



# THE JUDICIARY



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAROK**  
**ELC MISC APP NO. E004 OF 2025**

**ITA OLE KANYARE.....**  
**APPLICANT**

**VERSUS**

**JAMES NDUNG’U KUSERO.....**  
**RESPONDENT**

## **RULING**

1. The Applicant herein, filed this ***Notice of Motion Application*** dated ***9<sup>th</sup> June 2025***, brought under Sections ***1A, 1B, 3*** and ***3A, 79(G) and 95*** of the ***Civil Procedure Act 2010***, of the ***Laws of Kenya, Order 46 Rule 2***, of the ***Civil Procedure Rules, 2010***, and sought for the following orders;
  - i. That the court be pleased to grant the Applicant leave to lodge the Appeal out of time against the Judgment of the Hon. Chief Magistrate in MCELC No. 88 of 2018 delivered on 17<sup>th</sup> December 2024.***
  - ii. That the leave so granted do operate to enable Memorandum of Appeal enclosed***

***herein be deemed as properly filed subject to payment of requisite court fees.***

***iii. That court be pleased to issue an order of stay of execution of Judgment of the Hon. Chief Magistrate in MCELC No. 88 of 2018 delivered on the 17<sup>th</sup> December 2024.***

***iv. That costs of the application be provided for.***

2. The application is supported by the grounds set out on the face of the Application and on the Supporting Affidavit of ***Ita Ole Kanyare*** the Applicant herein.
3. Among the grounds in support of the Application are; that parties herein were engaged in a Civil dispute before the Chief Magistrate's Court in ***MCELC No.88 of 2018***, where the applicant herein was the Defendant and the Respondent herein was the Plaintiff.
4. That the Judgment in the Chief Magistrate's Court was delivered on ***17<sup>th</sup> December 2024***, and that ***no notice*** of Judgment date was given to the then applicant's ***advocate, Irene Nchoe***, who later learnt that the Judgment had been delivered.
5. That the Judgment in ***MCELC No. 88 of 2018***, was entered in favour of the Plaintiff/the Respondent herein as follows; *a declaration that the Plaintiff is the legal owner of all that parcel of land composed of **Narok Cis-Mara/Kojonga/27**; an order of permanent injunction to restrain the defendant by himself, his agents, servants or any person claiming under him from entering upon, remaining upon, putting up structures*

(temporary or otherwise), or in any other way interfering with the Plaintiff's quiet use of occupation of the land known as Narok Cis-Mara/Kojonga/27; costs of the suit and the counter-claim by the defendant dated **24<sup>th</sup> October 2017** dismissed with costs.

6. That being dissatisfied with the said judgment of the Chief Magistrate's Court, the applicant wishes to prefer an appeal, but time has since lapsed for the filing of an appeal; the applicant therefore seeks for **stay of execution** of the said judgment pending the hearing and determination of the intended appeal; that the applicant has a merited appeal with an overwhelming chance of success; that the Respondent will not suffer any prejudice if the application is allowed.
7. In his Supporting Affidavit the applicant, **Ita Ole Kanyare** reiterated the contents of the grounds in support of the application and urged the court to allow the instant application for the interest of justice.
8. The application is opposed by the Respondent through the Replying Affidavit sworn by **James Ndungu Kusero**, the Respondent herein, who averred that the allegation that the Advocate who was handling the lower court matter on behalf of the Applicant was not notified of the date of judgment is not true, since if the Applicant's Advocate was not notified of the Judgment date, then the Applicant should have informed this court how the said Advocate came to know about the delivery of judgement, which has not been done meaning that the

allegation is not true, and there is no proof or support of such allegation.

9. He further averred that the Judgment in the lower court case was delivered on **17<sup>th</sup> December 2024**, and the instant application for leave was filed on **9<sup>th</sup> June 2025**, which is about **180 days (6 months)**, which delay **is inordinate and no compelling reasons** have been given for the delay; that contrary to the Applicant's allegation that the grant of leave will not prejudice the Respondent, the same will prejudice him considering the fact that for almost **2 years** or so after closing the case, the Applicant delayed the conclusion of the case claiming that he had witnesses, only for the case to be closed when there were none who were forthcoming.
10. The Responded further averred that looking at the prayers sought in the application, a prayer of **stay of execution** cannot be applied for through the instant application, and still, an application for leave and the draft Memorandum of Appeal be deemed as properly filed cannot be granted through this application since this was supposed to be a simple application which has been turned into an omnibus application.
11. The deponent contended that the reasons given by the Applicant do not warrant this court to tilt its discretion in favour of the Applicant, and hence the instant application should be dismissed with costs.
12. The Application was canvassed by way of written submissions. The Applicant filed his written submissions dated **10<sup>th</sup>**

