

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**  
**ELC MSC E026 OF 2025**

**MEREZA A.  
TINGO.....PLAINTIFF/RESPONDENT**

**V E R S U S**

**LUCAS MWITA  
MACHERA.....DEFENDANT/APPLICANT**

**RULING**

**(On whether this court should enlarge time to allow the  
applicant to file an appeal out of time)**

**The Application**

- 1.** The applicant filed a Notice of Motion application dated 19<sup>th</sup> July 2025 under a certificate of agency. He seeks ORDERS THAT:
  1. Spent
  2. The Applicant be granted leave to file an appeal out of time.
  3. Costs of the application be provided for.
- 2.** The application is premised on the grounds contained in the application the application as well as the supporting affidavit deponed Lucas Mwita Machera, the applicant herein. The applicant stated that the trial court delivered a judgment on 30<sup>th</sup> November 2023 against which he intends to appeal. He, however, maintained that the time for instituting an appeal had lapsed hence the instant application.
- 3.** The applicant attributed his failure to file his appeal within the stipulated timelines to lack of instructions on the part of his

advocate on record since he (the applicant) is serving a sentence at the Naivasha Maximum Prison. He maintained that communication between himself and his counsel had been a challenge. He averred that his counsel on record got instructions to appeal the judgment of the trial court after the requisite period within which to appeal had lapsed.

- 4.** Besides, the applicant also attributed the delay in filing his application to the fact that he applied for copies of the proceedings and judgment of the trial court. He maintained that by the time he got the said proceedings and judgment, the requisite period for filing an appeal had already lapse. He however stated that the trial court issued a certificate of delay.
- 5.** He also stated that, his counsel was unable to determine whether to institute an appeal or seek a review since he had not received a complete copy of the proceedings. However, he added that, as soon as he got the said proceedings and judgment, he preferred an appeal and immediately made an application to this this court seeking extension of time to file an appeal out of time since the time for lodging an appeal had since lapsed.
- 6.** The applicant maintained that he stands to lose his ancestral piece of land, which is also the source of livelihood for his family in the event he is not allowed to appeal the matter at hand. he also averred that he intended appeal raises triable issues requiring audience of this court for purposes of just adjudication.

7. Finally, the applicant averred that the suit had been brought timeously, and that the grant of the orders sought will not occasion prejudice to the respondent and added that the interests of justice leaned towards granting the orders he had sought in his application.
8. The affidavit sworn by the applicant replicates most of the grounds contained in the application save to add that the applicant deponed that his advocated applied for a copy of typed proceedings as well as the judgment of the trial court on 6<sup>th</sup> March 2023 and the same were availed on 29<sup>th</sup> March 2023. He also clarified that the difficulties in filing his appeal on time was occasioned by his inability to find his advocate and communicate with him since he was in prison.
9. the applicant annexed to his supporting affidavit a copy of the judgment in Migori High court criminal case no. 10 of 2019, a copy of the certificate of delay and a copy of the draft memorandum of appeal.

## **Response**

10. The respondent filed a replying affidavit sworn on 20<sup>th</sup> August 2025. He gave a brief litigation history of the case before the lower court and deponed that the firm of J.M Nyagwencha & Co. Advocates were on record for the applicant. He also deponed that the said firm were represented the Applicant throughout the proceedings in Kehancha PMC ELC No. 15 of 2015 including on 24/8/2023 after the

Defendant/Applicant had been convicted and sentenced at the Naivasha Maximum Prison.

- 11.** The respondent deponed that the applicant is not being truthful and pointed to paragraph 6 of the supporting affidavit where the applicant indicated that his counsel applied for a copy of the proceedings on 6<sup>th</sup> March 2023 and stated that the same were issued to the said counsel on 29<sup>th</sup> March 2023 yet the trial court rendered its judgment on 30<sup>th</sup> November 2026.
- 12.** The Respondent deponed that his advocates applied for a copy of the certified judgment and proceedings and these same were issued on 1<sup>st</sup> March 2024. He therefore concluded that the reasons advanced for the cause of delay in filing the intended Appeal are not only unfounded, misleading and mischievous but also false and/or an abuse of the process of the court. He annexed a copy of the certified copies of the said proceedings and judgment to his affidavit.
- 13.** Concerning the allegation that the applicant could not communicate with his counsel hence his failure to give instructions since November 2023, the respondent deponed that the account given by the applicant is illogical and /or unbelievable. He maintained that same Advocates were on record for the applicant in Kehancha PMC ELC No. 15 of 2019 which was heard and determined while the applicant was still serving his sentence at Naivasha Maximum Prison. He further clarified that, on 24<sup>th</sup> August 2023, the applicant testified

virtually from the Naivasha Maximum prison, which fact meant that he was in communication with his advocates on record.

