



Kivaya v Mutuku & 2 others (Environment and Land Miscellaneous Application E043 of 2024) [2025] KEELC 5668 (KLR) (29 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5668 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E043 OF 2024
NA MATHEKA, J
JULY 29, 2025**

BETWEEN

ANNA MULIMA KIVAYA APPLICANT

AND

KYULI MUTUKU 1ST RESPONDENT

VICTORIA KOKI KYULI 2ND RESPONDENT

RUTH SYOMIIT MUTUKU 3RD RESPONDENT

RULING

1. The application is dated 27th September 2024 and is brought under Section 1A, 1B, 3, 3A of the [Civil Procedure Act](#), Order 22, Rule 22 and Order 51 Rule 1 & 15 of the [Civil Procedure Rules](#) seeking the following orders;
 1. That this Application be certified urgent, service be dispensed with thereof and the same be heard ex-parte in the first instance.
 2. That this Honourable Court be pleased to extend the time for filing of the Appeal.
 3. That this Honourable Court be pleased to grant leave to file the intended Appeal.
 4. That the costs of this Application be provided for.
2. It is based on the grounds that there is a Judgment on record dated 25th day of March, 2024 which was delivered in favour of the Defendants/Respondents. That the Advocate acting for the Applicant in the trial court failed to file the Appeal within the time despite clear instructions to do so. That it is fair and just that this Application be allowed. That the Application is brought in good faith. That this Honourable Court is seized with unfettered discretion to grant orders sought.



3. The Respondents submitted that the application was made in bad faith. That the judgement was delivered in the presence of the Applicant's Advocate and her son. There is no evidence that she gave her Advocate instructions to appeal. That the application is made in bad faith and litigation must come to an end. That the delay of over six months has not been explained.

4. This court has considered the application and submissions therein. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the Civil Procedure Act provides 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.”

5. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & Others v Wanjiru & Another* (1970) EA 482 the court stated as follows;

Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

6. The Court of Appeal in the above case guided that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in *Edith Gichungu Koine v Stephen Njagi Thoithi* (2014) eKLR thus;

Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

7. The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (2013) eKLR the court held 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.
- (5) Whether there will be any prejudice suffered by the respondent of the extension is granted.
- (6) Whether the application has been brought without undue delay; and
- (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

8. I have given due consideration of the record in light of the pleadings, submissions, and principles that guide the court. The reason given for the delay in filing the appeal is that on 25th March, 2024, Judgment was delivered in favour of the Respondents herein. The Applicant states that upon delivery of the Judgment, the Applicants’ instructed the Advocates on record to file an appeal. That the Advocate acting for the Applicant in the trial court failed to file the Appeal within the time despite clear instructions to do so. After attempts to locate them failed the Applicant resolved to seek legal representation from J M Mwangangi & Co. Advocates hence this application. The Applicant has annexed the draft Memorandum of Appeal. I find that this application was filed on 27th September 2024. I find that the applicant does have an arguable appeal. I also find that the applicant is not guilty of inordinate delay in the circumstances. I find this application is merited and I grant it on condition that the appeal is filed and served within the next 30 days. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF JULY 2025.

N.A. MATHEKA

JUDGE

