

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**FAMILY MISC. APPLICATION NO. E025 OF 2025**

**NGUTHUKO KAHUTHU .....**  
**APPLICANT**

**VERSUS**

**ELOSE WANJIRA KAHUTHU (Sued as the Legal  
Administrator of the Estate of Joseph Kahuthu)  
.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 18/9/2025, the applicant sought leave to appeal from the decision made on 22/3/1979. They also sought stay. The application was for orders that: -

- a) Spent
- b) Pending the hearing and determination of this application *inter partes*, this Honorable Court be pleased to grant a temporary stay of proceedings in Karatina Succession Cause No. 235 of 2022, In the Matter of the Estate of Joseph Kahuthu.
- c) The Applicant be granted leave to file a Memorandum of Appeal out of time against the ruling of the District Magistrate's Court at Karatina in Land Succession No. 128 of 1978 (Estate of Kahuthu Nguthuko) delivered on 22nd March, 1979.

d) Pending the hearing and determination of the intended appeal herein, there be a stay of proceedings in Karatina Succession Cause No. 235 of 2022; In the Matter of the Estate of Joseph Kahuthu.

e) Costs of this application be in the cause.

2. The applicant described himself as the son of the first registered proprietor, the late Kahuthu Nguthuko. There is no privity of estate indicated in terms of administration or otherwise. The court noted that the respondent was 1 year old when the case was decided thus was not a party to the case. It is contended that the estate was distributed in Land Succession Cause No. 128 of 1978. They now wish to appeal to that decision.
3. An appeal ought to have been preferred 47 years ago. There is no right of appeal as there can be no explanation for the long delay. The court recalls the maxim "*vigilantibus non dormientibus, jura subveniunt*" well enunciated in the case of **Lewa v Mwangandi [2015] KECA 532 (KLR)** where the court of appeal [W Ouko JJ.A as he then was, MS Asike-Makhandia & K M'Inoti, JJA] lamented on the question of delay in land related matters as follows:

The main justification for the law of adverse possession has variously been given as the need to discourage land owners against, as it were, sitting or sleeping on their land-related rights hence the maxim "*vigilantibus non dormientibus,*"

*jura subveniunt*”, an equivalent to the maxim that equity aids the vigilant. Paper owners of land are encouraged to utilize their land or else a squatter would be prepared to make use of it, invoke the equitable defence of laches and the law will protect him.

4. The delay in this case is not just for one month or even 12 years but 4 limitation periods, 47 years. To make matters worse, the applicant wishes to tie the fate of a matter filed in 2022 to his escapades. The succession does not even relate to the original deceased, Kahuthu Nguthuko. It relates to one of the beneficiaries of the estate of the late Kahuthu Nguthuko (Deceased). The succession in Karatina P&A E235 of 2022 relates to the estate of Joseph Kahuthu. The property originally dealt with was IRIANI/CHEHE/566.
5. Attached to the proceedings was a ruling where the court distributed land parcel number IRIANI/CHEHE/566 to two persons, that is Nancy Njeri W/o Kahuthu and Joseph Kahuthu, each to get 6.05 acres.
6. The attached summons for confirmation relate to IRIANI/CHEHE/1563, in the name of the new deceased, the late Joseph Kahuthu Ndege, who died in 2013.
7. When the matter came to court, the court asked the advocate for the applicant to justify the delay but maintained that those were her instructions. I have thus written this extempore

ruling lamenting on the 47 years delay. The court cannot entertain claims affected by laches and indolence. There is no way the delay of 47 years can even be entertained.

8. The discretion to extend time is unfettered. There is no limit to the number of factors the Court may consider, provided they are relevant. These factors are also unlimited and include the period of delay, the explanation tendered for that delay, the diligence or otherwise of the applicant, the prejudice to the respondent, and the overarching interests of justice. Waki, JA in **seventh Day Adventist Church East Africa Ltd & 2 Others v Masosa Construction Company** [2006] KECA 194 (KLR) stated:

As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and

varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant's counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.

9. The Supreme Court of Kenya decision (M.K. Ibrahim & S.C. Wanjala SCJJ) in **Salat v Independent Electoral and Boundaries Commission & 7 others** [2014] KESC 12 (KLR) provided guidance on the principles to apply in extension of time, as follows:

“(1) 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.

(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

10. In an application for extension of time, where the Court is invited to exercise its discretion, there must be material placed before it to justify such exercise. Upon non-compliance with statutory or procedural timelines, the burden rests squarely on the party seeking indulgence to offer a credible and satisfactory explanation for the delay, failing which the Court has no basis upon which to exercise its discretion in their favour. In the case of **Dilpack Kenya Limited v William Muthama Kitonyi [2018] KEHC 4858 (KLR)**

Odunga J, as he then was, stated as follows:

In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman vs. Cumarasamy* [1964] 3 All ER 933; *Savill vs. Southend Health Authority* [1995] 1 WLR 1254 at 1259.

11. There is no justification for delaying for 47 years to apply to file appeal out of time. The applicant will learn to live with the consequences of the decision in Succession Cause No. 128 of

1978. The application lacks merit and is accordingly dismissed.

12. Though the respondent is yet to file a response, she was present in court. The applicant has hauled her to court over matters that were settled many years ago. Therefore, disbursements of a sum of Ksh. 5,000/= will suffice. The same should be paid within 15 days, failure which execution to issue.

13. The lower court succession matter, Karatina Succession Cause No. 235 of 2022, In the Matter of the Estate of Joseph Kahuthu should proceed without unnecessary theatrics. This file is closed.

#### Determination

14. In the circumstances I make the following orders: -

- (a) The Notice of Motion dated 18/9/2025 lacks merit and is accordingly dismissed.
- (b) The Respondent shall have disbursements of Kshs. 5,000/= payable within 15 days, in default execution do issue.
- (c) Karatina Succession Cause No. 235 of 2022, In the Matter of the Estate of Joseph Kahuthu should proceed without unnecessary theatrics.
- (d) The file is closed.

**DELIVERED, DATED and SIGNED at NYERI on this 3<sup>rd</sup> day of February, 2026.** Ex Tempore Ruling delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE  
JUDGE**

**In the presence of: -**

Ms. Kusoto for the Applicant

Respondent - present

Court Assistant - Michael