



**Muthama & 3 others v Ngari (Miscellaneous Application
E037 of 2025) [2026] KEELC 2605 (KLR) (30 April 2026) (Ruling)**

Neutral citation: [2026] KEELC 2605 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
MISCELLANEOUS APPLICATION E037 OF 2025**

EC CHERONO, J

APRIL 30, 2026

BETWEEN

STEPHEN MUTHAMA 1ST APPLICANT

ALICE NZILANI MUTHAMA 2ND APPLICANT

DAUGLAS MAINGI MUTHAMA 3RD APPLICANT

PETER KAMAU MUTHAMA 4TH APPLICANT

AND

JANE WAMBUI NGARI RESPONDENT

RULING

1. Vide the Notice of Motion application dated 03/12/2025, the Applicants are seeking orders of enlargement of time within which to file a Memorandum of Appeal out of time from the judgement in Siakago ELC Case No. E021 of 2021 delivered on 23/10/2025. They also seek a stay of execution of the judgment pending the hearing and determination of the intended appeal.
2. The application is based on grounds on the face of the application supported by the affidavit of the 2nd Applicant, Alice Nzilani Muthama sworn on 03/12/2025. She deposed that on 23/10/2025 the court delivered judgment in favour of the Respondents against her. She further stated that the advocate who was representing her in the Magistrate's Court did not inform her of the said judgment until 28/11/2025. That according to the judgment, she was required to vacate her home by 23/01/2026. She averred that she has now instructed a new advocate to come on record and represent her at the appeal stage. She contends that she has a good appeal which should be heard and determined on merit.
3. She further contends that unless the application is allowed and an order for stay granted, the entire object of the appeal will be defeated and rendered nugatory as the Respondent will have proceeded to execute the judgement of the Court to her detriment. She averred that failure to file the appeal on



time was inadvertent and that the Respondent will suffer no prejudice if the orders sought are granted. She attached to the supporting affidavit a copy of the judgement and decree and a copy of the draft memorandum of appeal.

4. The Respondent in opposition to the application filed a replying affidavit dated 24/12/2025 and deposed that it was incumbent upon the Applicants to exercise due diligence by following up on the outcome of their case with their former advocate or registry. She averred that the Applicants did not annex any evidence to substantiate their claim that they were not informed of the delivery of the judgement in good time. That the Applicants were granted a period of 90 days within which to vacate the suit property and therefore, they stand to suffer no prejudice should the orders of stay not be granted as they hold no proprietary interest in the suit property.
5. She averred that she will suffer grave prejudice if the orders are granted as she is the lawful and registered proprietor of the suit land and has litigated over it for over five years. That the present application is intended to delay the conclusion of the matter and frustrate her enjoyment of the fruits of the judgment. She contended that the Applicants claim that they have an arguable appeal is misconceived and unfounded as the annexed draft memorandum of appeal does not raise any triable or weighty issues for determination.
6. She further contended that the purported grounds of appeal are repetitive, generalized and do not disclose any error of law or fact warranting appellate intervention. She averred that the application had been brought after inordinate and unexplained delay, is misconceived, unmerited and an abuse of the court process. That the application is also an after-thought intended to unjustly deny her the opportunity to enjoy the fruits of her lawful judgement while aiding indolent litigants. She urged that the application be dismissed with costs.
7. The Applicants filed a supplementary affidavit dated 21/01/2026 sworn by Alice Nzilani Muthama. She averred that she is the legal beneficial owner of land parcel Mbeere/Wachoro/1151 and that she has been in occupation of the land since the 1980's and has constructed a house for her family and cultivated maize on the land. She averred that their application which was filed on 03/12/2025, 10 days after the period required for filing the memorandum of appeal had lapsed, was not filed with inordinate delay so as to deny her the right to be heard on appeal.
8. She averred that the judgement herein was delivered virtually in the absence of her then advocates and that her memorandum of appeal raises triable issues. She averred that she stands to suffer irreparable loss if the orders sought are not granted as she has resided on the suit property for the last 40 years and built a family home where all her children reside. She attached photographs of her homestead.
9. When the application came up for directions, the parties agreed to canvass it by way of written submissions and affidavit evidence. The Applicants filed submissions dated 21/01/2026 through the firm of Vusha, Onsembe and Mabiri Advocates. They submitted that Section 79G of the [Civil Procedure Act](#) governs applications to enlarge time to file an appeal. The section provides that an appeal from a subordinate court to the High Court should be filed within thirty (30) days from the date of the decree or order appealed against, but the court may admit an appeal out of time if the appellant demonstrates good and sufficient cause for failing to file the appeal in time.
10. Counsel submitted that the principles guiding extension of time are well settled and relied on *Thuita Mwangi vs Kenya Airways Ltd (2003) eKLR*, where the court reiterated the decision in *Mutiso v Mwangi (1997) KLR 630* that the court exercises discretion whether or not to grant an extension of time to appeal and considers the length of delay, the reason for the delay, the chances of the appeal succeeding, and the degree of prejudice to the respondent. They further relied on the Supreme Court



decision in *Nicholas Kiptoo Korir Arap Salat vs IEBC & 7 Others* [2014] eKLR, where the court outlined guiding principles applicable in an application for leave to appeal out of time.

