

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CIVIL APPEAL NO. E086 OF 2025

MARGARET NYAMBURA MWANGI.....
.....APPELLANT/APPLICANT

VERSUS

TERRY ADHIAMBO OTHUOK.....
.....RESPONDENT

RULING

1. Before me are two applications for determination. The first one is dated 18/11/2025 filed by the Appellant/Applicant while the second one is dated 19th November 2025 filed by the Respondent. The Appellant's application dated 18/11/2025 seeks for the following reliefs:

- i) Spent.
- ii) That this Honourable court be pleased to enlarge time for the Applicant to enable her

comply with the conditions in the ruling delivered on 9th October 2025.

- iii) That this Honourable Court be pleased to grant a temporary order of stay of execution of the lower court judgment and/or the decree delivered on or about 27/5/2025 and all consequential orders arising therefrom pending the hearing and determination of the appeal.
- iv) That this Honourable Court be pleased to issue any other order as it may deem just, appropriate and expedient in the interest of justice.
- v) That costs of this application be provided for.

2. The application is supported by the grounds set out thereunder and by the supporting affidavit of the Applicant sworn on even date. The Applicant's gravamen is inter alia; that the applicant sought leave to appeal the lower court judgment out of time through Siaya HCC Misc No. E025 of 2025; that the court granted her leave to appeal out of time through a ruling delivered on the 9/10/2025; that the Applicant is willing to satisfy the conditions issued in the ruling delivered on 9/10/2025 but has been unable due to financial and economical constraints and thereby seeks enlargement of time by this Honourable Court to do so; that the Applicant is desirous to canvass this appeal to its logical conclusion; that the Applicant stands to suffer

substantial loss and damage if orders sought herein are not granted, and further, the appeal will be rendered nugatory if stay of execution of the impugned lower court judgment is not granted; that this application is made timely and that the Respondent will not be prejudiced in any way beyond the ambit of costs if the orders sought herein are granted as prayed; that the judgment subject matter herein is substantial and should the execution process commence, the Applicant stands to suffer irreparable loss and prejudice as her right of appeal will be curtailed whereas the ability of the Respondent herein to refund the decretal amount is unknown; that this Honourable court has statutory and discretionary powers to grant the orders sought herein in the interest of justice and in all fairness.

3. The application was opposed by learned counsel for the Respondent vide a replying affidavit sworn by Francis Omondi on 1st December 2025 wherein he averred inter alia; that it is true that the Appellant was granted leave to file an appeal out of time vide ruling delivered on 9th October 2025 in Siaya HC Misc. Civil Application No. E025 of 2025. That the said ruling imposed conditions the Applicant was required to fulfil to validate the appeal; that the Applicant did not fulfil the very 1st condition which was to file an appeal within ten (10) days and that therefore there is no competent appeal to anchor the present application; that in the aforesaid

case, the Applicant swore an affidavit on 23/7/2025 stating inter alia; that she was willing to furnish security for the entire decretal sum awarded by the trial court; that it is inconceivable that she now pleads financial and economic constraints for her inability to comply with the orders of court; that the Applicant has not laid a basis for further indulgence by the court and that the application before the court is thus misconceived, frivolous and vexatious and an abuse of the court process.

4. The Applicant filed a supplementary affidavit sworn on 4th December 2025 wherein she averred inter alia; that one of the grounds seeking for enlargement of time was due to financial and economic constraints to which the Respondent has taken to mean that she has no capability of fulfilling the conditions imposed; that she has complied with the condition Number 2 which required her to pay half the decretal amount of Kshs1,243,800/= to the Respondent; that she has also prepared bank account opening forms in a bid to comply with the condition to deposit the other half of the decretal sums wherein she sent the documents to the Respondent's counsel on 15/11/2025 but which have not been executed and returned to her to fulfill the condition; that the Respondent has not demonstrated how her application will prejudice him to oppose the enlargement of time; that she has demonstrated intention to litigate the appeal to its logical conclusion and to exercise her right to appeal and right to access

justice as enshrined in Article 48 of the Constitution; that it is in the interest of justice and fair play that this court dismisses the application dated 19th November 2025 and allow the application dated 18th November 2025.

5. The Respondent's application dated 19/11/2025 seeks the following reliefs:

i) The Memorandum of Appeal filed herein be struck out and the appeal dismissed with costs to the Respondent.

6. The Respondent's application aforesaid is supported by the following grounds:

i) That the appeal was filed on 28/10/2025 against the Judgment delivered on 27/5/2025 in Ukwala PMCC No. E094/2023.

ii) That leave was granted on 9/10/2025 to the Appellant in Siaya HC Misc. Civil Application No. E025/2025 by which the Appellant was to file the appeal within 10 days from 9/10/2025.

iii) That by 28/10/2025 when this appeal was filed the ten (10) days had lapsed.

iv) That this appeal was therefore filed out of time and is therefore an abuse of the court process.

