



**Shilaro v Shilaro & another (Civil Appeal (Application)  
118 of 2024) [2026] KECA 755 (KLR) (24 April 2026) (Ruling)**

Neutral citation: [2026] KECA 755 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL (APPLICATION) 118 OF 2024  
HA OMONDI, JA  
APRIL 24, 2026**

**BETWEEN**

**JOHN SHILARO ..... APPLICANT**

**AND**

**SHEM FESTO SHILARO ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL SINDANI SHILARO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application seeking extension of time to file and serve Notice of Appeal out of time from the ruling of the Environment and Land Court at Kakamega (Obungo, J.) dated 16th January, 2025 in Case No.017of 2022)*

**RULING**

1. The applicant had initially filed a suit against the respondents in Butali MCELC No. 9 of 2019, claiming ownership of the land N/Kabras/Surungai/1148; and seeking eviction of the respondents who had begun construction of a house, and were also conducting farming activities; he also sought removal of a caution which the respondents had lodged in respect of the suit property. The respondents denied the claim and prayed for its dismissal. The learned magistrate in his finding ordered that:

“...the parties to invite a surveyor to hive one (1) acre for the 1<sup>st</sup> defendant and one (1) acre (sic) for the 2<sup>nd</sup> defendant from parcel No. N/Kabras/Surungai/1148.”

2. Dissatisfied with this outcome, the applicant successfully appealed in Kakamega ELC No.017 of 2022 where the court (Cherono, J.) on 25<sup>th</sup> April 2024, held as follows:

“I find merit in this appeal, and I therefore allow it. I set aside the judgment of the Subordinate Court and replace it with the following orders:



The respondents' counterclaim is dismissed. The respondents to vacate the parcel of land known as N/Kabras/Surungai/1148 within 90 (ninety) days from the date of delivery of this judgment. In default, the Subordinate Court to issue an eviction order.

The caution registered against land parcel number N/Kabras/Surungai/1148 on 21<sup>st</sup> June 2018 as entry number 7 in favour of Peter Juma Shilaro be removed by the Land Registrar”

3. The respondents in a notice of motion application dated 6<sup>th</sup> May, 2024, the respondents/applicants sought stay of execution of the judgment, the decree and all consequential orders, pending hearing and determination of an appeal to the Court of Appeal. On the 16<sup>th</sup> January, 2025, the Environment and Land Court (Ohungo, J.), delivered a ruling in Kakamega ELC No. 017 of 2022, ordering stay of execution of the appeal judgment which had been in the applicant's favour.
4. The applicant, John Shilaro was dissatisfied with the outcome and instructed my advocate to appeal the same. That being a lay man, he was confident that his advocate had moved to file the intended appeal. It was only after making an inquiry from the said advocate that the applicant learned that the notice of appeal had not been filed.
5. The applicant has thus filed this Notice of Motion dated 31<sup>st</sup> January 2026, seeking leave to file his appeal out of time. The applicant blames the delay on his advocate whom he says failed in his duty yet he had given clear instructions. He contends that he should not be punished for counsel's indolence; and in support of this proposition, cites the case of Owino Ger vs. Marmanet Forest Co-Operative Credit Society Ltd [1987] eKLR; CFC Stanbic Limited vs. John Maina Githaiga & another [2013] eKLR, where the Court variously declined to visit wrongs committed by advocates and their staff on innocent clients where it had been sufficiently demonstrated that clients were not to blame for such default.
6. In opposing the application, the 1<sup>st</sup> respondent Samuel Sindani Shilaro, by a replying affidavit dated 20<sup>th</sup> January 2026, describes the said application as inept, incompetent, frivolous, ill-conceived, and without merit; and urges for its dismissal, saying that the supporting affidavit as filed is defective as the same is undated, and the 2<sup>nd</sup> respondent's identity is unknown; that that the applicant's claim that he instructed his advocate to appeal the ruling is a blatant lie, as he has not produced any document to support the same.
7. The respondent further contends that that the applicant ought to have sought leave of the Court that delivered the ruling to appeal against the said ruling, which has never been done to date; that in any event, there is no notice of appeal filed and/or adduced by the applicant and that it is worth noting that the applicant uploaded the instant application on 5<sup>th</sup> November 2025, about 10 months after the ruling was delivered that the case belongs to the litigant, not the advocate; the applicant was indolent in moving the court appropriately, and this Court should not aid him in delaying the appeal and adding to the case backlog. He urges the court to be guided by the equitable maxim that: "Equity aids the vigilant and not the indolent," and find that the applicant has no remedy in failing to utilize his right to appeal within the limited timeframe as provided by the law.
8. An application for extension of time is catered for under rule 4 of the Court of Appeal Rules which grants this Court unfettered discretion without paying regard to several factors which were set out in various authorities such as Fakir Mohammed vs. Joseph Mugambi & 2 others [2006] eKLR, which was quoted in Mukunga Njoka vs. Wanjiku Njoka (2005) eKLR. Indeed, it has been pointed out in various authorities by this Court that extension of time is not a right to a party, rather it is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks extension of time has the burden of laying basis to the satisfaction of the court. In considering the prayer, a court



must also take into account whether there will be any prejudice suffered by the respondent if extension is granted; and whether the application has been brought without undue delay.

9. I acknowledge that indeed, the Supreme Court of Kenya in the case of Nicholas Kiptoo Korir Arap Salat vs. IEBC [2014] eKLR set down the guiding principles to consider in the exercise of discretion. One other consideration included by the learned Judge in the case of Julius Kamau Kithaka vs. Waruguru Kithaki & 2 Others (2013) eKLR is whether prima facie the intended appeal has chances of success or is a mere frivolity.
10. The applicant in his submissions has attempted to explain the delay as an omission and/or mistake on the part of lawyer and absolves himself from any fault. I recognise that the alleged mistake of counsel does not of itself cure a litigant's own inaction, basically because it is a litigant's case and not that of his counsel. The primary responsibility to act within the prescribed timelines under this Court's Rules rests heavily on the litigant's shoulders. Indeed, with regard to the responsibility of the litigant to follow up their case, Waki, J.A. had this to say in Habo Agencies Limited vs. Wilfred Odhiambo Musingo [2015] eKLR:

“It is not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”
11. On the issue as to whether or not the intended appeal has no chance of success, this Court is conscious of the fact that it is not the role of a single judge to determine the merits or otherwise of the appeal. This Court has held in the case of Athuman Nasura Juma vs. Afwa Mohammed Ramadhan [2016] eKLR:

“...this court has to be careful to ensure that the intended appeal has merit or not is not an issue to be determined with finality by a single Judge”.
12. I bear in mind the afore-going principles whilst determining this application. In this case, the ruling was delivered on 16<sup>th</sup> January 2025; the Notice of Appeal ought to have been filed within 14 days of the decision. The instant application was filed on 5<sup>th</sup> November 2025. Of course, the applicants have not presented any letter of instruction to their advocate, to fortify their claim that they had given instructions. The other consideration to be borne in mind, relates to whether the respondent will suffer any prejudice, the respondents sought stay orders so as to pursue an appeal, which in effect gives the applicant herein to still vent the issues he is aggrieved about, and I detect no grievous prejudice if the orders sought are not granted. I think what is critical at this stage is, whether the reason for the delay has been adequately explained, and whether thereafter the applicant acted in a timely manner.
13. Having considered the scenario presented, and the arguments advanced, I find that length of the delay, and the reason for the delay does not predispose the applicant to a favourable outcome. I am disinclined to exercise discretion in favour of the applicant; and the application is dismissed with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF APRIL, 2026.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.



Signed

DEPUTY REGISTRAR

