

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT
GARISSA

ELCA NO. E001 OF 2025

FATUMA MUMINA KAYO 1ST
APPLICANT

SULEIMAN MOHAMED ARBICHO 2ND
APPLICANT

VERSUS

ABDULKARIM HANTI KAMBICHA
RESPONDENT

RULING

[NOTICE OF MOTION DATED 24TH SEPTEMBER 2025]

1. The matter before the Court is a Notice of Motion dated 24th September 2025 by the applicants, seeking for leave to file an appeal out of time against the judgment delivered by Hon. J. Omwange, Principal Magistrate, on 11th June 2025 in Garissa CMCC ELC Case No. E005 of 2023. It principally seeks for enlarging of time to enable the Applicants to lodge an appeal against the said judgment. The Applicants also pray that the costs of the application be provided for. The application is supported by an affidavit sworn by C.P. Onono, advocate, in which he deposed inter alia that the hearing of the suit before the subordinate court concluded on 26th February 2025; that

the Applicants thereafter filed their written submissions on 19th March 2025; that the matter was initially scheduled for judgment on 4th June 2025, but counsel did not attend court on the scheduled date due an oversight; that the court fixed another date for the delivery of judgment and directed that notice be issued, but no such notice was served upon him; that the judgment was eventually delivered on 11th June 2025 in his absence; that subsequent inquiries at the court registry revealed that the court file remained with the trial magistrate for some time after the judgment was delivered, and it was not until 28th July 2025 that he confirmed that the judgment had in fact been delivered; that upon receiving instructions from the Applicants, he wrote to the court on 29th July 2025, requesting for copies of the proceedings and the judgment to commence the appeal process; that the proceedings and judgment were only made available for collection on 12th September 2025, whereupon he promptly collected them, and thereafter filed the present application; that the intended appeal raises serious issues because the trial court referred to documents marked PMFI-1 and PMFI-2 in its judgment, which had allegedly never been formally produced as exhibits during the hearing; that the Court should therefore enlarge the time so that the applicants may ventilate their grievance on appeal.

2. The application is opposed through the replying affidavit of Abdulkarim Hanti Kambicha, Respondent, sworn on 24th November 2025, in which he deposed to among others

that the application is fatally defective and amounts to an abuse of the court process; that the affidavit in support of the application was sworn by the Applicants' advocate contrary to the Advocates' Practice Rules, yet the matters deposed to are contentious and ought to have been sworn by the Applicants themselves; that the application's heading refers to the High Court, which that this demonstrates that the application was improperly brought before this Court; that the Applicants are essentially raising complaints against the conduct of the trial magistrate, which are matters that ought to be addressed before the Judicial Service Commission, rather than through an application for an extension of time; that the Applicants were indolent and failed to act within the statutory period prescribed for filing an appeal; that notice of the delivery of judgment was issued through the Court Tracking System (CTS) and through SMS notifications; that the application should be dismissed with costs on the ground that extension of time is an equitable remedy that should not be granted to an indolent litigant.

3. That pursuant to the consent of 26th November 2025, the application was canvassed through written submissions. The learned counsel for the applicants, and respondents filed their submissions dated the 9th December 2025 and 20th February 2026 respectively that the court has considered.

4. The counsel for the Applicants submitted inter alia that the affidavit sworn by their advocate is proper because the matters deposed to concern steps personally taken by counsel in the course of conducting the litigation, including court attendances, follow-up at the registry and correspondence with the court; that the reference to the High Court in the heading of the application was a typographical error that does not go to the substance of the application; that the delay was largely due to the unavailability of the court file and the time required to obtain copies of the judgment and proceedings.
5. The counsel for the Respondent submitted that the application is defective, as the supporting affidavit was sworn by the Applicants' advocate contrary to the Advocates' Practice Rules, which generally prohibit an advocate from swearing an affidavit on contentious matters of fact on behalf of a client. The counsel cited the cases of ***Murgor & Murgor versus Kenya Pipeline Company Ltd [2021] eKLR, Uhuru Highway Development Ltd & 3 Others, and King Woollen Mills Ltd & Another versus Kaplan & Stratton Advocates [1990-1994] EA 244***, for the principles governing circumstances in which an advocate may be disqualified where he becomes a potential witness in a matter. Counsel further submitted that extension of time is an equitable remedy that is only available at the discretion of the Court. In that regard, counsel relied on the case of ***Mombasa County Government versus Kenya Ferry***

