



REPUBLIC OF KENYA



Trustees Anglican Church of Kenya & 6 others v Kafuta & 7 others (Environment and Land Appeal E069 of 2025) [2026] KEELC 1908 (KLR) (12 March 2026) (Ruling)

Neutral citation: [2026] KEELC 1908 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E069 OF 2025**

**A OMBWAYO, J
MARCH 12, 2026**

BETWEEN

THE TRUSTEES ANGLICAN CHURCH OF KENYA 1ST APPELLANT

PATRICK MAZA & 5 OTHERS 2ND APPELLANT

AND

JAPHETH MSHOTE KAFUTA 1ST RESPONDENT

MNGWANA KASTRUNGI & 6 OTHERS 2ND RESPONDENT

RULING

1. This ruling is in respect of the Appellants Notice of Motion application dated 8th October, 2025 and the Respondents Preliminary Objection dated 24th October, 2025. The Appellants Notice of Motion application seeks the following orders:
 1. Spent
 2. Spent
 3. That pending the hearing and determination of the Intended Appeal herein an order be granted, staying execution of the Judgement delivered on 14th August 2025 and its decree issued herein.
 4. This Honourable Court be pleased to grant leave to the Applicant to file and serve a Memorandum of Appeal and Record of Appeal out of time against the Judgment/Decree delivered on 14th August 2025 by the Honourable Chief Magistrate JB Kalo in MC ELC No. E159 of 2019 at Mombasa Magistrate's Court.
 5. Upon granting of the above order, the time for filing and serving the Memorandum of Appeal and Record of Appeal be extended as this Honourable Court may deem fit.



6. That this Honourable Court makes appropriate orders to preserve the subject matter of the Intended Appeal herein.
 7. That this matter be transferred to Voi ELC Court because all the parties herein reside in Taveta, which is closer to Voi ELC Court.
 8. The costs of this Application be provided for.
2. The application is supported by the annexed affidavit of Kennedy Mwandigha Machila, the 3rd Appellant, sworn on 8th October, 2025. He deponed that on 14th August, 2025, the Honourable Chief Magistrate JB Kalo delivered a Judgement in MC ELC No E159 of 2019 against the applicant and the decree is due for execution. He deponed that the intended appeal is arguable and has a high chance of success.
 3. The 3rd Appellant deponed that the delay in filing the appeal was occasioned by inadvertent oversight by their previous advocate who hardly updated them on the progress of their case. He deponed that they became aware of the judgment after he was served with the decree after the lapse of the 30 days statutory period to appeal. It was his deposition that the delay is not inordinate and the Respondents will not be prejudiced by granting the sought orders.
 4. The Respondents filed Grounds of Opposition dated 24th October, 2025. They stated that the application is an abuse of the Court process. They stated that the Appellants cannot be granted stay orders because there is no appeal and no leave has been granted to file an Appeal out of time. They stated that the Appellants should seek leave separately to file the Appeal out of time which they have not done. The Respondents asked the court to dismiss the application with costs.
 5. The Respondents filed a Preliminary Objection dated 24th October, 2025 on the following grounds:
 1. The Application is fatally defective and offends Section 75G of the *Civil Procedure Act* for reason that no appeal has been filed within thirty (30) days of the decision of the Magistrate court.
 2. The Applicants having filed the Appeal without leave there is no competent appeal before the Court.
 3. Order 50 Rule 6 cannot cure the anomaly of an Appeal which has been filed out of time without leave and as such the Application is incurably defective and an abuse of the process of the Court.
 4. The Appeal filed herein is a suit within the meaning of a suit given in Section 2 (b) of the *Civil Procedure Act* cap 21 Laws of Kenya and having commenced this matter as an Appeal the Applicant had a duty to comply with section 75G of the *Civil Procedure Act* cap 21 Laws of Kenya, it is only then that there can be a credible Appeal to sustain an Application. (sic)
 5. The results of incompetent Appeal is that it cannot sustain an application and it follows that the Application and Appeal should collapse.

Appellants Submissions

6. Counsel for the Appellants filed submissions dated 27th November, 2025 and identified the following issues for determination:
 - a. Whether leave should be granted to file the Appeal out of time?
 - b. Whether the Preliminary Objection is merited?



