

**IN THE COURT OF
APPEAL AT NAIROBI
CIVIL APPLICATION NO. E558 OF 2025
(CORAM: ONGUDI, JA (IN CHAMBERS))**

BETWEEN

COUNTY GOVERNMENT OF KIAMBU.....APPLICANT

AND

TONY KINYANJUI WAWERU.....RESPONDENT

*(Being an application for extension of time to file and serve
Memorandum of Appeal and the Record of Appeal out of time arising
from the Ruling and Orders by (B. Ongaya, J) as he then was) on 5th
June, 2025*

in
**Nairobi Milimani ELRC Petition No. E136 of
2023)**

RULING

1. The applicant herein filed the Notice of Motion dated 23rd September, 2025 seeking leave to file and serve a Memorandum of Appeal and the Record of Appeal out of time, against the decision by **Ongaya Byram, J** delivered on 5th June, 2025. The applicant further requests the court to issue an order of stay of execution of the ruling and further proceedings. Finally, it seeks an order directing the Deputy Registrar ELRC Milimani to

expedite the release of certified

court proceedings in **Nai. ELRC Petition No. E136 of 2023, Tony Kinyanjui vs. County Government of Kiambu.**

2. The application is premised on the grounds on its face plus the supporting affidavit of Elizabeth Kibathi the applicant's Deputy Director Litigation and Prosecution. The deponent avers that the delay was not of their own making. That they had requested for and were waiting for typed proceedings from the court. She further averred that the impugned ruling goes against the rules of ELRC (Procedure) Rules 2024 and Public Service Human Resource Policies and Manuals 2016. Thus, the appeal is meritorious.
3. The respondent filed a replying affidavit sworn on 16th February 2026 opposing the application. He averred that the applicant had not presented any documents to support its claim requesting for typed proceedings. Further, that the impugned ruling was based on a consent made in the presence of both parties and their respective counsel.
4. Both parties filed written submissions. The applicant's submissions were filed by Sylvia Muchiri, Principal Legal

Counsel for the County Attorney and are dated 26th
January, 2026. She relied on the cases of:

- (i) **Leo Sila Mutiso vs. Hellen Wangari Mwangi [1999] 2 E.A. 231.**
- (ii) **Fakir Mohammed vs. Joseph Mugambi & 2 Others [2005] eKLR.**

5. It is her submission that the delay in filing the record of appeal was not deliberate, as explained earlier. Secondly, that the intended appeal raises matters of significant public interest. It is her further submission that the dispute herein interrogates questions of public interest including adhering to public sector human resource frameworks and lawful expenditure of public funds.
6. Finally, she submits that the intended appeal is arguable and is likely to succeed. That the appeal challenges the validity of the consent order upheld in the impugned ruling on the ground that it is procedurally defective for violating section 57 of the ELRC (Procedure) Rules. She further argues that as held in the case of **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1EA 227**, an appeal is rendered nugatory where the subject matter cannot be reversed or adequately compensated. She submits that in this case the enforcement of the impugned ruling would compel the applicant to release public funds that maybe difficult to recover.

7. Lastly, that the respondent will suffer no prejudice if the application is allowed, since he will have a right to oppose the appeal on merit. On the other hand, the applicant stands to suffer irreversible loss if denied audience.
8. The respondent's submissions were filed by Masaviru & Ketoo Advocates and are dated 17th February, 2026. Counsel cited the three key pillars to be considered in granting leave to file Memorandum of Appeal and Record of Appeal out of time. He cited the case of **Nicholas Kiptoo Korir Arap Salat vs. IEBC & Other [2014] eKLR** which set out the three pillars to be as follows:

- (a) **the delay is not inordinate and its excusable. That and its**
- (b) **The intended appeal is arguable and has the prospects of success.**
- (c) **No prejudice will be suffered by the respondent.**

See **Paul Musili Wambua vs. Attorney General & 2 Others [2015] eKLR.**

9. On the issue of delay, counsel argued that the applicant failed to attach any documents from the Deputy Registrar or receipts to confirm that any request for proceedings had been made.