**14.** On the basis of the foregoing argument, the respondent the respondent deponed that both the applicant and his advocates on record were fully aware of the delivery of the judgment of the trial court but intentionally elected not to file the intended Appeal within the stipulated period and/or immediately after certified copies the said copies were availed or received by his advocates on record.

**15.** Further to the above, the respondent deponed that the applicant has not been keen on filing his intended appeal and maintained that the instant application is an afterthought and that the same is aimed is an abuse of the court process aimed at denying the respondent the fruits of his judgment.

**16.** The respondent also deponed that granting the prayers sought by the applicant would be prejudicial to him and prayed that this courts finds that the applicant's application is not merited and hence dismiss the same with costs.

## **Submissions**

**17.** The application was canvassed by way of written submissions. The applicant filed his written submissions dated 25<sup>th</sup> September 2025. He identified one issue for determination, being, whether this court can allow the application in the interest of justice. He relied on section 95 of the Civil Procedure Act as well as Order 50, Rule 6 of the Civil Procedure Rules to

argue that this court has powers to enlarge time for purposes of allowing the appeal out of time.

- 18.** He relied on *Mutiso v Mwangi [1997] KLR 630* to submit that the power to allow or disallow an appeal out of time is a power exercised at the discretion of the court. He submitted that, the court, when making such a determination should consider the length of delay; the reason for the delay; the chances of appeal succeeding if the application is granted; and the degree of prejudice to the Respondent of the application is granted.
- 19.** The counsel for the applicant argued that, the fact that his client was serving a prison sentence meant that his liberty was limited. In the same vein, he submitted that he could only act upon the instructions of the client and that instructions for acting in the lower court matter were given before the client was imprisoned. He also referred the court to the certificate of delay issued by the lower court, which he stated, was an acknowledgment that the matter was not deliberately delayed. He also referred the court to the annexed memorandum of appeal to argue that the appeal has chances of success.
- 20.** The applicant submitted that land being an emotive issue he should be allowed to exploit all the possible avenues available to him. In the circumstances, he submitted that this court should disregard the statutory limitations on filing of appeals in favour of ensuring that justice is done.

- 21.** The respondent filed his submissions dated 10<sup>th</sup> September 2025. He identified a single issue for determination, that is, **whether the applicant has satisfied the conditions for enlarging time for purposes of instituting an appeal out of time.**
- 22.** The respondent submitted that the proceedings and judgment of the trial court were issued on March 2025 and that it has taken more than a year to institute the instant appeal.
- 23.** The respondent relied on the case of ***the first American Bank Limited versus Gulan P Shah & 2 others*** to highlight the conditions to be met by the applicant in an application as the instant one. These factors are: explanation for the delay, if any, the merits of the contemplated action, whether the matter is arguable one or deserving a day in court and whether the matter is a frivolous one only resulting in delay in the course of justice; and whether the respondents can adequately be compensated by way of costs.
- 24.** The respondent submitted that the copies of proceedings and judgment were issued in 1<sup>st</sup> March 2024, which period is one year and six months. He contended that the applicant has not placed any material before court to convince this court to exercise its discretion in his favor.
- 25.** The respondent concluded that orders sought are oppressive and that the application is made in bad faith and the same constitutes abuse of the court process. As such, he prayed that the same be dismissed with costs.

