



**Gathuri v Nyaga & another (Civil Application E176 of 2025)
[2026] KECA 27 (KLR) (16 January 2026) (Ruling)**

Neutral citation: [2026] KECA 27 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E176 OF 2025
A ALI-ARONI, JA
JANUARY 16, 2026**

BETWEEN

GEOFFREY REYS NJAGI GATHURI APPLICANT

AND

LUCY WANJIRA NYAGA 1ST RESPONDENT

CHARLES NJUE 2ND RESPONDENT

(Being an application for extension of time to file and serve the record of appeal against the Judgment of the Environmental and Land Court at Embu (K. Bor, J.) dated 11th September 2025 in ELC Case No. 37 of 2019)

RULING

1. Before the Court is an application by way of a notice of motion dated 26th November 2025, brought under section 3A and 3B of the *Appellate Jurisdiction Act* and rule 4 of the Court of Appeal Rules 2022, seeking extension of time to file and serve the record of appeal.
2. The application is predicated on the grounds on the face of the application, which have been rehashed in the supporting affidavit sworn by the applicant on 26th November 2025. In his affidavit, the applicant explains that the delay in filing the appeal was due to his hospitalization between the 20th of September 2025 and the 20th of November 2025, which prevented him from communicating with his advocate. He describes the failure to file as inadvertence and an honest mistake arising from illness.
3. He further states that he is at risk of losing a 5-acre parcel of land (Gaturi/Nembure/2900), which has been subdivided into six smaller titles (16489 through to 16493). He notes that the land is currently registered in the respondents' names and that, if the extension is not granted, the intended appeal will be rendered nugatory and a mere academic exercise.



4. The applicant avers further that the intended appeal raises arguable grounds, contending inter alia, that the trial court ignored evidence that demonstrated that occupation of the suit property by the respondents was with the applicant's consent; was neither peaceful nor uninterrupted; there were several suits and the occupation was not adverse to the applicant; he also asserts that the respondents will not suffer any prejudice if the Court allows his application.
5. The application was opposed by way of a replying affidavit sworn of the 2nd respondent dated 10th December 2025, where he deposes that the applicant has not provided a valid reason for failing to file the record of appeal on time;

he points out that the applicant was admitted to the hospital on 20th September 2025, whereas the judgment was delivered on 11th September 2025; he asserts the applicant had sufficient time between the judgment and his hospitalization to instruct his counsel; further the applicant was not totally incapacitated because he was able to swear an affidavit and filed a notice of motion on 6th October 2025; and that a draft memorandum of appeal had already been prepared by 6th October, suggesting that instructions had already been given to the counsel; further preparing a record of appeal is the duty of an advocate, not the applicant personally, making the health plea irrelevant; the application is an abuse of the court process as a previous suit seeking eviction orders (CMCCC Case No. 189 of 1996) was dismissed for want of prosecution in 2001 and the order was not appealed; further the 1st respondent has occupied the suit property since July 1974, and the 2nd respondent has lived there since his birth in 1978 and an extension of time would deny them the fruits of the judgement and render them destitute.

6. Learned counsel for the applicant has filed submissions dated 5th December 2025, wherein he reiterates that the delay was due to the applicant's illness, which prevented him from instructing his advocate. Counsel cites rule 4 of the Court's Rules, which grants the court discretionary power to extend time limits in the interest of justice and states that granting the extension will not cause any prejudice to the respondents, but that denying the application would deprive the applicant of access to justice and would not serve the overriding objective of the Court. In support of his argument, counsel relies on

Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others [2014] (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014), where the Supreme Court outlined the criteria to be considered by Courts when considering whether or not to extend time.