11. Counsel further submitted that in this case, the judgment of the lower court was delivered on 23/10/2025 in the absence of both parties through Microsoft Teams. The Applicant contended that she was not aware of the delivery of the judgment and was only informed by her advocate on 28/11/2025. The present application was filed on 03/12/2025, which translates to a delay of approximately ten (10) days after learning of the judgement, which counsel argued was not inordinate. It was further submitted that a cursory perusal of the intended Memorandum of Appeal demonstrates that the intended appeal is arguable and meritorious, and therefore deserving of the court's discretionary powers. Counsel relied on *Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another* [2018] eKLR, where the court held that at this stage an applicant only needs to demonstrate that the appeal is arguable and not that it has a high probability of success.
12. On the issue of prejudice, counsel submitted that the Respondent would suffer no prejudice if the orders sought are granted other than having to wait longer, which can be adequately compensated by an award of costs. They relied on *George Kianda & Another vs Judith Katumbi Kathenge & Another* [2018] eKLR, where the court observed that costs can remedy most prejudice in litigation. On the prayer for stay of execution pending appeal, counsel relied on Order 42 Rule 6(2) of the Civil Procedure Rules, which requires an applicant to demonstrate substantial loss, absence of unreasonable delay, and willingness to provide security.
13. It was submitted that the application was filed ten (10) days after the Applicant became aware of the judgment, which does not amount to unreasonable delay. Counsel further argued that the Applicant stands to suffer substantial loss if stay is not granted as the Respondent is on the verge of dispossessing her of the suit property, which is her homestead where she has lived since the 1980s and where her family resides. On whether the Applicant has established a sufficient cause, they submitted that the Applicant had sufficiently demonstrated that unless the orders sought are granted, the substratum of the intended appeal will be destroyed and the appeal rendered nugatory. They urged that the application be allowed.
14. The Respondent filed submissions dated 31/01/2026 through the firm of E.C Gitonga and Company Advocates. They submitted that according to Section 79G of the [Civil Procedure Act](#), before the court considers extension of time, the Applicant must satisfy the court that there was good and sufficient cause for filing the appeal out of time. They further relied on the decision of the Supreme Court in *Nicholas Kiptoo Korir Arap Salat vs IEBC & 7 Others*, which outlined the principles applicable in applications for extension of time. It was submitted that judgment in the lower court was delivered on 23/10/2025, and the statutory period for filing an appeal lapsed on 22/11/2025, yet the present application was filed on 03/12/2025, 11 days after the lapse of time, without any credible or documentary explanation for the delay. Counsel argued that the Applicants merely shifted blame to their former advocate and the court registry but failed to annex any letters, emails, affidavits, or correspondence to substantiate those allegations. They cited the case of *Kamau v Nyoike* (2024) KEHC 1952 (KLR) to emphasize the importance of attaching evidence in case there is a claim of delay from the registry in supplying certified copies of judgements or ruling for purposes of appeal.
15. Counsel also cited *Moses v Kilonzo & Another*, where the court held that however short the delay may be, it must be satisfactorily explained. Counsel therefore submitted that although the delay of 11 days may not be inordinate, the Applicant failed to provide a plausible explanation for the delay, and the application should therefore be dismissed. On whether the intended appeal is arguable, counsel submitted that the draft Memorandum of Appeal raises generalized and repetitive grounds, does not point to any error of law or fact, and merely seeks to re-litigate issues conclusively determined by the



trial court. Reliance was placed on *Mwangi & Another v Muiruri (2024)* eKLR, where the court found that the appeal did not raise arguable grounds of appeal and that the chances of the appeal succeeding were slim thereby declining to enlarge time to file an appeal.

