an appeal out of time; and
- b) Who should bear the costs of the application

23. This Court begins the analysis in the sequence the issues are listed above.

a) Whether the Applicant should be granted leave to file an appeal out of time

24. The judgment against which the intended appeal is being sought by the Applicant was rendered on 9th April 2024. The instant application was filed on 14th January 2025, which is way beyond the 30 days statutory period provided under section 79G of the civil procedure Act, by over eight months. The provision is to the effect 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.

25. The proviso in Section 79G of the Civil Procedure Act (cited above) grants the court the power to admit an appeal filed out of time where the court is satisfied that there exists a good and sufficient reason for filing the appeal out of time.

26. The Supreme Court in **Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling)** further expounded on the factors that courts should consider when faced with an application seeking leave to file an appeal out of time. The court held that:

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

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; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; Whether there will be any prejudice suffered by the Respondents if the extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

27. Without a doubt, the Appellant took more than the 30 days statutory period prescribed for lodging appeals. While this fact is not disputed, this court has a duty to determine whether the reasons advanced for the delay in lodging the appeal by the Applicant are show a good cause and are sufficient as to warrant the grant of the orders sought. The burden as usual, as stipulated under Section 107 of the Evidence Act, is on the party who wishes to rely on the facts he asserts to support the existence or non existence of a fact to prove them to the required standard.

28. The Applicant argued that he could not file an appeal in time because other parties, who were not party to the suit filed applications seeking to be joined in the suit in their quest to re-open the suit after judgment had been delivered. He argued that he had to wait for the determination of these applications. He also s submitted that, once these applications were dismissed, he filed the instant application seeking to appeal the judgment of the trial court.

29. The Respondents on the other hand argued that the instant application was a mere afterthought, especially after the applications filed by third parties seeking to be joined in the suit were dismissed by the trial court. In any event, the Respondents added that the Applicant had filed a replying affidavit in response to the Respondents' application seeking to execute the trial court's t decree in their favor. In this affidavit, the Respondent contended that the Applicant showed no intention whatsoever of appealing the judgment

of the trial court. Equally, the Respondents argued that the appeal and decree in question was never directed to the said third parties and that the Applicant had cannot now hide behind the said third parties so as to convince the court that he could not file his appeal on account of their applications.

30. As was held in the ***Salat case*** (*supra*) the Applicant is expected to give a full, honest and acceptable explanation for the delay so as to enable the court to exercise its discretion in its favour. The court held that:

“In those circumstances, it is incumbent on the Applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.”

31. This court has considered the reasons for the delay in filing the Applicant’s appeal. These applications, the court notes, were made by persons who were not parties to the suit. Even if the court were to believe that he applications had something to do with the delay, the court finds that there was no stay of further any further action following the filing of the applications. As such, the mere filing of the said applications did not in any way prevent any further court process from taking place, including the filing of the alleged appeal by the Applicant herein. Thus, the Court is not convinced that the Applicant was prevented from filing an

appeal within time by dint of the applications states to have barred him from filing the appeal.

32. The Applicant has not demonstrated the nexus between his intend appeal and the outcome of the applications, by a stranger to the matter at that time the applications were made, that he claims to have barred him from filing his appeal. He did not take any steps to lodge an appeal, despite claiming to have been aggrieved by the court's finding. In any event the applications for joinder, as the record bears were commenced way after the thirty (30) days to appeal had expired. Other than trying to hang on reasons which arose much later, which do not support the delay past the thirty days, the Applicant does not attempt to explain the reasons for not complying with the immediate statutory period.

33. In **Kimathi & another v Muriuki & 12 others (Civil Appeal (Application) 61 of 2020) [2023] KECA 666 (KLR) (9 June 2023) (Ruling)**, the court of appeal held that:

Equity does not aid the indolent. A party must demonstrate that they are not just sitting and doing nothing, then approach the court for clemency. Justice cuts across both sides of a case. It must be balanced to favour all parties in a case

34. The court also notes that the Respondents would be prejudiced should the appeal be allowed. Extension of time to allow a party to appeal out of time should never be about

the Applicant alone; it should also consider the prejudice to be suffered by the Respondents. Besides, courts should also appreciate that there should be finality to litigation (**see Maclean & another v Kiago & another (Miscellaneous Civil Application E070 of 2023) [2025] KEHC 3572 (KLR) (24 March 2025) (Ruling).**

35. The Respondents deponed that, following the judgment and decree of the court, they had gone ahead and processed a new title and annexed the same to their replying affidavit. In these circumstances, and bearing in mind that the Applicant did not give a convincing explanation for his delay in lodging his appeal, this court is inclined to find the interests of justice title towards making a finding that the application is without merit. Accordingly, prayer 1 of the application is hereby declined. Having so found, I am of the humble view that there is no basis for me to analyze the chances of success of the intended appeal. This process of determination of the instant application must rest at this point, to save the court's time.

Who should bear the costs of the application

36. Section 27 of the Civil Procedure Act provides that costs follow event, and that the same should be granted at the discretion of the court, bearing in mind the circumstances of each case.

37. In the instant application, the Respondents have succeeded. Accordingly, the Applicant shall bear the costs of the application.

38. Orders accordingly.

RULING Dated, Signed and Delivered virtually via the **Teams Platform this 16th day of January 2026.**

HON. DR. IUR NYAGAKA,

JUDGE,

From 08:43 AM in the presence of:

B. Mboya Advocate for the Respondent

Obach Advocate for the Applicant (absent)