

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA

ELC MISC. APPLICATION NO. E069 OF 2025

FRANCIS WETUKHA MURABULA

(Suing as the personal representative of

the estate of AGNES MATENDECHERE

UBULAMIRE and on his own behalf)

...APPLICANT

VERSUS

DANCAN KIZITO MABWABO.....1ST

RESPONDENT

CHIEF LAND REGISTRAR, KAKAMEGA....2ND

RESPONDENT

CHIEF IMANGA LOCATION.....3RD

RESPONDENT

ASSISTANT CHIEF BULANDA SUBLOCATION....4TH

RESPONDENT

RULING

Introduction

1. Before court is a Notice of Motion dated 9th October 2025 filed by the applicant seeking the following orders:

a) Spent.

b) Spent

c) That the applicant be granted leave to file appeal out of time.

d) That pending hearing and determination of the appeal, there be a stay of the taxation proceedings of the 1st respondent's bill of costs dated 25th April 2025 in MC ELC 28/2023 FRANCIS WETUKHA MURABULA V DANCA KIZITO MABWABO AND 3 OTHERS AND 2 OTHERS

e) Any other orders that the court may deem fit

f) That costs of this application be provided for.

2. The application is predicated on the affidavit sworn by the applicant dated 9th October, 2025. The applicant's case is that the trial court delivered its judgment on 18th March 2025 in MCELC /28/2023 dismissing the suit on account of lack of capacity. That the applicant filed an appeal within the statutory period of 30 days but filed in the

High Court family division being Kakamega HCFA E013 /2025. That on 3rd October 2025, the High Court held that it had no jurisdiction to determine the matter which should be determined by the ELC. That the applicant is now out of time for filing the appeal in this court. That the application was filed 3 days after the High Court decision hence it was filed without delay. That the applicant had sought stay in the High court and that if the bill of costs is assessed the respondent will execute, the appeal will be rendered nugatory and he will suffer substantial loss. That the respondent will not suffer prejudice if orders sought are stayed because he is in possession of the suit property.

3. The application was opposed. Dancan Kizito Mabwabo the 1st respondent filed a replying affidavit dated 3rd November 2026 opposing the application. He stated that there was an inordinate delay on the part of the applicant; that the application was filed in bad faith, was malicious and frivolous and that the draft Memorandum of Appeal has no chance of success. Further that the suit property does not form part of the estate of Agnes

Matendechere as she was not a widow of the late Albert Murabula.

4. The 2nd to 4th respondents' counsel filed grounds of opposition dated 4th November 2025. They stated that the application lacks merit and did not meet the relevant threshold. Further that the application was incompetent as no substantial loss had been demonstrated. They also stated that the taxation had not been challenged by way of reference hence costs could not be stayed. That there was no basis for grant of leave to appeal out of time and that the matter ought not have been filed in the High court.

Analysis and determination

5. The court has carefully considered the application as well as the response thereto. Two issues arise for the court's determination namely;
 - i. **Whether there is good and sufficient cause for the court to grant extension of time to the applicant to file appeal out of time.**

ii. Whether the applicant has met the threshold for grant of stay of taxation.

6. Section 79G of the Civil Procedure Act provides that appeals from the subordinate court to this court shall be filed within 30 days of the delivery of the decision sought to be appealed against, but the court may admit an appeal out of time where good and sufficient cause is shown.

7. Order 50 Rule 6 of the Civil Procedure Rules provides for extension of time as follows;

“Power to enlarge time [Order 50, rule 6]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

8. This court has both the jurisdiction and unfettered discretion to extend time. In determining whether or not to grant extension of time, the court considers the length of the delay, the reason for the delay and the interests of justice. An applicant for extension of time must explain the reasons for the delay to the court's satisfaction as extension of time is not a right of a party.

9. In the case of **Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 Others (2014) e KLR**, the Supreme Court of Kenya stated principles that govern the court's discretion in an application for 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 the 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 a 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 respondents if the extension is granted;**
- 6) Whether the application has been brought without undue delay; and**
- 7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

10. In the instant matter, the applicant's reason for delay is that he filed his appeal within time but before the wrong court and that when his appeal was struck out for want of jurisdiction, he approached this court within 3 days of the High court's decision. The applicant was ably represented by counsel in filing the appeal before the High court leading to a delay of 6 months. The case in the

lower court is an ELC Case, therefore the filing of the appeal in the High court has is the applicant's counsel's mistake. Therefore, there was no deliberate act on the part of the applicant to delay the filing of the appeal. In the premises I am satisfied that the applicant has met the threshold for extension of time and I am therefore persuaded that the applicant deserves orders of extension of time subject to payment of costs.

11. Regarding stay of execution, Order 42 Rule 6 of the Civil Procedure Rules grants this court power to grant stay of execution pending appeal where the applicant demonstrates substantial loss, the willingness to provide security for the due performance of the decree that may be passed against them and show that they have sought stay without inordinate delay. In the instant matter, there is no appeal yet and therefore, there is no basis for grant of orders of stay of execution pending appeal, hence that prayer is hereby rejected. The applicant shall be at liberty upon filing appeal to seek stay of execution.

12. In the premises the application dated 9th October 2025 partially succeeds. Therefore, leave is hereby

granted to the applicant to file appeal against the judgment delivered in Butere SPMC ELC CASE NO. 28 OF 2023- Francis Wetukha Murabula v Dancan Kizito Mabwabo & 3 Others. The applicant shall file and serve his appeal in 30 days of this ruling. The costs of this application are awarded to the respondents and shall be borne by the applicant. The prayer for stay of execution is premature and is hereby rejected.

13. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
VIRTUALLY/OPEN COURT THIS 11TH DAY OF
February 2026 THROUGH MICROSOFT TEAMS
VIDEO CONFERENCING PLATFORM**

A. NYUKURI

JUDGE

In the presence of;

Ms Awuor for the applicant

No appearance for the 1st respondent

Mr. Juma for the 2nd to 4th respondents

Court Assistant- Delphine

