

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC MISCELLANEOUS APPLICATION NO. E082 OF
2025

**NASHON SIMIYU (Suing as the
administrator of the estate of
BONIFACE MALALA MUSUNGU (Deceased).....
APPLICANT**

VERSUS

**ALFRED SONGOI NYUNDO (Suing as the
Administrator of the estate of WILLIAM NYUNDO
alias NYUNDO NACHIBATI (Deceased).....1ST
RESPONDENT
LAND REGISTRAR KAKAMEGA COUNTY.....2ND
RESPONDENT**

RULING

Introduction

1. Vide a Notice of Motion dated 27th November 2025, the applicant sought the following orders;

a) Spent

b) spent

c) That the Honourable court be pleased to grant an order of stay of execution of the order of 20th May 2025, in Kakamega MCLE MISC. NO. E036 OF 2025 pending the hearing and determination of the intended appeal.

d) That this Honourable court be pleased to grant the applicant leave to appeal against the order of 20th May 2025 in Kakamega MCELC MISC. NO. E036 OF 2025 out of time.

e) That costs of this application be provided for.

2. The application is supported by the affidavit sworn by the applicant on 27th November 2025, where he deposed that he was the administrator of the estate of the late Boniface Malala Musungu the intended appellant. That the 1st respondent moved the trial court in Kakamega MC ELC MISC. NO. E036 OF 2025 and obtained ex parte orders on 20th May 2025 seeking a survey

of properties of deceased persons and alteration of their boundaries.

3. He maintained that he was not made a party to the said application, but was only made aware of the ex parte orders when he was served with notice of intention to ascertain and fix boundaries dated 7th September 2025 slated for 7th October 2025, which was later scheduled for 28th November 2025. That if the exercise proceeds, the estate and beneficiaries of the deceased persons will not have had opportunity to be heard before being condemned, leading to miscarriage of justice.
4. Further that the delay in filing appeal was not deliberate as the applicant was not party to the suit and was not served with the ex parte orders. That the orders sought should be granted to cure an injustice.
5. The application was opposed. The 1st respondent filed a replying affidavit dated 15th December 2025. He stated that he was the administrator of the estate of William Nyundo alias Nyundo Nachibati. That his father had a boundary dispute with the late Boniface Malala Musonye, who is the applicant's father in relation to parcel Nos. Bunyala/Budonga/380 and Bunyala/Budonga/381.

That the said dispute was heard and determined in Navakholo Land Dispute Tribunal in Case No. 5 of 2004 which decision was adopted as judgment in Kakamega CMC MISC. AWARD NO. 57 of 2005.

6. He stated that before execution of the judgment in the aforesaid matter, both William Nyundo and Boniface Malala died. That he obtained grant for his father's estate and cited the applicants herein and was granted leave to file succession in Citation case No. CMC CT NO. 24 OF 2019. That the applicant together with his siblings refused to apply for grant of representation hence the respondent proceeded to apply as ordered. That he eventually lodged the boundary and resurvey exercise with the Land Registrar in conformity with the decision of the Land Disputes Tribunal Award and that the Land Registrar advised him to obtain an order for security from court and that, that led to the filing of Kakamega Misc. E036 of 2025.
7. That the applicant has never disclosed to the respondent and to the court that he filed Kakamega Succession Cause No. CMC SUCC NO. E55 OF 2023 where he obtained grant of representation for his late father's estate. That the resurvey will not prejudice the applicant as it will confirm and grant him 3

acres lawfully purchased by his late father. That there is nothing to appeal from as the Land Registrar and surveyor are simply complying with the decision of the court being Misc Award No. 57 of 2005 which was adopted as a decision of the court and which the applicant and his father never appealed against.

8. He added that the dispute herein is that the applicant and his father allocated themselves more than the 3 acres the latter lawfully purchased. That the applicant has equally filed CM MISC E036 OF 2025 where parties were directed to file submissions. That the applicant does not deserve orders sought.

Analysis and determination

9. The court has considered the application, supporting affidavit and response thereto. The issues that arise for determination are whether the applicant has met the threshold for grant of orders of extension of time and stay of execution pending intended appeal.

10. Section 79G of the Civil Procedure Act requires that an appeal against a decision of the Magistrates court be filed in 30 days from the date of the decision. The same provides as follows;

“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.”