Services & Another (2018) eKLR, which cited the principles set out by the Supreme Court in ***Nicholas Kiptoo Korir arap Salat versus IEBC & 7 Others [2014] eKLR*** on the exercise of judicial discretion in applications for enlargement of time. On costs, the counsel relied on *Section 27* of the Civil Procedure Act, submitting that costs follow the event, and urged the Court to dismiss the application with costs.

6. The issues arising from the application for the court's determinations are as follows:

a. Whether the application is incompetent or defective.

b. Whether the Applicants have established sufficient cause to warrant extension of time to file an appeal.

c. Who pays the costs?

7. I have carefully considered the grounds on the notice of motion, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following conclusions:

a. The Respondent challenges the application's competence on three fronts: firstly, that the application appears to have been intended for the High Court, rather than the Environment and Land Court; secondly, that the supporting affidavit was sworn by the Applicant's advocate contrary to the Advocates' Practice Rules, and thirdly, the application

raises complaints against the conduct of the learned trial magistrate. With regard to the description of the court on the heading of the application, the Applicants submitted that the reference to the High Court in the title of the application was a typographical error. Upon perusing the record, the Court has noted that the application arises from Garissa CMCC ELC Case No. E005 of 2023. Further, that the application itself was filed before this court, and placed before a Judge of the Environment and Land Court. In the circumstances, the Court is satisfied that the error in the heading of the application neither affects the substance of the application, nor does it prejudice the respondent.

- b. *Section 100* of the Civil Procedure Act chapter 21 of Laws of Kenya empowers the Court to at any time amend any defect or error in any proceeding for the purpose of determining the real question in controversy. Courts have consistently held that typographical or clerical errors that do not go to the substance of the matter should not defeat a litigant's claim. In that regard, the Court is guided by the decision in the case of *Ali Okata Watako versus Mumias Sugar Co. Ltd* [2012] eKLR, where it was held that a discrepancy attributable to a typographical error could be corrected, and was not a sufficient basis to strike out proceedings.

c. The Respondent further contends that the application is defective because the supporting affidavit was sworn by counsel for the Applicants. The applicable law is found in *Order 19 Rule 3(1)* of the Civil Procedure Rules, which provides:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.”

The governing principle is that an advocates should not depose to contentious matters of fact that may render him a witness in the proceedings. However, where the matters deposed to are within the personal knowledge of the advocate arising from the conduct of the case, such an affidavit is not necessarily incompetent. In the case of ***James Mwangi Muraguri versus Assumpta Murugi Gika [2021] KEELC 3550 (KLR)***, the Court held that an affidavit sworn by counsel may properly stand where the matters deposed to concern actions taken by counsel in the course of representing a client in the proceedings. In the case of ***Simon Isaac Ngugi Overseas Courier Services (K) Ltd 1998 eKLR and Kisya Investment Ltd & others versus Kenya Finance Corporation Ltd***, the court held that:

“.....it is not competent for a party’s advocate to depose to evidentiary fact at any stage of the suit.”

