

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISII**

**APPEAL NO. E043 OF 2025**

**EVERLINE KEMUNTO KIMWEI.....1<sup>ST</sup> APPLICANT**

**PAULINE MOKEIRA NYAITUKA.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**EDWIN AMENYA SIRO.....1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR- KISII.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. For determination is the notice of motion dated 11<sup>th</sup> December, 2025, brought under the provisions of article 159 of the Constitution, sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, amongst others. The Applicants are seeking orders:

- 1. THAT, the Honourable Court be pleased to stay all the proceedings and further orders emanating out of Ogembo Civil Miscellaneous Application No. E026 of 2023 pending hearing of the intended Appeal.**
- 2. THAT, the lower court matter be transferred to a court with appropriate jurisdiction to handle land matters.**

**3. THAT, this Honourable Court be pleased to make any other order as it may deem just and expedient.**

2. The application is based on the grounds listed on its face and the Affidavit of Everline Kemunto Kimwei. The grounds listed inter alia;

**a. THAT, there lies a gross continued miscarriage of justice in the lower Court matter leading to this Appeal prompting the urgent intervention of this Honourable Courts' supervisory jurisdiction emanating out of a blatant disregard of the clearly set out rules of natural justice with no similar regard to procedure if at all.**

**b. THAT, from the onset, the learned magistrate declined to set aside the orders and continued pursuit of the 2nd Respondent herein for contempt. He gave directions for the Appellants' Application and reserved it for ruling on 17th July 2025. The ruling was not ready on the appointed date with parties directed to appear before Court the following Thursday when it was equally not ready. The learned magistrate then indicated that the same would be delivered on notice to parties which notice was never given only for the Appellants counsel to establish that the same had been secretly delivered on and uploaded to the CTS on 26th September 2025 only with the knowledge of the 1st Respondent. Delivery of the ruling alone therefore also demonstrates a clear violation on the law regarding to delivery of rulings**

**c. THAT, the trail of proceedings at the trial Court evidently demonstrates the Courts disregard to justice. The disputed land now faces the peril of being disposed without any hearing known in law (considering how emotive the issue of land is in this region), with the 2<sup>nd</sup> Respondent at risk of being arrested anytime. The learned Magistrate also found no reason even to enjoin cautioners to proceedings relating to removal of their own caution entirely locking them out of the seat of justice.**

3. The 1<sup>st</sup> Appellant deposed that she had registered a caution on the 1st Respondent's title number Nyaribari/Chache/3649. The said caution was lifted with orders obtained on 23<sup>rd</sup> August, 2023 in Ogembo Misc application E026 of 2023. That she got wind of these orders and applied to be joined in those proceedings and to have those orders set aside. The court declined hence the filing of this appeal together with the interlocutory application.
4. The application is opposed by the Respondents through the replying affidavit sworn by Edwin Amenity Siro on 15<sup>th</sup> December, 2025. He deposes that the present motion is hopeless and that the Applicants do not disclose why they did not file their appeal within the stipulated period in the law.
5. The Respondents aver that by the time the Applicants filed the notice of motion dated 11<sup>th</sup> June 2025 seeking to be joined in Misc application E026 of

2023, the latter application had already been heard and determined. They state that the Applicants have not filed any suit instead they are seeking to appeal the decision which refused to join them in a miscellaneous application.

6. The 1<sup>st</sup> Respondent continued that he is the registered owner of L.R. No Nyaribari Chache/3469 and was therefore entitled to apply for the removal of the caution lodged on it. That even if the court were to grant the Applicants leave to appeal, such appeal would be hopeless, irregular and unlawful. They urged the court to dismiss the application for being an abuse of the court process and it does not capture any reasonable cause of action.
7. Each side filed submissions in support of and against the application. The Applicants' submissions dated 26<sup>th</sup> January, 2026 gave a background of the case before the trial court and raised the question of whether the orders they are seeking should not be granted.
8. It is their submission that the impugned ruling was never delivered at the appointed date and no notice of delivery of the ruling was never served on them. The Applicants then submitted on the headings of right to hearing and lack of jurisdiction which in my view are premature as there is no appeal yet filed and on record.
9. The Respondents vide their submissions dated 10<sup>th</sup> February, 2026 inter alia reiterated the contents of their replying affidavit. The cases cited inter alia **GARISSA ELC CASE NO. 16 OF 2017 MWANZIA KIMWELE VERSUS**

**KITOME KUBORA & OTHERS and KERUGOYA ELC CASE NO. 151 OF 2013, MICHAEL MUNENE NJOGU & 2 OTHERS VERSUS**

**BENARD GITHINJI & OTHERS** referred to the principles guiding joinder of parties to a suit. They serve no relevance to the merits of the application before me.

