



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELCL MISCELLANEOUS CASE NO. E031 OF 2025

JAMES KAMAU KAHURA.....

APPLICANT

VERSUS

SIMON KIROBI MUYA.....

RESPONDENT

MUNGORA KAHURA.....INTERESTED

PARTY

RULING

1. The Application before the Court is brought under Section 79G of the Civil Procedure Act, Order 42 Rule 6, and Order 50 Rule 6 of the Civil Procedure Rules. It seeks the Court's intervention to allow the Applicant to lodge an Appeal out of time and to halt any dealings with the suit property pending the outcome of the intended Appeal.
2. The Applicant prays for the following specific orders:

1. Spent.

2. THAT the Honourable Court be pleased to grant the Applicant unconditional leave to file an

Appeal out of time against the Judgment delivered on 17th December 2024.

3. THAT the Court issues an interim order of stay of execution, temporarily stopping the implementation of the Judgment delivered by the Chief Magistrate's Court at Kikuyu in Case No. 77 of 2023, pending the hearing and determination of this Application.

4. THAT the costs of this Application be provided for in the main cause.

3. The Application is premised on the following grounds:

- i. The Judgment was delivered in the absence of the parties on 17/12/2024 but was only uploaded to the Judiciary Portal on 17/01/2025, after the statutory 30-day Appeal period had already expired.
- ii. During the period the Judgment was made available, the Applicant was emotionally and mentally incapacitated due to his wife's hospitalization, rendering him unable to instruct Counsel.
- iii. The Applicant maintains that the intended Appeal is arguable and has high chances of success, as demonstrated in the annexed Draft Memorandum of Appeal.
- iv. The Respondents are currently moving to subdivide and transfer the suit land. If not restrained, their actions will

render the intended Appeal nugatory as the subject matter will have been disposed of.

4. In response the Respondent and on behalf of the Interested Party swore a Replying Affidavit dated 10/04/2025 and deposes in opposition to the Application, stating that the trial Court's Judgment was actually rendered on 11/12/2024 and subsequently communicated to the Applicant's Advocates via a formal letter dated 26/02/2025, which included a request for the necessary completion documents to facilitate the transfer of **Title Number MUGUGA/MUGUGA/4720**.
5. He asserts that the Applicant failed to respond to this correspondence or comply with the Court's directions, prompting the Respondent to move the Court on 15/04/2025 for a variation of the Judgment to correct the property description and authorize the Executive Officer to sign transfer documents in the Applicant's default.
6. The Deponent further challenges the Applicant's plea for an extension of time, noting that the annexed medical records indicate a brief five-day hospitalization in mid-January 2025, which fails to provide a reasonable or sufficient explanation for the total inaction during the subsequent months.
7. Furthermore, he points out that the Applicant has not established a legal nexus between himself and the patient named in the medical reports. The Respondent further contends that the intended Appeal is fundamentally flawed and unenforceable, as it refers to **Title Number**

MUGUGA/MUGUGA/4081, a parcel that no longer exists in that form having been subdivided by the Applicant himself prior to the conclusion of the trial. Consequently, the Respondent maintains that the present Application is a frivolous attempt to obstruct the execution of a valid Judgment and to deny the Respondent the fruits of his litigation, thus amounting to an abuse of the Court process.

Applicant's submissions

8. The Applicant, through these written submissions, moves this Honourable Court for an extension of time and leave to file an Appeal out of time pursuant to **Section 79G** of the **Civil Procedure Act** and **Order 42 Rule 6** of the **Civil Procedure Rules**. It is submitted that the delay in preferring the Appeal was primarily occasioned by the trial Court's failure to upload the Judgment onto the Case Tracking System (CTS) until 17/01/2025, a month after its delivery on 17/12/2024. The Applicant contends that by the time the Judgment was accessible, the statutory 30-day window had already lapsed, a fact corroborated by the CTS screenshots annexed as **"JKK1"**. Furthermore, the Applicant explains that his inability to instruct Counsel immediately thereafter was due to a hypertensive medical emergency involving his wife, whose treatment and recovery spanned the months of February and March 2025, as evidenced by the medical records marked **"JKK3"**.

9. Relying on the precedent set in **Paul Musili Wambua vs. Attorney General & 2 Others [2015] eKLR**, the Applicant asserts that the Court should exercise its unfettered discretion in his favour, as the delay is well-accounted for and not inordinately long. It is further submitted that the intended Appeal is not frivolous but is one with a high probability of success, specifically on the grounds that the trial Court erred in law and fact by imputing a trust where none existed without any supporting evidence. The Applicant maintains that the delay was largely a result of administrative lapses within the Court Registry coupled with personal family distress, and therefore, in the interest of substantive justice, he should be granted an opportunity to have his Appeal heard on its merits.