11. Essentially, where there is delay in filing an appeal and the intended appellant demonstrates good and sufficient cause for such delay, the court has the discretion to extend time.

12. In the case of **County Executive of Kisumu v County Government of Kisumu & Others [2017] e KLR**, the Supreme Court cited with approval its own decision in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] e KLR**, where it was 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 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.”**

13. Essentially, therefore, extension of time is not a right of any party. The power of the court to extend time for filing an appeal out of time is discretionary, and the court ought to consider all the circumstances of the case including the reason for the delay, the length of the delay and the prejudice that may be occasioned by the delay.

14. In the instant case, it is not disputed that orders issued in Kakamega CM MISC E36 OF 2025 were issued ex parte, where the applicant was not a party. From the respondent's explanation and documents, it is clear that the applicant herein together with

his siblings were cited vide Kakamega CM Citation Cause No. 24 of 2019 on the basis of a pending case involving the late Boniface Malala, being Kakamega CMC MISC AWARD NO. 57 OF 2005. It is clear that they were unwilling to seek grant of letters of administration in respect of the estate of their late father Boniface Malala Musungu, and therefore frustrating efforts for substitution in the unexecuted suit. Besides, they failed to indicate that they eventually filed succession proceedings, which led the applicant to file Kakamega CM Succession Cause NO. E109 OF 2023, and was issued with a grant in respect of the estate of Boniface Malala on 11th July 2023 for purposes of filing, defending and representing a suit.

15. The grant made to the respondent has not been revoked or set aside and therefore to date, the respondent has power to enforce causes of action on behalf of the estate of Boniface Malala on the strength of that grant, the respondent filed Kakamega MCLE MISC NO. 36 OF 2025.

16. It is upon filing the application herein that the respondent was made aware that the applicants had obtained grant on 1st August 2023 vide Kakamega CM Succession Cause No. E55 of 2023 in respect of the estate of Boniface Malala. The fact that the court

adopted a Land Disputes Tribunal that the applicant's father is awarded the three acres that he purchased, is not disputed.

17. The reason given by the applicant for the delay he was not aware of the orders issued. It is clear that the conduct of the applicant together with his siblings was aimed at frustrating the respondent. The applicant has not stated that he has appealed against the order of the Tribunal Award or that there was anything wrong with the Land Registrar hiving off three acres to his late father Boniface Malala's estate. The order of 20th May 2025 was sought and obtained ex parte on the basis that the respondent had been issued with the grant dated 11th July 2023 in regard to the estate of the late Boniface Malala, long before a grant in that respect was made to the applicant herein. The grant issued on 11th July 2023 in favour of the respondent as administrator of Boniface Malala Musungu remains in force to date, therefore the respondent is also a lawful administrator of the estate of Boniface Malala.

18. Therefore, the applicant approached this court with dirty hands by failing to disclose that there was a dispute between his late father and the respondent's father over the suit property, which dispute was determined by an order that the land being in excess

of 3 acres be hived from his late father's title to revert to the respondent's father's title; and that they were cited vide Kakamega Succession CAUSE No, 24 of 2019, and failed to report to that court that they had filed succession proceedings.

19. In view of the fact that the applicant's father was entitled to 3 acres as conceded by himself before the Tribunal and having not appealed against the adopted award that the Land Registrar hives off his 3 acres, I find and hold that the applicant has approached this court with unclean hands, the reason given for delay in filing the appeal is based on half-truths and the applicant has no arguable appeal, hence does not deserve orders of extension of time. As the prayer for leave to appeal out of time is not merited, the prayer for stay of execution pending appeal lacks basis, is moot hence unworthy of interrogation.

20. The upshot is that the application dated 27th November 2025 lacks merit and the same is hereby dismissed with costs to the respondents.

21. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA IN
OPEN COURT/VIRTUALLY THIS 11TH DAY OF**

**FEBRUARY 2026 THROUGH MICROSOFT TEAMS
VIDEO CONFERENCING PLATFORM**

A. NYUKURI

JUDGE

In the presence of;

Mr. Otsyeno for the applicant

Ms Bosita holding brief for Mr. Getanda for the 1st
respondent

Mr. Juma for the 2nd Respondent

Court Assistant: Delphine