## **Issues, Analysis and Determination**

- 26.** The main issue for determination in this application is whether this court should exercise its power to enlarge time to allow the applicant to file his appeal out of time. Equally important is the question on costs of the application.
- 27.** Section 79(G) of the Civil procedure Act provides that appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree. The section states that:

***“ 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 filling the appeal in time.***

- 28.** In ***Edith Gichungu Koine v Stephen Njagi Thoiti [2014] eKLR***, the Court of Appeal reasoned that:

***“8. I have anxiously considered the application, the affidavits on record and the submissions of counsel. There can be no doubt that the discretion I have to exercise under rule 4 is***

***unfettered and does not require establishment of “sufficient reasons”. Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst***

**29. In *Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR (supra)*, the Supreme Court Concurred that:**

***“It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider “all the circumstances of the case” including:***

- a) the interests of the administration of justice;***
- b) whether the application for relief has been made promptly;***
- c) whether the failure to comply was intentional;***
- d) whether there is a good explanation for the failure;***

- e) the extent to which the party in default has complied with other rules, practice directions and court orders;***
- f) whether the failure to comply was caused by the party or his legal representative;***
- g) the effect which the failure to comply had on each party; and***
- h) the effect which the granting of relief would have on each party.***

**30.** The court has carefully considered the application in totality, the replying affidavit file by the respondent as well as the submissions filed by the parties. there is no doubt that the time for filing an appeal lapsed, because the judgment which the applicant intended to appeal against was rendered on 30<sup>th</sup> November 2023.

**31.** The applicant stated that he is at the Nakuru Maximum prison where he has been serving a sentence. He argued that he was not able to communicate with his advocate for purposes of giving instructions. He further stated that the delay in filing the appeal was caused by delay in getting a copy of the proceedings and judgment of the trial court.

**32.** The applicant equally stated that his advocate applied for the said proceedings and judgment on 6<sup>th</sup> March 2023 and that the same was issued on 29<sup>th</sup> March 2023. The court believes that this must be a typing error since it is not possible for the lower court to issue a certificate of delay before the impugned

judgment had been issued. The certificate of delay annexed to the applicant's supporting affidavit indicates that counsel for the applicant applied for the proceedings and judgment vide a letter dated 23<sup>rd</sup> December 2023 and the same were certified on 1<sup>st</sup> March 2024. The certified copies of the proceedings and judgment, according to the certificate of delay filed in court by the applicant, were received by the applicant's counsel on 22<sup>nd</sup> April 2024.

**33.** Despite the argument that the applicant's counsel could not act because the said counsel had not received instructions from the applicant who was in prison, the court notes that the said counsel was in communication with the client during the hearing of the trial at the lower court. Although the court appreciates that, in deed there may be challenges in communication with client who is incarcerated, the applicant did not explain the circumstances which made communication possible during the hearing at the lower court but impossible when the need to appeal arose.

**34.** It was submitted that counsel for the applicant was only seized with instructions to represent the applicant up to the conclusion of the lower court suit. However, the said counsel made an application seeking certified copies of the proceedings and judgment of the lower court. The court presumes that these documents were intended to be used in filing an appeal. The question the court then asks itself is, on whose instructions was the counsel acting at this point? Definitely it was the

applicant who now alleges that he could not communicate with his lawyer in time as to appeal. That to me sounds absurd or at best intent to mislead the court.

- 35.** Even if the court were to give the applicant the benefit of the doubt, the court notes that counsel for the applicant did not file the appeal immediately the certificate of delay was issued to them on 22<sup>nd</sup> April 2024. The instant application was filed on 19<sup>th</sup> July 2025, a period of one year, six months and three weeks after the certificate of delay was issued. It is not clear to this court why the appeal was not filed promptly, even after the receipt of the certified copies of the proceedings and the judgment of the trial court. If the applicant was able to instruct his advocate to extract the aforesaid certified copies for purposes of appeal while in prison, he should also have been able to instruct his advocate to file the appeal.
- 36.** Given the above set of circumstances, it would be prejudicial to respondent were the court to set aside a judgment that was rendered more than two years ago, absent a reasonable justification for doing so.
- 37.** The court therefore finds that the application was not filed promptly and there is no reasonable explanation for the delay. The upshot of the foregoing is that prayer 2 of the applicant's application is declined.
- 38.** The costs of the application are to be borne by Applicant.
- 39.** Orders accordingly.

Ruling dated, signed and delivered virtually via the Teams Platform  
this 26<sup>th</sup> day of February 2026.

**HON. DR. IUR F. NYAGAKA**

**JUDGE**

From 12:39 PM, in the presence of

Mr. Masolo Advocate for the Applicant

Mr. Ayienda Advocate for the Respondent