**November 2025, through Kiprono Duncan & Co. Advocates.**

13. The Applicant set out these issues for determination being;

***i. Whether this court be pleased to grant the applicant leave to lodge an appeal out of time against the Judgment of the Hon. Chief Magistrate in MCELC No. 88 of 2018, delivered on the 17<sup>th</sup> December 2024.***

***ii. Whether the leave so granted do operate to enable Memorandum of Appeal enclosed herein be deemed as properly filed subject to payment of requisite court fees.***

***iii. Whether this court be pleased to issue an order of stay of Execution of Judgment of the Hon. Chief Magistrate delivered on 17<sup>th</sup> December 2024 in MCELC No. 88 of 2018.***

14. ***On whether this Honourable Court be pleased to grant the applicant leave to lodge an appeal out of time against the Judgment of the Hon. Chief Magistrate in MCELC No. 88 of 2018 delivered on the 17 December, 202***, the applicant submitted that he was aggrieved by the said Judgment delivered on ***17<sup>th</sup> December 2024***, and seeks for leave to appeal out of time. He argued that this court has judicial discretion to enlarge time under ***Section 79G*** of the ***Civil Procedure Act***, which allows appeals to be admitted out of time if the appellant demonstrates good and sufficient cause for the delay.

15. Further, the Applicant attributed the delay to the indolence of his previous advocate, and argued that it would be unjust to punish him for his advocate's omissions. He relied on the case of ***Sokoro Savings and Credit Co-operative Society Ltd v Mwamburi (2023) KECA 381 (KLR)***.
16. ***On whether the leave so granted do operate to enable the Memorandum of Appeal enclosed herein to be deemed as properly filed subject to payment of requisite court fees***, the applicant submitted that the leave granted by this Court should acknowledge the Memorandum of Appeal filed with the application as properly filed upon payment of requisite fees.
17. ***On whether this Court should issue an order of stay of execution of Judgment of the Hon. Chief Magistrate 2024 in MCELC No. 88 of 2018***, the applicant submitted that the Respondent has extracted a decree in ***MCELC No. 88 of 2018***, and is in the process of executing it. The applicant argued that he stands to suffer irreparable loss, including the risk of losing their land, if a stay of execution is not granted. The applicant further contended that they have an arguable appeal with high chances of success. Reliance was placed on the case of ***Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 Others (2021) Eklr.***
18. On his part, the Respondent filed his written submissions dated ***8<sup>th</sup> December 2025***, through ***J. Maritim & Co. advocates*** and submitted that the Applicant has not demonstrated or

given convincing reasons to have the court tilt its discretion in his favour.

19. The Respondent raised the issues for determination as follows;
- i. Whether this court can procedurally grant Orders 3 and 4 of the application.*
  - ii. Whether the Applicant has advanced a credible reason to warrant this court exercising its discretion in favour of the Applicant and grant prayer 2 of the application.*
20. ***On whether this court can procedurally grant Orders 3 and 4 of the application***, the Respondent submitted that the Applicant seeks orders for a stay of the lower court judgment and for the ***Draft Memorandum of Appeal*** to be deemed as properly filed upon payment of requisite fees. However, the Respondent submitted that procedurally, these orders cannot be sought or granted through such an application. A stay of execution can only be sought in the court that delivered the judgment or in an appeal, making this prayer invalid. Similarly, the prayer for the ***Draft Memorandum of Appeal*** to be deemed properly filed is misplaced and also invalid.
21. ***On whether the Applicant has advanced a credible reason to warrant this Honourable Court exercising its discretion in favour of the Applicant and grant prayer 2 of the application***, the Respondent submitted that the applicant's conduct in the lower court case is scrutinized. The Respondent submitted that the applicant delayed the case for ***two years*** by seeking numerous adjournments to present

witnesses who never appeared, leading the court to close the case.

22. It was his further submissions that after judgment was delivered on **December 17, 2024**, the applicant took six months to decide to lodge an appeal, which the Respondent views as a tactic to deny him the fruits of his successful litigation. Although the applicant blames the previous advocate for being indolent, the Respondent argued that the advocate actively delayed the case in the lower court, and the applicant's claim is an afterthought.
23. It was argued that **Section 79G** of the **Civil Procedure Act** requires "good and sufficient cause" for filing an appeal out of time. The Respondent cited the cases of **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633**;- **Daphne Parry vs. Murray Alexander Carson [1963] EA 546**;- and **Velji Shahmad vs. Shamji Bros. and Popatlal Karman & Co. [1957] EA 438**, to support his argument.
24. The Respondent ultimately submitted that the applicant has not provided a justifiable reason for the delay, and the court must guard against being led by sympathy. He urged the court to dismiss the instant application with costs.
25. This court has carefully considered the instant application, the pleadings in general and the rival written submissions and finds that the issue for determination is whether the applicant's