Respondent and Interested Party Submissions

10. Through their written submissions dated 25/11/2025, the Respondent and the Interested Party, vehemently opposed the Applicant's Notice of Motion dated 25/04/2025 and prayed that the same be dismissed with costs. Adopting the averments contained in the Replying Affidavit sworn on 27/05/2025, the Respondent contends that the Applicant has failed to satisfy the twin principles requisite for the grant of stay and extension of time as settled in a long line of authorities.

11. Specifically, the Respondent raises a fundamental objection to the existence of the suit property described as **Muguga/Muguga/4081** in the Draft Memorandum of

Appeal. It is submitted that the said parcel of land is non-existent, a fact corroborated by the Mutation Form annexed to the Replying Affidavit, which the Applicant has notably failed to rebut.

12. Relying on the judicial principles enunciated in **Robinson Kuto & 3 Others v Jackson Kariuki Kahungura & 5 Others [2018] KECA 122 (KLR)** and **Multimedia University & Another v Professor Gitile N. Naituli [2014]eKLR**, the Respondent submits that an Applicant must demonstrate a *bona fide* arguable Appeal that is not frivolous. The Respondent argues that since the Applicant seeks orders over a non-existent property, the intended Appeal is inherently defective, incapable of enforcement, and lacks any substratum.

13. Consequently, it cannot be said that the Appeal is arguable or that it would be rendered nugatory in the absence of a stay. The Respondent further dismisses the other grounds raised by the Applicant as flimsy and insufficient to move this Honourable Court to exercise its discretion in his favour. Therefore, it is submitted that the Application is a mere scheme to delay the execution of a valid Judgment and ought to be dismissed to allow the Respondent to enjoy the fruits of his litigation.

Analysis and Determination

14. The main issue for determination from the pleadings, Affidavits and the submissions is whether the Court should

uphold the Applicant's Notice of Motion dated 25/04/2025, primarily seeking leave to file an Appeal out of time and a stay of execution of the Judgment delivered in **Kikuyu PMCC Case No. 77 of 2023**. The Applicant attributes his delay to the late uploading of the Judgment on the Judiciary's Case Tracking System (CTS) and a personal family crisis involving his wife's hospitalization. Conversely, the Respondents oppose the application on the footing that the Appeal is fundamentally defective, as it refers to a non-existent property title, and that the explanation for the delay is neither candid nor sufficient.

15. In considering an application for extension of time, the Court exercises unfettered albeit judicial discretion. The Court of Appeal in its decision in the case of **Paul Musili Wambua v Attorney General & 2 Others [2015] eKLR**, held 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 ... are the length of delay, the reason for the delay, the chances of the Appeal succeeding, and the degree of prejudice to the Respondent."

16. Regarding the delay, the Applicant contends that the Judgment, though dated 17/12/2024, was only accessible on 17/01/2025. While administrative lapses in the Registry are not to be visited upon a party, the Applicant must still account for the period following the discovery of the Judgment. **Black's Law Dictionary (11th Edition)** defines discretion as a public official's power to act in certain circumstances according to personal judgment and conscience. However, this Court notes that the Applicant remained inactive throughout February and March 2025. The medical records provided indicate a transient hospitalization in January, which does not, in the Court's view, explain a three-month hiatus. As stated in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**:

"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... The party seeking extension of time has the burden to lay a basis to the satisfaction of the Court."

17. Furthermore, on the requirement of an arguable Appeal, the Respondents have demonstrated through a Mutation Form that the suit property described in the Draft Memorandum of Appeal Muguga/Muguga/4081 ceased to exist upon subdivision. An Appeal must have a substratum.

In **Multimedia University & Another v Professor Gitile N. Naituli [supra]**, the Court emphasized that an Applicant must demonstrate an arguable Appeal, which is one that is not frivolous and deserves a full hearing. Where an Appeal is directed at a non-existent title, it is rendered futile and incapable of enforcement. It would be an exercise in futility for this Court to grant leave to file an Appeal that is prima facie defective and legally stillborn.

18. The Applicant has failed to rebut the evidence regarding the subdivision of the land or provide a compelling reason for the delay post-January 2025. The Respondents' right to enjoy the fruits of their Judgment cannot be suspended indefinitely on the basis of an application that lacks candor. Consequently, the twin principles for the grant of stay and extension of time have not been met.

Final Orders

19. Upon careful consideration of the pleadings, the rival Affidavits, and the submissions of Counsel, the Court finds that the Application lacks merit. The Court hereby makes the following final orders:

i) THAT the Application dated 25/04/2025 be and is hereby dismissed in its entirety.

ii) THAT the interim orders of stay of execution, if any, are hereby vacated.

iii) THAT the costs of this Application are awarded to the Respondents.

Orders Accordingly.

**DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA VIA
VIDEOLINK THIS 22ND DAY OF APRIL, 2026.**

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**MOGENI J
JUDGE**

In the presence of:-

Mr. Masaviru for the Applicant

Mr. Njau Ngigi for the Respondent and Interested Party

Mr. Melita - Court Assistant

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**MOGENI J
JUDGE**