



**Gitunga (Suing as Legal Representative of the Estate of Itunga Kiragua  
alias M'Itonga Kiragua) & 6 others v Mbataru & another (Civil Application  
E174 of 2025) [2026] KECA 19 (KLR) (16 January 2026) (Ruling)**

Neutral citation: [2026] KECA 19 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E174 OF 2025  
A ALI-ARONI, JA  
JANUARY 16, 2026**

**BETWEEN**

**JUDSON MWENDA GITUNGA (SUING AS LEGAL REPRESENTATIVE  
OF THE ESTATE OF ITUNGA KIRAGUA ALIAS M'ITONGA  
KIRAGUA) ..... 1<sup>ST</sup> APPLICANT  
GITUNGA KIENDE ESTHER ..... 2<sup>ND</sup> APPLICANT  
JAMLICK KABURU GITUNGA ..... 3<sup>RD</sup> APPLICANT  
JOYCE NDURU M'RUKARIA ..... 4<sup>TH</sup> APPLICANT  
HELLEN NKUENE WILFREDD GITUNGA ..... 5<sup>TH</sup> APPLICANT  
ESTHER MUGURE JOHN ..... 6<sup>TH</sup> APPLICANT  
FAITH KATHUE MURITHI ..... 7<sup>TH</sup> APPLICANT**

**AND**

**JULIUS MBATARU ..... 1<sup>ST</sup> RESPONDENT  
GEORGE GITONGA GITU (SUING AS LEGAL REPRESENTATIVE OF  
THE ESTATE OF RIRIA KARAGUA ALIAS FESTUS GITU KIRANGUA -  
DECEASED) ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for extension of time to file a notice of appeal and record  
of appeal from the Judgment of the Environmental and Land Court at Meru  
(C. K. Yano, J.) dated 23rd November 2023 in ELC Case No. E003 OF 2022)*



## RULING

1. Before the Court is an application by way of a notice of motion dated 21<sup>st</sup> November 2025, brought under Article 48 and 159(2)(d) of *the Constitution*, section 3A and 3B of the *Appellate Jurisdiction Act*, rule 4 and 43 of the Court of Appeal Rules 2022 ('the Rules') and section 10 of the *Judicature Act*, seeking extension of time to file a notice of appeal and record of appeal out of time and for the notice of appeal and record of appeal annexed to the application be deemed as duly filed.
2. The application is predicated on the grounds on the face of the application and the supporting affidavit of the applicants' counsel, Faith Kerubo, sworn on 21<sup>st</sup> November 2025, in which she deposes that the application arises from a judgment delivered on 23<sup>rd</sup> November 2023, in the Environment and Land Court at Meru (ELC Suit No. E003 of 2022). The applicants initially lodged an appeal on 5<sup>th</sup> December 2023. The respondents moved to strike out the appeal vide an application dated 29<sup>th</sup> August 2024, and on 18<sup>th</sup> July 2025, the Court struck out both the appeal and the record of appeal for the applicants' failure to seek leave of the Court to enlarge time. The said ruling was conveyed via email.
3. Counsel further contends that the applicants took the initiative to correct the earlier error by filing an application on 23<sup>rd</sup> July 2025, seeking an extension of time to file the appeal. The Court of Appeal registry notified the parties that a ruling on the application would be delivered on 24<sup>th</sup> October 2025. There seems to have been a communication breakdown; it was expected that the ruling would be delivered via email, as is customary, however, the ruling was not emailed as expected, and it was not until 20<sup>th</sup> November 2025 that counsel discovered that the ruling had been uploaded to the Case Tracking System (CTS) portal on 24<sup>th</sup> October 2025, thereby explaining the non-compliance with the court order; the failure was inadvertent and not due to negligence; the applicants are desirous of appealing, as their appeal presents arguable grounds; there has been no significant delay in filing this application, and granting the orders sought would not prejudice the respondents; denying the application would harm the applicants; and that it is in the interests of justice that the application be allowed.
4. Counsel further explains that in its earlier ruling, this Court had granted the applicants 14 days to file their documents; seeks a further extension of seven (7) days to file their documents; the draft notice of appeal and record of appeal are already prepared and ready for filing.
5. The 2<sup>nd</sup> respondent has filed a replying affidavit sworn on 18<sup>th</sup> December 2025 and in opposition, contending that the applicants have been indolent and have failed to demonstrate sufficient cause for their delay; he seeks for striking out of the affidavit in support of the application sworn by counsel for the applicant and urges that advocates are barred from swearing affidavits on behalf of parties regarding contentious issues. He also argues that this Court has already dealt with the issues of extension of time and therefore, the instant application is res judicata and should be dismissed with costs. Further, the applicants were admittedly aware of the 24<sup>th</sup> October 2025 ruling date. And reference to Tracking System (CTS) is a "farce," since the Court's digitization has been in place for over five years and it was the applicants' duty to follow up on the ruling; the applicants waited an additional 27 days after the ruling date before making a follow-up inquiry; litigation must come to an end; and that the application is an afterthought intended to keep the respondents in a continuous loop of litigation.
6. Learned counsel for the applicants has filed submissions, a case digest and a list of authorities, all dated 16<sup>th</sup> December 2025, and argues that the primary issue for determination in this matter is whether this Court should grant the applicants an extension of time to file a notice of appeal and a record of appeal.