***Notice of Motion Application dated 9<sup>th</sup> June 2025, is merited, and who should bear costs of this Application.***

26. The Application herein is anchored under various provisions of law, but being an application for extension of time to file an appeal out of time, the main provisions of law is **Section 79G** and **95** of the **Civil Procedure Act, Sections 1A, 1B** and **3A** of the same Act come into play too as they deal with the overriding objectives of the Act, and the unfettered power of the court to issue orders that are necessary for the end of justice to be met.
27. The judgment sought to be appealed against was delivered on **17<sup>th</sup> December 2024**. Ordinarily, an Appeal from the subordinate Court to the Superior Court (ELC included) should be filed within a period of **30 Days** from the date of the Judgement. In the instant case, **30 Days** expired on **17<sup>th</sup> January 2025**, or thereabout.
28. However, the proviso to this section gives court discretion to admit an appeal out of time **‘on sufficient cause or reasons.’** This **Section 79G** provides;
- “Time for filing appeals from subordinate courts  
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.**

29. Further, **Section 95** of the said Act provides for **Enlargement of time**, where there is a fixed period of doing any act, the court has discretion to enlarge time after the expiring of such period. However, this discretion should be exercised judiciously. See the case of **Nicholas Kiptoo Arap Korir Salat Vs IEBC & 7 Others SCK App. No. 16 of 2014. [2014] eKLR**
30. It is not in doubt that the applicant herein did not file his Appeal on time. He blames his previous advocate for such indolence or failure to comply. He submitted that he should not be punished for the mistakes of his counsels, and that failure to extend time to file his appeal will be prejudicial to him.
31. Courts have variously determined such applications for extension of time to file an appeal out of time, and have laid out the principles to be considered. Further, Courts have continuously held that discretion to extend time should be exercised judicially, and not on whim, sympathy or caprice. See the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported)**
32. The principles to be considered in an application to extend time were well spelt out by the Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir vs Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR**, where the court held;

- i. Extension of time is not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;*
- ii. A party who sought extension of time had the burden of laying a basis for it to the satisfaction of the court;*
- iii. Whether the court ought to exercise the discretion to extend time, was a consideration to be made on a case to case basis;*
- iv. Whether there was a reasonable reason for the delay, which ought to be explained to the satisfaction of the court;*
- v. Whether there would be any prejudice suffered by the respondents if the extension was granted;*
- vi. Whether the application had been brought without undue delay; and;*
- vii. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.*

33. From the above holding of the **Supreme Court of Kenya**, it is evident that extension of time is not a right of a party, but it is **an equitable remedy**, that is only available to a deserving party. Has the applicant herein presented such evidence that would allow this court to exercise its discretion in his favour?

34. From the wording of **Section 79G** of the **Civil Procedure Act**, it is evident that before the court considers extension of time,

the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was well laid out in the case of ***Diplack Kenya Limited v William Muthama Kitonyi [2018] eKLR***, where the court emphasized 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.

35. Further, 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 stated the following: -

***“.....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.”***

36. In applying the above principles to the instant case, the judgment herein was delivered on **17<sup>th</sup> December 2024**, and the Applicant had **30 days**, within which to file an appeal. The

Judgement was delivered in the absence of the parties and their advocates. The applicant alleged that his advocate was not notified of delivery of the said Judgment. This court does not have the advantage of considering the original court record from the Lower court, and cannot therefore hold with certainty, whether the advocates were aware of the Judgment date or not.

37. However, it is evident that the applicant filed the current application for leave to file the appeal out of time on **9<sup>th</sup> June 2025**, which is about **6 Months** after the judgment was entered. That is indeed out of time. The applicant has attributed the delay in filing his appeal to failure by his previous advocates to notify him of entry of the said judgment.

