

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MILIMANI
ELCLMISC NO. E303 OF 2025

VILLA GREENS
LIMITED.....APPELLANT/APPLICANT
VERSUS
CREEKVIEW LIMITED.....
.....RESPONDENT

RULING

1. Before this court for determination is the notice of motion dated 30th September, 2025 filed by the appellant/applicant and it is expressed to be brought under **Order 51 Rule 1**, and **Order 50 Rule 6** of the **Civil Procedure Rules** and **Sections 1A, 1B, 3A** and **79G** of the **Civil Procedure Act** and **Article 50** and **159** of the **Constitution of Kenya** seeking the following orders:-

1. *Spent.*
2. *That this honourable court be pleased to extend time and grant leave to the applicant to lodge their memorandum of appeal out of time against the judgement and/decreed entered against the applicant by Hon. Gakuhi Chege on 26th day of August, 2022 in BPRT civil suit No 654 of 2019.*
3. *That the appellant be granted leave to file and serve the record of appeal out of time.*
4. *That costs of this application be provided for.*

2. The application is premised on the grounds on its face. It is further supported by the affidavit of Mwenda Sawa Chokera, the director of the appellant/applicant sworn on even date. The appellant/applicant deposed that they filed a reference to the Business Premises Rent Tribunal together with an application dated 11th July, 2015 and that the respondent, who is the landlord, filed a notice to terminate the tenancy dated 3rd October, 2019.
3. It was further deposed that the business premises rent tribunal proceeded to hear the matter and rendered its judgment on 26th day of August, 2022. Being dissatisfied with the said judgment, the appellant/applicant filed the memorandum of appeal dated 23rd September, 2022 and the same was amended on 5th March, 2024. Further, the matter proceeded for hearing and the court delivered its judgment on 15th August, 2025 and proceeded to strike out the appeal for the reason that there was no prayer sought in the amended appeal.
4. The appellant/applicant deposed that from the foregoing, the issues appealed against had not been addressed, and that for this reason, they would like them to be addressed. As a result, they seek leave of this honorable court to file a fresh appeal out of time from the judgment of the tribunal. Further, that there is an

arguable appeal that was filed early on, except that it was struck on the ground that it lacked the prayers sought which has now been amended.

5. The appellant/applicant argued that the respondent will not suffer any prejudice in case leave is granted, instead, they stand to suffer if leave is not granted as they will be denied the opportunity to canvas the appeal and demonstrate to the court that the tribunal erred in law and in fact in failure to address the issues that was raised with the reference.

6. In opposition thereto, the respondent filed the notice of preliminary objection dated 1st December, 2025, opposing the instant application on the following grounds:-

1) The application herein is res judicata in terms of Section 7 of the Civil Procedure Act, since the Appeal herein was heard and determined in ELC Appeal No. E082 of 2022.

2) The application herein is frivolous, vexatious and an abuse of the Court Process.

3) That from the foregoing, the applicant's notice of motion application dated 30th September, 2025 should be dismissed with costs to the respondent.

7. The respondent also filed its replying affidavit sworn on 2nd

February, 2026 by Vivek Shah. The respondent deposed that the appellant/applicant filed an appeal against the decision of the business premises rent tribunal vide the memorandum of appeal dated 23rd September, 2022 together with an application for stay of the judgment by the tribunal. Further, that this court dismissed the application for stay on 1st November, 2022 and issued the parties with directions for the filing of submissions, but on verification of the court's records, it was noted that the appellant/applicant had not filed the record of appeal.

- 8.** The respondent deposed that this matter has dragged long in court, and that on 15th August, 2025 it was struck out. Further, that the appellant/applicant has not disclosed sufficient reasons to be allowed to file a fresh appeal out of time and the respondent cannot continue to be unfairly punished for the applicant's lack of understanding of proper procedure since it has already been subjected to a three-year appeal process and, prior to that, a four-year litigation process at the tribunal level.
- 9.** The application was canvassed through written submissions. The respondent filed its submissions dated 10th March, 2026. I have not seen the written submissions filed by the appellant/applicant. Be that as it may, I have considered the application, the preliminary objection and the written submissions filed. The issue

for determination is *whether the appellant/applicant should or ought to be granted leave to file the memorandum of appeal.*

10. The appellant/applicant seeks leave of this court to lodge their memorandum of appeal out of time. The respondent filed a preliminary objection, arguing that this application is *res judicata*. According to the Black Law Dictionary 8th Edition a preliminary objection is defined as being:-

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary...”

11. The above legal preposition has been cemented in the now famous case of **Mukisa Biscuit Manufacturing Co. Ltd -VS- West End Distributors Ltd. [1969] E.A. 696**. The court then held that: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice

should stop.”