**Analysis and determination:**

10. My duty is to determine whether the Applicants have established grounds upon which a stay of execution/proceedings can be granted and leave to appeal out of time. Thus, although the Applicants relied on the overriding objectives, they were still under a duty to prove that their application met the threshold for staying the proceedings. In the case of **David Morton Silverstein v Atsango Chesoni [2002] eKLR** the following principles were laid down by the Court to be met in application such as this:

- a. **There must be an appeal pending before the higher Court;**
- b. **The Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;**
- c. **The Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;**
- d. **The Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted**

**as opposed to having the case concluded and all arising grievances taken up on a single appeal; and**

**e. The Applicant must demonstrate that the application for stay was filed expeditiously and without delay.**

11. In this case, there is no appeal filed as one of the prayers sought is for an extension of time to lodge the appeal. That takes out paragraphs a-c of the principles. The Applicant is required to demonstrate that there are exceptional circumstances that require the stay of the proceedings. From the pleadings in support of the present application, the ruling the applicant was unhappy about was delivered on 23<sup>rd</sup> August 2023. They annexed a copy of the said ruling to their application. Their application to be joined in the earlier proceedings was dismissed on 26<sup>th</sup> September, 2025.

12. Therefore, as at the time of filing this application, there were no ongoing proceedings before the trial court capable of being stayed. Since the two applications were heard and determined, there is nothing to transfer to another court with jurisdiction to hear and determine.

13. Are there any further orders capable of being stayed? The Applicant did not present evidence of whether the caution had been removed pursuant to the order of 23.8.2023. However, the Respondents in their replying affidavit stated that the Land Registrar had not executed the order meaning there is an order capable of being stayed.

14. The Applicants had a duty to explain the delay in filing the appeal, which, according to them, was occasioned by the court not issuing them with the notice of the delivery of the ruling. They pleaded that the ruling was uploaded on the CTS on 26<sup>th</sup> September, 2025 while this application was filed in December, 2025. The Applicants do not depose on the date they became aware of the impugned decision. Hence, I cannot ascertain that the application was filed without undue delay.

15. The Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** summed up the applicable considerations for extension of time as follows:

*i. Extension of time is not right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*

*ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;*

*iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to- case basis;*

*iv. Whether there is a reasonable reason for the delay. The delay should be explained to the Court's satisfaction.*

*v. Whether there will be any prejudice suffered by the respondents if the extension is granted;*

*vi. Whether the application has been brought without undue delay; and,*

*vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

16. The Applicants in laying a basis for the extension of time averred that the substantive orders lifting the caution placed by the 1<sup>st</sup> Applicant were issued upon filing of the application and without even giving hearing the 2<sup>nd</sup> Respondent. They stated the said orders are blatantly irregular as the Miscellaneous Application was not served on any person prior to giving final orders. However, it is my considered opinion that at this stage, the Applicants can only challenge the orders which refused to join them in the proceedings.

17. They contended that the order refusing to admit them barred them from access to justice and accused the trial magistrate of neglecting justice. The Applicants further stated that the disputed land now faces the risk of being sold without providing them an opportunity to be heard.

18. This court asks the question, would their interest be fully determined in a miscellaneous application filed purposefully for removal of a caution or it should be canvassed through a substantive suit? For me to get the answer, I

would have considered the grounds in a draft memo of appeal, which, in this case, was not annexed to the affidavit in support of the motion.

19. In the case of Nick salat supra, the Supreme Court held thus;

**“Where one intended to file an appeal out of time and sought an extension of time, the most he could do was to annex the draft intended petition of appeal for the court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalise it.”**

20. Without prejudice to this position, I noted that the Applicants raised substantive issues in paragraphs 4 to 9 of her affidavit, sworn on 11th June 2025, in support of their previous application. These issues cannot be addressed in a miscellaneous application so that the granting of leave to appeal would not resolve the dispute between the parties. It would be an academic exercise.

21. Therefore, it is my considered view, and for the reasons stated, that I hold this application lacks merit and it is dismissed with half costs to the Respondent.

**Dated, signed and delivered at Kisii this 19<sup>th</sup> day of March, 2026.**

**A. OMOLLO**  
**JUDGE**