

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC APPEAL CASE NO. 046 OF 2024

SHEPHARD OKOKHO ZADOCK.....APPELLANT

VERSUS

SAUL ASHIENGA SHITANDI.....

RESPONDENT

RULING

Introduction

1. On 4th November 2025 when this matter came before me for admission of this appeal, I declined to admit the appeal for reasons that the same had been filed out of time as the appeal was filed on 20th August 2024 against a decision made on 23rd April 2024. I further granted the appellant opportunity to provide evidence demonstrating that this appeal was filed with leave of court. The matter was then fixed for mention on 4th February 2026, for the court to consider the appellant's evidence on leave to appeal out of time, if any.

2. On 4th February 2026, when counsel for the appellant appeared before court, he informed the court that he had filed submissions and was seeking a judgment date. The court informed counsel of the orders of 4th November 2025. Counsel sought another date to enable him avail evidence that this appeal was filed with leave of court. The court acceded to his request and granted him 14 days to avail evidence of leave to appeal out of time. This matter was then scheduled for today.
3. This morning, the appellant's counsel filed an affidavit sworn by himself and dated 11th February 2026. In the affidavit, he stated that the court required him to explain why he filed the instant appeal out of time. He went on to narrate his explanations in that regard. In totality, he stated that the late filing of the appeal was not deliberate. He attached a copy of the lower court judgment.

Analysis and determination

4. I have considered the Memorandum of appeal, the record, the orders made by this court on 4th November 2025 and 4th February 2026, together with the affidavit sworn by Mr. Daniel Chitwa Chegenye Advocate for the appellant dated 11th February 2026. The orders made herein, required the appellant to provide

evidence of leave to file appeal out of time. Instead, the appellant's counsel reframed the question that was supposed to be answered in his affidavit on what the court required, and stated that the court required from the appellant, an explanation for the delay in filing the instant appeal. For avoidance of doubt, there is no application before me for leave to file appeal out of time or to deem the appeal already filed as properly filed.

5. Section 79G of the Civil Procedure Act provides that an appeal against the decision of the lower court to this court ought to be filed within 30 days. The same states 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.”

6. Therefore, to appeal against a decision of the Magistrates court, an appellant ought to file the appeal within thirty days.

Where there is a delay, leave to appeal out of time ought to be sought and the same may be granted where a good and sufficient cause for delay is shown.

7. In the instant case, the court is not dealing with an application for leave to appeal out of time. At this point, what the court required from the appellant and which he undertook to provide, is evidence of leave of court to appeal out of time. In other words, the appellants duty was to avail an order from this court granting him leave to file the instant appeal out of time. The appellant and his counsel being aware that no leave was obtained before filing this appeal, instead of being forthright and informing this court as much, have filed an affidavit with a long and winding narrations on why the appeal was filed out of time, but evading the real question as to whether leave to appeal out of time was granted.

8. The instant appeal was filed on 20th August 2024 against a decision made on 23rd April 2024. This means that the appeal was filed after a period of over 3 months. It is clear that this appeal was filed out of time. No leave was obtained to file the appeal and no application for leave to appeal out of time has

ever been filed. I therefore find and hold that this appeal is incurably incompetent and the same is hereby struck out with costs to the respondent.

9. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 19TH DAY OF FEBRUARY 2026

A. NYUKURI
JUDGE

In the presence of;

Mr. Chitwa for the appellant
Mr. Otinga for the respondent
Court Assistant- Delphine