16. With respect to the prayer for stay of execution pending appeal, counsel submitted that the applicable provisions are Order 42 Rule 6 of the Civil Procedure Rules, which require an applicant to demonstrate substantial loss, absence of unreasonable delay, and provision of security for the due performance of the decree. Counsel relied on *Katam & 2 Others v Maiyo & Another (2024)* KEELC 6285 (KLR), where the court outlined the conditions for stay of execution pending appeal, namely the existence of an arguable appeal, demonstration of substantial loss, absence of unreasonable delay, and provision of security. It was further submitted that failure to satisfy any one of those conditions is fatal, as affirmed in *Vishram Ravji Halai v Thornton & Turpin (1990)* eKLR.
17. On the question of substantial loss, counsel argued that the Applicants have not demonstrated any real or irreparable loss. They averred that the Applicants have merely alluded to the fact that there is an impending eviction which is a lawful process of execution as pointed by the court in *Katam & 2 Others v Maiyo & Another (2024)* KEELC 6285 (KLR). Finally, counsel submitted that the Applicants failed to offer any security for the due performance of the decree as required which they averred is fatal to their application. They urged that the application be dismissed with costs.
18. I have considered the application, the responses filed thereto and the parties' submissions. The issues that arise for determination are whether the Applicants have established sufficient cause to warrant extension of time to file an appeal out of time and whether they have met the threshold for the grant of stay of execution pending appeal.
19. On the issue of enlargement of time within which to file an appeal out of time, Section 79G of the [*Civil Procedure Act*](#) provides that:

“Time for filing appeals from subordinate courts 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.”
20. The principles applicable to an application for enlargement of time were discussed by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014]* eKLR 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 ought to 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, which ought to be explained to the satisfaction of the Court;



5. Whether there would be any prejudices suffered by the respondent's if the extension was granted;
 6. Whether the application had been brought without undue delay; and;
 7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.
21. In the present case, the judgment sought to be appealed against was delivered on 23/10/2025. The statutory period for filing an appeal therefore lapsed on or about 22/11/2025. The present application was filed on 04/12/2025, which is approximately twelve (12) days after the lapse of the statutory period. The explanation offered by the Applicants is that the judgment was delivered virtually in the absence of their advocate and that they were only informed of the judgment on 28/11/2025, following which they instructed new counsel who promptly filed the present application. Although the Respondent contended that the Applicants did not provide documentary proof to support that explanation, the delay involved is relatively short. In the circumstances of this case, I am persuaded that a delay of about twelve (12) days cannot be said to be inordinate.
22. I have also perused the draft Memorandum of Appeal annexed to the application. Without delving into the merits of the appeal at this stage, I am satisfied that the Applicants have raised issues which are arguable. Taking all the circumstances into account, I am satisfied that the Applicants have provided a sufficient basis to warrant the exercise of this court's discretion in their favour. I therefore find that the Applicants have established sufficient cause to justify enlargement of time within which to file their appeal.
23. The second issue for determination is whether the Applicants have satisfied the conditions for the grant of stay of execution pending appeal. The applicable law is Order 42 Rule 6 of the Civil Procedure Rules, which requires an applicant to demonstrate that substantial loss may result unless the order is made, that the application has been brought without unreasonable delay and that the applicant is willing to provide security for the due performance of the decree. The Applicants contend that the suit property is their homestead where they have resided since the 1980s and where their family home is situated. They state that unless stay is granted they stand to be evicted from the property, thereby rendering the intended appeal nugatory. In my view, the eviction of a party from property which they claim to have occupied for over 40 years is a matter that may occasion substantial loss if the appeal ultimately succeeds. It is therefore necessary to preserve the subject matter of the dispute pending the hearing and determination of the intended appeal.
24. I also note that the present application was filed shortly after the Applicants became aware of the judgment and therefore cannot be said to have been brought with unreasonable delay. With regard to security for the due performance of the decree, I am of the view that With regard to security for the due performance of the decree, I am of the view that the court has the discretion to impose such security notwithstanding that the applicants did not offer it. In the circumstances, I am satisfied that this is a proper case in which to exercise the court's discretion in favour of granting both leave to appeal out of time and stay of execution pending appeal.
25. In the premises, I find that the Notice of Motion application dated 03/12/2025 is merited. Consequently, I make the following orders:
- a. The Applicants are hereby granted leave to file their Memorandum of Appeal out of time against the judgment delivered on 23/10/2025.



- b. The Applicants shall file and serve their Memorandum of Appeal within fourteen (14) days from the date of this ruling, failing which the leave granted herein shall automatically lapse.
- c. There shall be an order of stay of execution of the judgment delivered on 23/10/2025 pending the hearing and determination of the intended appeal.
- d. The order of stay of execution is granted on condition that the Applicants deposit security in the sum of Kshs. 100,000 in court or in a joint interest earning account in the names of the advocates for the parties within thirty (30) days from the date hereof, failing which the order of stay shall automatically lapse.
- e. Costs of the application shall abide the outcome of the appeal.

READ, DELIVERED AND SIGNED AT EMBU THIS 30TH DAY OF APRIL, 2026.

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HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Rugano for the plaintiff
2. Defendant/Advocate-absent
3. Diana Kemboi C/A