7. The Respondent's application aforesaid is supported by the grounds set out thereunder and the affidavit of

Francis Omondi, sworn on even date. The Respondent's gravamen is inter alia; that the appeal was filed on 28/10/2025 yet the lower court judgment was delivered on 27/5/2025; that this court granted leave on 9/10/2025 and that the Appellant was to file the appeal within ten (10) days from the date thereof; that the filing of the appeal on 28/10/2025 was outside the ten days provided and therefore it was out of time and should be struck out with costs to the Respondent; that it is fair, just and expedient that the instant application be allowed.

8. Parties agreed to canvass the two applications simultaneously by way of written submissions. They further agreed that the determination and/or orders in this file shall apply to the sister appeal files namely HCCA/E085/2025, HCCA/E086/2025, HCCA/E087/2025, HCCA/E093/2025 and HCCA/E093/2025 respectively. It is noted that it is only the Respondent who complied.

9. The Respondent's submissions are dated 20th January 2026.

10. It was submitted that all the appeals were lodged outside the ten (10) days window extended by this court. That the computation of the ten days does not require rocket science in that pursuant to Section 57(d) of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya as well as Order 50 Rule 2 of the Civil Procedure Rules and that the date the ruling was given

(9/10/2025) was excluded and therefore the ten days started to run on 10/10/2025 and that the appeal ought to have been lodged by the 19th October 2025. However, 19/10/2025 and 20/10/2025 were a Sunday and Public holiday respectively which are excluded and hence the last date ought to have been 21/10/2025. That the filing of the appeal on 23/10/2025 was clearly out of time. That the reasons advanced by the Appellant/Applicant regarding the delay to lodge the appeal attributed to the CTS are unsubstantiated as there is no disclosure as to when the memorandum of appeal was allegedly uploaded and that there is no evidence that the CTS suffered any downtime during the period in issue. That there is also no evidence that the Appellant's counsel made any communication to the court regarding any difficulties faced in filing the appeal. That not all the appeals were lodged on 23/10/2025 as others were filed on 28/10/2025.

11. Learned counsel for the Respondent also submitted on the Appellant's application dated 18th November 2025. Learned counsel relied on the averments in his replying affidavit. It was submitted that the supplementary affidavit filed by the Appellant is incompetent and should be disregarded as it was filed without leave of court. That the prayers that the Appellant seems to only seek for enlargement of time to comply with the order on depositing a decretal sum. That there is no purpose to extent time for

the Appellant to comply with the issue of deposit of security when the appeal itself is incompetent. That the orders sought for extension of time to lodge the appeal have been wrongly filed in this appeal when they ought to have been filed in the miscellaneous file where the orders had been made. It was finally submitted that even if the court was to consider the supplementary affidavit, it is clear that the settlement of half decretal sum was effected on 11/11/2026 while the account opening forms were delivered on 17/12/2025 yet the order was made on 9th October 2025. It was urged that the said application be dismissed with costs.

12. I have given due consideration to the two applications as well as the rival affidavits and submissions filed. The issue for determination is whether the two applications have merit.
13. In determining the two applications, I propose to start with the one which was filed earlier and that is the one dated 18/11/2025 by the Appellant.
14. I will first address the issue raised by learned counsel for the Respondent that the application should have been filed in the Miscellaneous file wherein orders had been made and not in the main appeal file. Indeed, the Appellant had earlier approached this court vide Misc App. No.E025 of 2025 where orders were granted. Ordinarily, once the miscellaneous matter had been determined, the file is closed but the same could be placed alongside the main file

for reference purposes by the parties. Apparently, the said file has not been placed alongside this one. I find that even though the Appellant has filed the application in the appeal file, there is no prejudice suffered by the Respondent since all the matters in issue in the appeal will be dealt with as opposed to proceeding in the miscellaneous file. In any event, the orders made vide the miscellaneous file were directly in issue with this appeal. It is instructive that the parties should be allowed to present all the issues in controversy so that the court can thrash them substantially in the end. I find that the Respondent will not suffer any prejudice if the application is entertained in this appeal. Hence, the objection raised by the Respondent lacks merit and must be rejected.

15. The gist of the Appellant's application is that the period allowed to lodge appeal and to deposit the security elapsed before she could comply. She has further indicated that she has since deposited the half decretal sums to the Respondent while the balance thereof are awaiting the Respondent to complete the bank account opening forms. The Appellant has given an explanation regarding the delay and now pleads with this court to grant her another chance to comply with the order and thereafter prosecute her appeal to its logical conclusion so as to exercise her rights to access to justice under article 48 of the constitution. The Appellant also seeks for orders of stay of execution pending determination of the appeal.

16. Leave to appeal out of time is an equitable remedy granted by the court and that a party seeking such remedy has the obligation to explain the delay as to why he/she did not lodge the appeal in time. Leave to appeal out of time is provided for under section 79G of the Civil Procedure Act 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 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.”

