

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC CASE NO. 126 OF 2019**

**MITABONI KATANI CO. LTD:.....APPELLANT**

**VERSUS**

**JOSEPH MUTUA MUINDE:.....1<sup>ST</sup> RESPONDENT**

**DOMINIC MUSEI IKOMBO:.....2<sup>ND</sup> RESPONDENT**

**GEOFREY KITHUKA MWANGANGI:.....3<sup>RD</sup> RESPONDENT**

**HELLENA CHERESEM:.....4<sup>TH</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR  
MACHAKOS:.....5<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY:.....6<sup>TH</sup> RESPONDENT**

**RULING**

The application is dated 20<sup>th</sup> December 2024 and is brought under Section 1A, BA and Section 79 G of the Civil Procedure Act and Order 51 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya seeking the following orders;

1. That this matter be certified as urgent and be heard ex parte in the first instance.
2. That this Honourable court be pleased to grant leave to the firm of J.M Tamata Advocates to come on record in place of Paul Mwangela and Company Advocates.

3. That the Honorable Court be pleased to grant the Appellants leave and permissions to lodge an appeal outside the stipulated period under the Law.
4. That costs do abide the Application.

It is grounded on the Annexed Application of Kalekye Kilonzo and grounds that Judgment was made on 7<sup>th</sup> February 2024. That Appellants are aggrieved by the decision of the Court. That time to appeal has expired. That Applicants are desirous off challenging the decision and have meritorious appeal. That Applicants are in occupation of Suit land and have developed substantial. That Applicants were abandoned by previous counsel on record. That Applicants have a new Advocate and are ready.

This court has considered the application and the submissions therein. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the Civil Procedure Act provides 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 filing the appeal in time.”*

From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & Others vs Wanjiru & Another* (1970) EA 482 the court stated as follows;

*“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”*

The Court of Appeal in the above case guided that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in *Edith Gichungu Koine vs Stephen Njagi Thoithi* (2014) eKLR thus;

*“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”*

The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court. In *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* (2013) eKLR the court held as follows;

*“(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 respondent of the extension is granted.*

*(6) Whether the application has been brought without undue delay; and*

*(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”*

I have given due consideration of the record in light of the pleadings, submissions, and principles that guide the court. The reason given for the delay in filing the appeal is that the Applicant was abandoned by the previous Advocates. No evidence of the same was adduced in terms of correspondence and no draft memorandum of appeal has been availed. To establish whether there was an arguable appeal. On perusal of the Judgement I find that the plaint was struck off for being res judicata.

Judgment was in this matter was entered on 7<sup>th</sup> February 2024. That Appellants were aggrieved by the decision of the Court. I find that this application was dated 20<sup>th</sup> December 2024. I find that the Applicant is guilty of inordinate delay in the circumstances. I find this application is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24<sup>TH</sup> DAY OF  
MARCH 2026.**

**N.A. MATHEKA**

**JUDGE**

ORIGINAL