- c. Whether stay of execution pending appeal is warranted?
 - d. Whether the transfer to Voi ELC is in the interests of justice?
7. On the first issue, counsel submitted that the 3rd Appellant was served with the decree on 24th September, 2025 which was eleven days after the appeal period had expired. Counsel submitted that the intended appeal has a high chance of success and the draft Memorandum of Appeal raises serious and arguable grounds. Counsel submitted that the Appellant's face imminent eviction from land that they have occupied since 1992 while the Respondents will suffer no prejudice by maintaining the status quo pending the appeal. Reliance was placed on the following cases: *Thuita Mwangi vs Kenya Airways Limited*, Civil Appeal No 162 of 2002 and *Towett vs Kibaru & another* [2025] KECA 1650 (KLR).
 8. On the second issue, counsel submitted that the only error on the part of the Appellant is failing to file the Application under a Miscellaneous Application in the e-filing portal which does not render the application nugatory as it still holds the prayers which are clear to the court. Counsel submitted that there is no requirement that the Appeal has to be filed first before seeking leave to file out of time. Counsel relied on Article 50 and 159 (2) (d) of the *Constitution* of Kenya.
 9. On the third issue, counsel relied on provisions of Order 42 Rule 6 of the *Civil Procedure Rules*. Counsel submitted that on substantial loss, the Appellants face eviction, demolition of a church and financial harm. On furnishing security, counsel submitted that the Appellants are willing to deposit title documents or provide any other security the court may direct.
 10. On the fourth issue, counsel submitted that all parties reside in Taveta Sub-county. Counsel submitted that Voi Environment and Land Court is less than fifty kilometers away while Mombasa is over three hundred kilometers. Counsel submitted that the suit property is in Taveta and the transfer will drastically reduce costs and promote access to justice. Reliance was placed on Section 18 of the *Environment and Land Court Act*. Counsel asked the court to grant the orders sought in the application and dismiss the preliminary objection.

Respondents Submissions

11. Counsel for the Respondents filed submission dated 10th December, 2025. Counsel submitted that the Appellants have not given sufficient explanation for failure to file their appeal within the stipulated thirty days period. Counsel submitted that the previous advocate's failure to update the Appellant's on their case cannot justify the failure of the current advocate to file the appeal within time. Counsel submitted that the current advocate should have followed up on the progress of the case after receiving instructions. Reliance was placed on Section 16A of the *Environment and Land Court Act* 2011 and the case of *Tana and Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 others* [2015].
12. Counsel submitted that the Court cannot transfer a suit which is defective from one court to another. Counsel submitted that one must file an appeal first before seeking stay pending appeal. Counsel asked the court to dismiss the Notice of Motion Application dated 8th October, 2025.

Analysis And Determination

13. The issues for determination are:
 - a. Whether the Preliminary Objection dated 24th October, 2025 is merited?
 - b. Whether the Application for extension of time to file an appeal out of time is merited?



14. The Respondent’s preliminary objection is premised on offending provisions of Section 75 G of the Civil Procedure Act. It provides as follows:

“Every Appeal from a Subordinate Court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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.”

15. The Supreme Court in Independent Electoral & Boundaries Commission v. Jane Cheperenger & 2 Others [2015] KESC 2 (KLR) held :

“(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law...

(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

16. In the Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare, Appeal No. 3 of 2011 the East African Court of Justice adopted the following approach to preliminary objections:

“All the other so-called preliminary points were not at all preliminary points of law. Each and everyone of them involved the clash of facts, the production of evidence, and the assessment of testimony. Any such issue (depicting those features) cannot and should not be treated as a preliminary point. Rather, it becomes a matter of substantive adjudication of the litigation on its merits - with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross-examined; and a finding of fact then made by the court.” (Emphasis mine)

17. In this case an analysis of whether the Appellants offended the provisions of Section 75 G of the Civil Procedure Act will involve computation of time which is a factual issue and not a pure point of law.

18. The Appellants in their Notice of Motion application are asking this court to file their appeal out of time. The principles to be considered by the Court in exercising the discretion on whether to extend time, are stipulated by the Supreme Court’s decision in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, which are 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 a 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 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, public interest should be a consideration for extending time.”
19. A party that seeks extension of time to file an appeal out of time must satisfy the above principles, noting that it is not a right, but an equitable remedy, which is at the discretion of the court. In this case the Appellants have attached a draft memorandum of appeal in their application. The application is dated 8th October, 2025 whereas the Judgment which is the subject of the appeal was rendered on 14th August, 2025. This is inordinate delay. The court is not satisfied with the Appellant’s reasons for the delay as the applicant has not demonstrated that he sought any information about the judgment from his advocate. The Appellants Notice of Motion application dated 8th October, 2025 lacks merit and I issue the following orders:
- a. The Respondents Preliminary Objection dated 24th October, 2025 is hereby dismissed. Each party shall bear their own costs.
 - b. The Appellants Notice of Motion application dated 8th October, 2025 is hereby struck out. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF MARCH, 2026.

HON. JUSTICE ANTONY O. OMBWAYO

MOMBASA ENVIRONMENT AND LAND COURT