12. Section 7 of the Civil Procedure Act establishes the statutory basis for the doctrine of *res judicata* and provides that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

13. This doctrine was discussed by the Supreme Court in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR)**, where it was evaluated thus:-

“There are conditions to the application of the doctrine of res judicata:-

i. the issue in the first suit must have been decided by a competent court;

ii. the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as

a bar; and

iii. the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89.”

14. In the present matter, the parties and the issues were indeed the same before the court in ELCLA E082 of 2022, which was an appeal from the decision of the business premises rent tribunal case no. 654 of 2019. However, the said appeal was not determined on merit, but the memorandum of appeal was struck out on 15th of August, 2025 for failure to contain prayers to direct the court as to what the appellant/applicant wanted from the court.

15. Striking out and dismissal do not constitute the same thing. In the case of **Amondi v Airtel Networks Kenya Limited & 4 others; Central Bank of Kenya (Interested Party) (Judicial Review Application E101 of 2025) [2025] KEHC 11893 (KLR)** it was held that:-

“This court reiterates that the doors of justice are never closed to those who genuinely seek it. The striking out of the application dated 24th April,

2025 does not amount to a denial of justice, but rather serves as a procedural safeguard, intended to preserve the integrity of the court's processes. It affords the applicant an opportunity to return to the drawing board, reflect, conduct proper legal research and present an application that complies with the requirements of the law.

This principle is well grounded in judicial precedent, which recognizes that striking out is not necessarily fatal to a party's case, particularly where the defect is procedural and capable of being cured through due diligence and proper presentation. (See the principle espoused in Microsoft Corp. v Mitsumi Computer Garage Ltd [2001] 2 EA 460 and Peter Kipyegon Kirui v Agricultural Dev Co-operation & 2 Others [2007] eKLR, Christopher Michael Strong v Mwangi Mwaniki Gitonga, Eldoret HCCC No. 259 Of 2000 (unreported); And Jovenna East Africa Ltd v Sylvester Onyango & 4 Others, Milimani, HCCC No. 1086 of 2002..."

- 16.** For this reason, the instant application is not *res judicata*. The preliminary objection is therefore dismissed. I will now proceed to determine the instant application on its merits. The application is filed pursuant to **Section 79G** of the **Civil Procedure Act** which 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.”

17. As the appeal is one from the decision of the business premises rent tribunal, established under **Section 11** of the **Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Cap 301**, the same Act applies. **Section 15** of the Act states as follows:-

“Any party to a reference aggrieved by any determination or order of a tribunal made therein may, within thirty days after the date of such determinations or order, appeal to the high court”

18. The decision of the tribunal was made on 26th August, 2022. Indeed, at the appellate stage, the appellant/applicant has been indifferent in prosecuting the appeal and it is demonstrated through the quality of drafting. Extension of time is a discretionary power of the court, meaning that the court will examine the merit of the same on a case by case basis. The Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v. IEBC and 7 Others, Sup Ct. Application 16 of 2014** established the principles to be applied in exercising the

discretionary power to extend time:-

“Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis [for] where they seek [grant of it..... This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a court should consider in the exercise of such discretion:-

- 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 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. where there is [good] 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, the public interest should be a consideration for extending time.***
- 19.** This court struck out the memorandum of appeal on 15th August, 2025 and thereafter slightly more than six weeks later, the appellant/applicant filed the instant application. In my view, this period of time is not unreasonably long. The decision to strike out the appeal was to give the appellant/applicant the opportunity to correct its errors and approach the court in the ordinary standard where the party is required to state its prayers needed for the court's intervention. The memorandum of appeal was not determined at all, and therefore, the appellant/applicant is right in filing this application.
- 20.** However, the court cautions that this application should have been filed in the same file i.e. ELCLA No. E082 of 2022 to avoid duplicate files with the same issues.
- 21.** From the above, I find merit in the notice of motion dated 30th September, 2025 and I grant the following orders:
- i. The appellant/ applicant is hereby granted leave to file the memorandum of appeal out of time against the judgement and/decreed entered***

against the applicant by Hon. Gakuhi Chege on 26th day of August, 2022 in BPRT civil suit No 654 of 2019.

- ii. The memorandum of appeal to be filed within 7 days from the date hereof and it shall be filed in ELCLA No. E082 of 2022.***
- iii. Costs shall abide the outcome of the appeal.***

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 21ST DAY OF APRIL, 2026.**

**HON. MBOGO C.G.
JUDGE
21/04/2026.**

In the presence of:

Ms. Benson Agunga - Court assistant

Ms. Ng'ang'a for the Respondent

Mr. Oonge for the Applicant