

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT KILGORIS
ELC MISC E007 OF 2025

TEIYAI OLE NTUMARI.....
.....APPLICANT

VERSUS

PAUL OSORO MOMANYI.....
RESPONDENT

RULING

1. Coming up for determination is the Notice of Motion dated 23/5/2025 seeking orders *interalia*; -
 - (i) Spent
 - (ii) Spent
 - (iii) Leave granted to the Applicant to file an appeal out of time against the judgment and decree of the subordinate court delivered on 30th January 2025 in Kilgoris MELC No. E004/2021.
2. The said application; is premised on grounds *interalia* that;
 - (i) The applicants is desirous of filling an appeal out of time and had obtained leave on 18/6/2024 conditional on depositing al sum of Kshs.50,000 in a joint interest earning account.
 - (ii) Applicant was taken ill and did not comply with the orders of the court and only learnt of the said orders on 13th February 2025, and he filed an application dated 14/2/025 which was struck out, hence the current application.
 - (iii) That here are genuine and good reasons which prevented the Applicant from issuing instructions on the appeal.
 - (iv) The applicant is willing to deposit the Kshs.50,000 as had previously been directed on 18/06/2024 as a condition for leave to Appeal.

3. The Above grounds were reiterated in the Applicant's supporting affidavit, which annexes copy the ruling delivered on 18/06/2024, letter from a medical doctor copy of draft Memorandum of Appeal.
4. The Application is opposed by the affidavit of Paul Osoro Momanyi the Respondent who depones *inter alia*, that; -
 - (i) The Applicant has not demonstrated sufficient reasons for grant of the Application which is ill conceived and an abuse of the court process.
 - (ii) That one year has lapsed since leave was granted to file the Appeal and hence there is an inordinate delay, seeking leave.
 - (iii) The Application is meant to delay the fruit of the judgment.
5. The court heard the oral submissions in respect of the application, Mr. O.M. Otieno argued the application on behalf of the Applicant while Mr. Nyasimi argued on behalf of the Respondent.

Applicant's Submissions

6. Mr. O.M Otieno learned counsel for the Applicant placed reliance on the grounds on the face of the application as well as supporting affidavit and submitted *inter alia* that the court had previously granted the Applicant leave to appeal and still has discretion to grant the same and that leave ought to be granted and sufficient reasons have been given, in spite of the property having been sold.

Respondents Submission

7. Mr. Nyasimi learned counsel for the Respondent, submitted that stay had been granted previously and upon lapse, the Respondent executed hence prayers 2 and 3 were overtaken by events, due to transfer of the property to a third party.
8. That the 3rd party who was now the registered proprietor ought to join in the application as he acquired rights.

9. The Respondent submits that leave had been granted to the Applicant to file an Appeal out of time based on draft Memo of Appeal and that the Applicant did not have any role since draft Memo of Appeal was already prepared.
10. The Respondent submits that Mr. Otieno ought to have obtained consent from the previous Advocates before filling this application he was thus not properly on record rendering the application defective and since it lacks merits Mr. Nyasimi urged the court to dismiss the same together with the costs previously awarded.
11. In brief rejoinder, Mr. Otieno submitted that there were no orders sought against the 3rd party hence their joinder was not necessary.
12. That an appeal being a fresh proceedings, he required no consent nor leave to come on record, after judgment.

Issues for Determination

13. Having analyzed the application, the affidavits in support and in opposition, heard the submissions by learned counsel and considered the law the court frames the following as issues for determination; -
 - (i) Whether or not the application is competently, filed before court, in view of the issue that whether Mr. Otieno is not properly on record?
 - (ii) Whether or not the application is merited?
 - (iii) What reliefs ought to issue?
 - (iv) Who bears the costs of the application?

Analysis Determination

14. On issue 1, on competence of the application, the Applicant submitted that no consent and/or leave to come on record after judgment was required as this is afresh proceedings, while the Respondent submitted that the Application was incompetent as leave

and/or consent was required under Order/Rule 9 of the Civil Procedure Rules.

