

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT**  
**KAKAMEGA**  
**ELC MISCELLENOUS APPLICATION NO. E031 OF 2025**

**NOEL        SWEEN        EMIKALA.....**  
**APPLICANT**

**VERSUS**

**THE BOARD OF TRUSTEES CHURCH OF GOD**  
**IN EAST AFRICA KENYA (MWIHILA MISSION) .....**  
**RESPONDENT**

**RULING**

**Introduction**

1. Vide a Notice of Motion dated 22<sup>nd</sup> April 2025, the applicant sought the following orders;

- a) That this Honourabel court be pleased to certify this application as urgent and allocate an early date for inter- partes hearing on priority basis.**
- b) That this Honourable court be pleased to grant the appellant leave to file appeal out of time against the**

**Ruling delivered by Hon. E. Wasike PM in BUTERE SPMC ELC NO. E006 OF 2024 pending inter partes hearing and determination of the application herein.**

**c) That an order of stay of execution be issued to stay or stop execution of the orders, decree and/or other consequential orders arising from the ruling of Hon. E. WASIKE-PM delivered on 24<sup>th</sup> September 2024 in BUTERE SPMC ELC NO. E006 OF 2024.**

**d) That the costs of this application be in the cause.**

2. The application is supported by the affidavit of the applicant dated 22<sup>nd</sup> April 2025. It was the applicant's case that the lower court allowed a preliminary objection against his claim in the said court, thereby striking out the suit for want of jurisdiction. That he is aggrieved with the said decision and instructed his advocate to lodge an appeal, but when he later checked he found that no appeal had been filed, yet time had expired. That the mistake of an advocate should not be visited on an innocent client. That his appeal is arguable with chances of success.

3. The application is opposed. The Respondent filed a replying affidavit sworn on 11<sup>th</sup> August 2025. He stated that the delay by the applicant was inordinate and inexcusable. That no demonstration was made that the applicant had instructed his advocate to appeal.

Further that the excuse of mistake by counsel does not cure the applicant's own inaction. That the applicant has no arguable appeal as his suit was *res judicata*, statute barred, incompetent and improperly before court. That the plaint shows that the cause of action arose in 2003 and that the suit was filed in 2023, which is 20 years later, and that the same concerns a boundary dispute between parcel No. Kisa/Mundobelwa/676 hence the court had no jurisdiction. That the claim was *res judicata* in view of the court's decision in Kakamega ELC Case No. 334 of 2017. That in that suit, the court decided against the applicant who was represented by the same advocate now on record. That Kisumu Civil Application No. E096 of 2024 was filed by another advocate alleging that the firm of Khayumbi Advocates had been instructed but failed to appeal but the court found that the reasons given were incorrect and dismissed the application. That he again filed Butere ELC E006 of 2023 regarding the same cause of action and judgment therein was delivered in the presence of the applicant who later attended assessment of costs in that matter.

4. The matter was canvassed by way of written submissions. On record are submissions dated 3<sup>rd</sup> September 2025 by the applicant

and those by the respondent dated 25<sup>th</sup> October 2025; both of which the court has duly considered.

### **Analysis and determination**

5. The court has carefully considered the application, response thereto and submissions. The only issue that arise for the court's determination is whether the applicant deserves the orders sought. Parties are bound by their pleadings. The applicant's prayer for leave to appeal out of time was sought pending hearing and determination of the instant application. This means that that prayer is spent.
6. On whether extension of time should be allowed, Section 79G of the Civil procedure Act provide for time within which to file appeal 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.”**

7. It is therefore clear that an appeal against a decision of the subordinate court to this court ought to be filed within 30 days of delivery of the decision sought to be appealed against. However, where there is a good and sufficient cause for delay, the court has discretion to extend time for filing appeal.
8. Therefore, to obtain leave to appeal out of time the applicant is obligated to explain the reason for delay to the satisfaction of the court, as the discretion to extend time ought to be exercised judiciously.
9. In the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] e KLR**, the Supreme court had the following to say on extension of time for filing an appeal;
  - (1) **“Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.**

- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court**
- (3) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.**
- (4) Whether there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.**
- (5) Whether there will be any prejudice suffered by the Respondents if the extension is granted.**
- (6) Whether the application has been brought without undue delay; and**
- (7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

10. In the instant case, the applicant alleged that he instructed his advocate to appeal but his instructions were not executed. The trial court ruling was delivered on 24<sup>th</sup> September 2024. The instant application was filed on 26<sup>th</sup> April 2025, a period of 7 months. In my view, this delay is inordinate. Regarding the reason given for delay, there is no evidence that instructions to appeal were issued as alleged or at all. Besides, the matter

belongs to the applicant and it did not have to take 7 months for him to discover that his instructions to appeal had not been executed, considering that an appeal ought to be filed in 30 days of the decision sought to be challenged. In the premises, the reason given is not excusable in the circumstances of the case.

11. In the premises I find no merit in the application dated 22<sup>nd</sup> April 2025 which I dismiss with costs to the respondent.

12. It is so ordered

**DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 18<sup>TH</sup> DAY OF MARCH 2026.**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Mr. Khayumbi for the applicant

Mr. Akwala for the respondent

Court Assistant: Delphine