38. Courts have variously held that a suit belongs to a party, and the party to a suit should always be in the know on what goes on in court, and not blame his advocate for any inaction. In the case of ***Rajeshi Rughani vs Fifty Investment Ltd & Another (2016) ekr***, the court held;

***"In Habo Agencies Ltd vs Wilfred Odhiambo Musingo (2015) ekr, this court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In Mwangi vs Kariuki (1999) LLR 2632(CAK) Shah JA, ruled that mere***

***inaction by a counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude"***

39. The applicant argued that he followed his matter with his previous counsel, whom he had instructed to file an appeal, but she did not do so on time, and thus he had to instruct a new advocate in **May 2025**, as indicated by consent between the two advocates marked as **"IOK 2"**.
40. In considering the **'good and sufficient reasons,'** this court will also consider other factors in determining whether to extend time to file the appeal out of time or not. These factors are; The **'sufficient cause,'** did the applicant explain the delay. The applicant herein blamed his advocate, which this court has found 'is not sufficient,' because he had a duty to check on the progress of his matters in court. See the case of **Stanley Kangethe Kinyanjui Vs Tony Ketter & 5 Others (2013) eklr.**
41. The court must also consider the **length of delay.** It is obvious that the delay herein is almost **six months**, which the applicant has tried to explain, but the court finds him not blameless. The court then will turn to exercise of **its discretionary power**, and as stated earlier, extension of time is not a right; the court exercises **'its discretion to ensure justice.'** The Applicant alleges that the Judgement of the trial court is **prejudicial** to him, and given that a party has a right to pursue his right of Appeal to the highest level, then the court will be persuaded to exercise its discretionary power and allow extension of time.

42. The other factor to be considered is the **prejudice to Respondent**; This Court will consider if granting the extension will unfairly impact upon the Respondent herein. The trial court allowed the Plaintiff/Respondent's suit; and since the said judgment is not being set aside through this application, but only tested through the intended appeal, the court finds '**no prejudice**' will be occasioned to the Plaintiff/Respondent herein.
43. Therefore, the court finds that the applicant is deserving of the exercise of this court discretion in allowing the *application for extension of time*.
44. The applicant urged the court to **stay execution** of the impugned judgment, in his **prayer No 4**, of the instant application. Though the applicant did not anchor his prayer under **Order 42 Rule 6** of the **Civil Procedure Rules**, it is evident that the Judgment herein was delivered on **17<sup>th</sup> December 2024**, and the Plaintiff was declared the owner of the suit land, and it was his evidence that he had a title deed for the suit land. The applicant had informed the trial court during cross examination, that he did have a title deed to prove ownership of the suit land.
45. The trial court declared the Plaintiff/Respondent as owner of the suit land, based on the available title deed, so it cannot be presumed that the Respondent will register the suit land in his name afresh because it is already registered in his name. Therefore, there is nothing to stay.

46. **Order 42** of the **Civil Procedure Rules** provides that;

**“1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(2). No order for stay of execution shall be made under sub-rule (1) unless—(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

47. It is evident that the conditions to be satisfied by parties seeking stay pending appeal to wit;

**a) Substantial loss may result to the applicant unless the order is made**

***b) The application has been made without undue delay.***

***c) Such Security for due performance of the decree as the court may deem fit to order.***

48. On substantial loss the applicant submitted that the Respondent has extracted the **Decree** of the trial court, and is about to execute it. No evidence of such extraction or imminent execution, to warrant the court to stay such Decree. There is no evidence that execution of the said Decree is imminent and thus it is important to grant stay pending appeal so that the appeal is not rendered nugatory. The applicant has not satisfied this condition, and the court finds that **no substantial loss** will be occasioned to the applicant unless the orders sought are granted.
49. The application was obviously filed with **unreasonable delay** since no appeal was filed on time, but the court has used its discretion to allow extension of time. However, the court finds no merit in the prayer for stay of execution.
50. On security, the applicant did not offer any security, but since the court has declined to issue a stay of execution, there is no need for such security.
51. On who should pay costs of this application, **Section 27** of the **Civil Procedure Act**, grants discretion to court to either award or decline to award costs. The Applicant brought this application after a long delay; and is therefore condemned to pay costs of the application.

52. Having considered the instant application and the rival written submissions, the court finds that the said application partially succeeds in terms of **prayer Nos 2**. Prayer No 3, **cannot** be **allowed** in a **Misc. Application**, since this is not an Appeal file. The costs of this application are awarded to the Respondent herein, to be borne by the applicant.
53. Further, the Applicant is directed to file and serve the intended substantive Appeal through a **Memorandum of Appeal**, together with the **Record of Appeal** within a period of **21 Days** from the date hereof. Failure to comply, the **leave so granted** herein will automatically lapse.

***It is so ordered.***

***Dated, signed, and delivered virtually at Narok this 19<sup>th</sup> Day of March 2026.***

***L. Gacheru  
Judge***

***Delivered online in the presence of***

***Elijah Meyoki - Court Assistant***

***Mr. Duncan Kiprono for the Applicant***

***Ms. Chepkemai holding brief for Ms. Maritim for the Respondent***

***L. Gacheru  
Judge***