7. Counsel also cited Paul Kipkorir Kibet [2018] [2018] KECA 701 (KLR), where this Court held that the law does not set out any minimum or maximum period of delay and the need for the delay to be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour.
8. On the part of the respondents, learned counsel filed submissions dated 12th January 2026. Counsel argues that the applicant has failed to meet the established legal principles necessary for an extension of time under rule 4 of this Court's Rules. He contends that the explanation that the delay was due to the applicant's hospitalization which prevented him from instructing his advocates is dishonest as judgment was delivered on 11th September 2025, and he was admitted to the hospital on 20th September 2025; which gave him enough time to swear an affidavit and file notice of motion on 6th October 2025, which included a draft memorandum of appeal; further preparing a record of appeal is the duty of the advocate, not the client personally; therefore, the applicant's alleged illness should not have stalled the process; the applicant is accused of being an "indolent party" who has not explained the entire period of delay or shown the "clean hands" required for an equitable relief. In support of his contention, counsel



relied on *Bi-Mach Engineers Limited vs. James Kahoro Mwangi* [2011] eKLR, where the Court held that a satisfactory explanation for the whole period of delay must be given.

9. On whether the respondents are likely to suffer prejudice, counsel submits that the 1st respondent has occupied the suit property since 1978, and any further delay would prevent them from enjoying the "fruits of their judgment" and threatens to render them destitute.
10. On whether the suit is *res judicata*, counsel avers that the matter is an abuse of the court process because a previous suit seeking eviction (CMCC Case No. 189 of 1996) was dismissed in 2001, and the ruling was never appealed against.
11. I have considered the application, the supporting affidavit, the replying affidavit and the submissions. The issue for determination is whether the applicant is deserving of extension of time to file and serve a record of appeal.
12. Rule 4 of the Court of Appeal Rules states that; -

The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

13. In *Kirera vs. M'Kirera & 2 Others* (Civil Application E073 of 2022) [2023] KECA 2 (KLR), this Court held:

...The principles to be considered by this court in determining whether or not to grant the application for extension of time under rule 4 of the Court of Appeal Rules 2022 are well settled. This court has unfettered discretion to allow or disallow such an application for extension of time. This discretion is, however, guided *inter alia*, by the following principles; the applicant must give a satisfactory reason for the delay taking into account the period of delay; the applicant must have made the application for extension of time without undue delay; the applicant must show that the appeal he intends to file is arguable or at least is meritorious hence the requirement that a draft memorandum of appeal should be annexed to the affidavit in support of the application for extension of time; and finally, it is established that the respondents will not be unduly prejudiced by the grant of the order of extension of time. (See *Vishva Store Suppliers Company Limited v RSR* [2006] Limited [2020] eKLR).

14. In this suit, Judgement in the High Court was delivered on the 11th of September 2025. A notice of appeal was filed within time on 16th September 2025. The applicant's explanation for the late filing and service of the record of appeal is that he was ill and hospitalised between 20th September 2025 and 20th November 2025. The application subject of this ruling is dated 26th November 2025, meaning that, at the time of filing, 71 days had elapsed. Are the days too many to be considered inordinate? Is the explanation plausible?
15. The respondent urges that the delay is not sufficiently explained for the reason that after the notice of appeal was lodged, a notice of motion seeking a stay was filed, and therefore the record could have been filed and served on time, and in any event, counsel could have filed the record and did not require the applicant to do so. That may be so in an ideal situation, where counsel for a client who has lost a case should take steps to appeal once the client expresses interest. Indeed, in this instance, a notice of appeal was filed, and an application for a stay was made. Was this an indication that counsel had sufficient instructions to file and serve the record of appeal? This depends on various factors; it is not as



straightforward as the respondents' state. A review of the medical record indicates that the applicant is 83 years old and has multiple medical conditions. Both the applicant and counsel state that the ailments delayed the issuance of instructions to counsel. In the legal world, the term 'instructions' connotes more than just a request to file suit or pursue a certain legal direction. I therefore find that the applicant has given a plausible explanation of his inability to instruct his counsel hence the delay in filing and serving the record of appeal. The draft memorandum of appeal attached is not idle; it raises arguable points.

16. The respondents complain that they will suffer prejudice since they have been on the suit property for several years and are likely to be destitute. The said issues will be determined on appeal. As for now having found the explanation satisfactory; the draft memorandum of appeal raises triable points; the delay not inordinate I form the view that prejudice if any can be compensated by way of costs.
17. I therefore allow the application and direct that the record of appeal be filed and served within the next 30 days of this ruling.
18. Costs of the application will abide by the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF JANUARY, 2026.

ALI-ARONI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