This prayer follows a previous grant of leave on 24<sup>th</sup> October 2025, which the applicants failed to meet due to a procedural misunderstanding.

7. Counsel argues that their failure to comply with the initial 14-day timeline was not deliberate or due to laziness. Instead, they were waiting for the ruling via email, a standard practice, while the court instead uploaded it to the Case Tracking System (CTS) portal without notifying them. Upon discovering the ruling on 20<sup>th</sup> November 2025, the applicants promptly filed the current application by 21<sup>st</sup> November 2025. In support of the assertion, counsel cited *Lucy Bosire vs. Kehancha Div. Land Dispute Tribunal & 2 Others* [2013] KEHC 681 (KLR), where the court held that cases involving land, an emotive subject, should be heard on merit rather than dismissed on technicalities so that parties do not feel that they have been driven from the seat of justice. Counsel equally cited section 3A of the *Appellate Jurisdiction Act* and Article 48 of *the Constitution* and argues that the right to access the court should prioritize fairness over finality.
8. Counsel relies on *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling), where the court summarised the principles governing the exercise of discretion. Counsel asserts that they have ready drafts of the required documents and that granting the extension will not prejudice the respondents. Additionally, the court must determine who should bear the costs of the application, with counsel stating that costs should abide by the outcome of the intended appeal.
9. Learned counsel for the 1<sup>st</sup> respondent has filed submissions and a list of authorities, both dated 9<sup>th</sup> January 2026. Counsel raises three issues for determination, namely: whether the application is res judicata in light of Nyeri Civil Application No. 108 of 2025; whether the doctrine of estoppel applies; and whether the time to file an appeal should be extended.
10. On res judicata, counsel argues that the previous application for extension of time (Nyeri Civil Application No. E108 of 2025) was heard and a ruling delivered on 24<sup>th</sup> October 2025 and asserts that parties are therefore prevented from re-litigating issues already decided on their merits by a competent court and therefore the court is barred from entertaining a fresh application on the concluded issue. In support, counsel relies on *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR where the court stated that the concept of res judicata operates to prevent causes of action, or issues from being re-litigated once they have been determined on the merits.
11. Counsel reiterated the fact that the applicants were granted leave to file their appeal in the previous application, but failed to do so within the prescribed time and seem to blame the court registry for their own failure to file the appeal as directed. Counsel argues that the court should not exercise its discretion to reward the applicants' "indolence" for a second time.
12. On whether the applicants deserve leave to appeal out of time, counsel contends the applicants have not met the legal threshold for an extension as there is no satisfactory reason for the 23-month delay since the original judgment or the 27-day delay following the October 2025 ruling. Counsel adds that the applicants were aware of the October ruling because it was discussed in a related probate matter at Nkubu Law Courts on 13<sup>th</sup> November 2025. In support of this contention, counsel cites *Julius Muthoka Ndolo & 4 Others vs. Danson Mutuku Muema* [2000] KECA 66 (KLR), where the court held that it is upon the applicant to explain to the satisfaction of the court that this discretion ought to be exercised in its favour.
13. On whether there is likely prejudice to be suffered by the respondent, counsel submits that the 1<sup>st</sup> respondent is an elderly man suffering from chronic gastritis, which he attributes to the emotional



distress of continuous litigation and threats of eviction; litigation has caused significant financial strain upon the respondents; and prevents them from enjoying the fruits of the judgment, specifically the excision of 1.5 acres of family land.

14. Counsel submits further that the applicants failed to attach a draft memorandum of appeal, making it impossible for the court to determine if the intended appeal has any merit.
15. I have considered the application, the supporting affidavit, the replying affidavit, the rival submission, and the law. The issue for determination is whether to grant the applicants an extension of time to file a notice of appeal and record of appeal pursuant to leave granted by this Court on 24<sup>th</sup> October 2025.
16. 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.

17. In *Abdul Azizi Ngoma vs. Mungai Mathayo* [1976] Kenya LR 61, 62, this Court stated:

“We would like to state once again that this court’s discretion to extend time under rule 4 only comes into existence after ‘sufficient reason’ for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”

18. It is not in dispute that a similar application seeking an extension of time was filed by the applicants, and a ruling allowing the same was granted on the 25<sup>th</sup> of October 2025. However, the circumstances placed before the Court in this application are different. The applicants, in explaining the delay, states that the earlier court ruling was posted on the CTS portal, unlike other rulings, which are posted to counsel’s email. Indeed, this is the court’s practice, which the respondents’ counsel does not dispute. Counsel for the applicants this time seeks seven (7) days to implement the order of 25<sup>th</sup> October 2025. The circumstances being different, the principle of *res judicata* and the doctrine of *estoppel* are not applicable.
19. The explanation given for the delay by the applicants and his counsel, in my view, is plausible and sufficient; and any prejudice that will be suffered because of the delay can be compensated by way of costs. This Court, having earlier found the extension of time merited, I would adopt the finding of *Kantai JA*, since the reasons for the delay leading to the earlier ruling remain.
20. The respondents indicated that a reference is pending before the court for determination by a full bench. The issue is not before this Court. It will be determined at the opportune time in the right forum.
21. For now, I allow the application and costs to abide by the outcome of the appeal.

**DATED AND DELIVERED AT NYERI THIS 16<sup>TH</sup> DAY OF JANUARY, 2026.**

**ALI-ARONI**

.....

**JUDGE OF APPEAL**

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



Signed

DEPUTY REGISTRAR