- d. In addition, *Rule 9* of the Advocates Practice Rules prohibits advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate's affidavit creates a legal muddle with untold consequences. However, where an affidavit by an advocate raises issues of law and fact which are within his knowledge, having been an advocate handling the suit on behalf of the party on whose behalf the affidavit is sworn, then there is absolutely no mistake or error in the affidavit that can render it defective.
- e. The supporting affidavit in the present application was sworn by counsel who conducted the proceedings before the trial court. The matters deposed to relate to the dates fixed for delivery of judgment, the absence of notice, counsel's inquiries at the court registry, and the request for copies of the judgment and proceedings. These are matters arising from counsel's conduct of the case, were within his personal knowledge, and was better placed to depose to them than his clients. In the circumstances, the Court is satisfied that the supporting affidavit does not offend *Order 19 Rule 3* of the Civil Procedure Rules and is properly on record.

f. As to the contention that the application amounts to a complaint against the conduct of learned trial magistrate, the Court observes that the Applicants have just relied on the circumstances surrounding the delivery of judgment, and the time they took to access it, only as part of their explanation for the delay in filing an appeal. The application before the Court is confined to a prayer for enlargement of time, and does not seek any orders directed against the learned trial magistrate. For these reasons, the Court finds that the application is not incompetent.

g. Appeals from subordinate courts to this Court are governed by *Section 79G* of the Civil Procedure Act, which provides:

“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.”

The provision makes it clear that an appeal must ordinarily be filed within thirty (30) days from the

date of the impugned decision. However, the Court retains the discretion to admit an appeal out of time where the applicant demonstrates good and sufficient cause for the delay.

- h. The principles guiding the exercise of the discretion to admit an appeal out of time were set out by the Supreme Court in the case of ***Nicholas Kiptoo Korir arap Salat versus IEBC & 7 Others*** [2014] eKLR, where it held that extension of time is an equitable remedy that is granted at the discretion of the Court upon consideration of factors such as the length of delay, the explanation for the delay and whether the application has been brought without undue delay. In the present case, it is not in dispute that the judgment sought to be appealed from was delivered on 11th June 2025. The statutory period for filing an appeal, therefore, lapsed on 11th July 2025. The present application was filed on 24th September 2025. The explanation offered by the Applicants is that firstly, their counsel was not present when judgment was delivered; secondly, that the court had earlier directed that notice be issued when the matter was adjourned to a new date for the delivery of judgment, but their Counsel did not receive such notice; thirdly, it was only on 28th July 2025 that their counsel confirmed that the judgment had been delivered; fourthly, that their counsel wrote to the court on 29th July 2025 requesting copies of the

proceedings and judgment and that these were only made available for collection on 12th September 2025, after which the present application was filed. The Respondent, on his part, submits that notice of delivery of judgment was issued through the Court Tracking System (CTS) and SMS notifications. However, no material has been placed before the Court demonstrating that such notice was issued or served upon the applicants.

- i. On the material placed before the Court, the Applicants have explained that the delay in filing the appeal in time arose in the course of confirming the delivery of judgment and obtaining copies of the proceedings and judgment. The present application was thereafter filed on 24th September 2025. In the circumstances, and bearing in mind the discretion conferred upon the Court under *Section 79G* of the Civil Procedure Act, the Court is satisfied that the Applicants have reasonably demonstrated sufficient cause to warrant the exercise of that discretion in their favour.
- j. The Respondent urged the Court to award costs pursuant to *Section 27* of the Civil Procedure Act, which provides that costs follow the event unless the Court for good reason orders otherwise. Given that the application concerns leave to file an appeal out of time, and the appeal itself has not yet been filed,

heard and determined, the Court is of the view that the appropriate order is for costs of the present application to abide the outcome of the appeal.

8. Flowing from the determinations set out above in respect to the application dated 24th September 2025, the court finds and orders as follows:

a. That the application has merit and is allowed, in terms of prayer (2).

b. That the memorandum of appeal be filed and served in fourteen (14) days from today.

c. That the record of appeal be filed and served within sixty (60) days from today.

d. The costs in the application to abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 25TH DAY OF MARCH 2026.

**S. M. Kibunja, J.
ELC GARISSA.**

IN THE PRESENCE OF:

APPLICANTS : N/A

RESPONDENT: M/S ONGWASO FOR UPENDO

MUHAMED-COURT ASSISTANT.

**S. M. Kibunja, J.
ELC GARISSA.**