17. From the foregoing provision, an applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR** where it was held that an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

18. The Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] eKLR** outlined

the principles applicable in an application for leave to appeal out of time. The court stated that the underlying principles a court should consider in the exercise of such discretion should include: -

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-by-case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

19. Similarly, in the case of **Paul Musili Wambua v Attorney General & 2 Others [2015] eKLR**, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time held:

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

20. Applying the above principles to the present case, it is noted that the Appellant was on the 9/10/2025 granted a period of ten (10) days to file her Memorandum of Appeal and to deposit the security vide High Court Misc. Application No. E025/2025. However, the applicant filed the current application seeking for extension of time and to comply with orders of 9/10/2025 and to accomplish the other limb of the order on deposit of security on 18.11.25. This is about one month out of the time limited for filing the appeal and depositing the security. The applicant has attributed the delay in filing his appeal to glitches in the

court's CTS and further that he has already deposited half the decretal sums with the Respondent's Advocates and is awaiting the Respondent's Advocates to complete filling the account opening forms so that she could deposit the balance of the decretal sums.

21. The Court of Appeal in the case of **Ngoso General Contractors Ltd. v Jacob Gichunge Civil Appeal No. 248 of 2001 [2005] 1 KLR 737** that:

“The failure by the Superior Court Judge in an application for extension of time to file an appeal, to consider, as a matter of law, whether the Appellant, who was admittedly absent when the Judgement was delivered, was served with notice of delivery of the Judgement was a misdirection...The law under Order 20 r 1 is explicit in terms and mandatory in tone that a Judgement which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates and where only the successful party in the Judgement had prior knowledge of the delivery of the Judgement and no apparent reason was advanced for the failure to serve or to attempt to serve the Appellant or his advocate, the Appellant's right of appeal was grossly compromised...An order was made by

the Magistrate granting a right of appeal within 28 days and directing the party in attendance to inform the other side does not cure the flagrant breach of the mandatory procedural rule which accords with fundamental rules of natural justice and the right to be heard which the Constitution safeguards.”

22. It is noted from the explanation of the Appellant that the delay to lodge the appeal was attributed to challenges with the court CTS. Even though the Respondent has maintained that this was not sufficient reason for the delay, it is common knowledge that blunders are always committed by parties and counsels and that the court has to take into consideration that the said blunders have not been deliberately or orchestrated by parties on purpose. The court must listen to the explanation and consider the circumstances on merit. In the case of **Phillip Keiptoo Chemwolo Versus Augustine Kubende [1986] KECA 87 (KLR)**, Apaloo JA held as follows:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits”

The learned judge went ahead to state that the broad equity approach to the matter is that unless there is fraud

or intention to overreach, there is no error or default that cannot be put right by payment of costs. That the court exists for the purpose of deciding the rights of the parties and not for the purposes of imposing discipline.

22. This court takes note of the fact that a period of about a month cannot be termed as an inordinate delay considering that the court's CTS often has challenges. Again, it is noted that the Appellant has already managed to deposit the half decretal sums with the Respondent's counsel and further has filled the account opening forms and is awaiting the Respondent to perform his part so that she could deposit the balance of the decretal sums. The application was also filed without undue delay and no prejudice would be occasioned to the Respondent if the prayer for extension of time is allowed. Again, the issue of substantial loss and deposit of security had already been determined by this court vide the Misc App. No. E025 of 2025 and that the present application flows from the orders granted therein and hence there is no need to delve into them again as the present application only seeks for extension of time to comply with orders issued on 9/10/2025..It is noted that the Appellant has already complied with the orders of 9/10/2025 and now seeks for more time to see to it over the deposit of the balance of the decretal sums. I am satisfied by the explanation of the delay to comply with the orders of 9/10/2025 by the Appellant. I find that the interest of justice militates against refusal to grant the prayers sought. I find that the

Respondent will not suffer any prejudice since he already has the half deposit of the decretal sums and further, an award of costs herein would cushion him. I find that the Appellant's quest to prosecute her appeal must be considered so as to ensure that her rights to access justice under article 48 of the constitution are not curtailed. I find that denying the Appellant this right would amount to throwing her under the bus yet the Respondent has already received half of the decretal sums. I find that the justice of the case warrants this court grants the Appellant an opportunity to ventilate her appeal on merits.

24. In view of the foregoing observations, I find that the Appellant's application dated 18/11/2025 has merit and is allowed in the following terms:

- i) The Appellant is granted a further 14 days within which to comply with the orders issued on 9/10/2025.
- ii) The Memorandum of Appeal filed herein is deemed as properly filed.
- iii) The order of stay of execution of the decree issued on 9/10/2025 is hereby extended and shall remain in force until the determination of the appeal.
- iv) The costs of the application are awarded to the Respondent.

- v) This order shall apply to the sister appeal files namely HCCA No. E085/2025, E086/2025, E087/2025, E092/2025 and E093/2025 respectively.

25. In view of my finding aforesaid, a determination of the Respondent's application dated 19/11/2025 now becomes moot. I find the same has been overtaken by events and is marked as spent.

Dated and delivered at Siaya this 4th day of March 2026.

D.KEMEI

JUDGE

In the presence of:

Ochang.....for Appellant

Omondi.....for Respondent

Maureen.....Court Assistant