15. The issue of whether or not new counsel require leave and/or consent to come on record, in anew proceedings like an Appeal, or this application seeking leave to appeal out of time, were settled by the Court of Appeal in its decision in the case of Tobias Wafubwa Vs Ben Butali 2017(eKLR)where the Court of Appeal held *inter alia*, **“we are of the same view and would adapt the same approach in its entirety in matters concerning appeals, once judgment is entered save for matters such as applications for review or execution is entered , inter alia, an appeal to an Appellate Court is not a continuation of proceedings, in the Lower Court but commence of new proceedings in another court where different rules may be applicable for instance, the Court of Appeal Rule 2010 and Supreme Court Rules 2010, parties should therefore have the right to choose whether to remain with the same counsel to engage another counsel on appeal without being required to file a Notice of change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous Advocates...”**.
16. This is being a new proceedings, the Advocates did not require leave and/or consent to come on record hence the application as drawn and fled by O.M. Otieno Advocates is competently before court.
17. On issue number 2, as to the merits of the application. It is the applicant’s case that leave to appeal had initially been granted on condition of depositing Kshs.50,000 as security for costs but that he was taken severely ill and could not make the payment while the Respondent submits that since draft Memo of Appeal had been annexed to the previous application, there was no further input that was required of the Applicant hence the applicant was indolent and is not deserving of the extension of time .

18. The principles to be considered for extension of time to file an appeal were set out in the decision in the case of Leo Silla Mutiso vs. Rose Hellen Wangari Nairobi Civil Application 255/1997 where the court held *inter alia*; - **"it is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary, it is also settled that in general the matters which the court takes into account in deciding whether to grant an extension of time are first the length of the delay, secondly the reason for the delay, the chances (possibly) of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the Respondent if the application is granted."**
19. Applying the said principles here in; -
- (i) On the length of the delay, the impugned judgment was delivered on 30/01/2024, and initial leave granted on 18/06/2024 this application was filed on 23/5/2025. If initially leave was granted on 18/6/2024, and the applicant had 30 days to file an appeal after leave was granted, the delay in filling in the appeal was from 18/7/2024 and application was filed on 13/5/2025, making it 10 months delays, which the court views is nor an inordinate delay.
 - (ii) On the reasons for the delay, the applicant has cited sickness as the reasons for the delay and annexed exhibit TON 2 a confirmation from medical doctor. The court finds the reason for the delay to be persuasive as he was incapacitated by sickness hence the reasons are sufficient.
 - (iii) On the chances of success of the Appeal if the application is allowed, among the grounds of Appeal in the draft of Memo of Appeal, is that the Learned Magistrate entertained a claim of adverse possession when she was bereft of jurisdiction, is an

arguable point without stating with finality, the ground among the other grounds ought to be heard by an Appellate court.

20. The Respondent has annexed a copy of the title of the suit parcel to confirm that the decree by the trial court was executed by way of transfer to a third party and that the third party is not a party to the proceedings and that the Respondent having no interest in the proceedings, stands to suffer *prejudice*, as he has no interest in the suit parcel the court thus agrees that there is thus likelihood of prejudice to visit the Respondent.
21. The Applicant has satisfied 3 out of the 4 conditions sets out in the Leo Silla Mutiso noting that the orders are discretionary the court allows the application in terms as follows; -
- (i) Leave is granted to the Applicant to file and serve a Memorandum of Appeal within 21 days from today.
 - (ii) The Applicant will be at liberty to pursue the joinder of the current registered owner in the Appeal either *ab initio* or through an application after filing Memo of Appeal.
 - (iii) The Applicant to pay the thrown away costs of Kshs.10,000 previously awarded on 23.10.2025 simultaneous with the filing of an Appeal and to deposit Kshs.100,000 as security for costs, within 30 days thereof in view of the fact that the Appeal will have 2 Respondents.
 - (iv) This miscellaneous file shall be closed once the Memo of Appeal has been filed.

Dated at Kilgoris this 2nd day of February 2026.

Hon. M.N. Mwanyale.
Judge.

In the presence of:

CA - Sylvia/Sandra/Clara

Mr. Nyasimi for Respondent

Mr. O.M Otieno for Applicant