On the intended appeal being arguable, counsel submitted that the same was dead on arrival as it is bad in law and has no remote chance of succeeding. On this point he refers to the consent that was recorded before the Judge between the claimant and respondent. That an application to review the consent was dismissed by the Judge. Further, that having elected to file for review he cannot appeal against it by virtue of Order 45 Rule (1)(a)(1)(3), Civil Procedure Rules.

10. Finally, on whether the applicant will suffer any prejudice if leave is not granted he answered in the negative. He urged that the money to be paid is simply salary arrears which is an entitlement.
11. I have carefully considered the notice of motion, affidavits both submissions, cited authorities and the law. The application before this court has been brought under Rule 4 and 5 (2)(b) of the Court of Appeal Rules 2022. In such an application seeking leave to file a memorandum of appeal and record of appeal out of time and stay of execution, there are three main principles for consideration. These have been set out in the **Nicholas Kiptoo Korir Arap Salat case** (supra).

12. On the issue of delay, the applicant admits there has been delay. Is it inordinate? Has it been explained? The impugned ruling was delivered on 5th June 2025. The Notice of Appeal was filed and served on 19th June 2025 which was within the required 14 days. The applicant was by virtue of Rule 84 (1) of the Court of Appeal Rules expected to file the Memorandum of Appeal within sixty (60) days upon filing the notice of appeal. This was not complied with hence the present application.
13. The applicant explained that a request for certified copies of proceedings was made vide a letter dated 17th June 2025 (EK3). The respondent denied this. The letter (EK 3) confirms that indeed a request for proceedings was made. The letter was equally copied to counsel for the respondents. This is in compliance to Rule 84(2) and (3), of the Court of Appeal Rules.
14. As at the time of filing this application the said proceedings had not been supplied hence prayer No. (3) of the said application. The applicant cannot therefore be faulted for the delay. It could not file the memorandum of appeal and record of appeal without the certified typed

proceedings.

15. On whether the intended appeal is arguable and further considering the issues being raised on the consent entered into and the use of public funds, I find these to be issues which ought to be addressed on appeal. There is no dispute that the respondent was a former employee of the applicant. The intended appeal is therefore arguable.

16. On whether the respondent will suffer any prejudice if leave is granted to file appeal out of time my answer is yes and no at 50:50.

Yes, because he has waited for the money for quite sometime. No, because the applicant is a government body and it has a duty to account for all money, spent.

17. The above being my findings, my conclusion is that there is merit in the Notice of Motion dated 23rd September, 2025 which I hereby allow and issue the following orders:

- (i) Leave is granted to the applicant to file and serve the Memorandum of Appeal and Record of Appeal out of time. The same to be filed and served within 14 days from today's date.**
- (ii) The Deputy Registrar Nairobi ELRC to supply the applicant with certified copies of proceedings and ruling in Nairobi Milimani ELRC Petition No. E136 of 2023, Tony Kinyanjui vs. County Government of Kiambu on or before 3rd March 2026 at**

5.00 pm

- (iii) There shall be stay of execution of the ruling delivered on 5th June 2025 by Byram Ongaya, J in No. E136 of 2023, Tony Kinyanjui vs. County Government of Kiambu. There shall also be a stay of proceedings pending the hearing of the appeal. The order of stay of execution is on condition that the applicant deposits in court half (1/2) the decretal sum within 21 days of today's date. In default, the stay of execution will be vacated immediately.
- (iv) Costs to be in the cause.

Orders accordingly.

Dated and delivered at Nairobi this 27th day of February, 2026.

H.I. ONG'UDI

.....
JUDGE OF APPEAL

*I certify that this is the
true copy of the original
signed*
DEPUTY REGISTRAR