



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC LAND CIVIL SUIT NO. E020 OF 2023

DANIEL JOSEPH GATHAIYA

NJAGI.....PLAINTIFF

VERSUS

SYOKIMAU FARM LIMITED & 15 OTHERS.....

DEFENDANT

RULING

1. This ruling aims to determine the notice of motion dated 15 October 2025, filed by Agnes Gathaiya Alias Joan Agnes Wairimu Gathaiya and Peter Ndegwa Gathaiya as executrix/executor of the deceased plaintiff, who died during these proceedings. The motion is expressed to have been made within the provisions of **Section 3A** of the **Civil Procedure Act, Orders 8, Rule 3, 24 Rule 3, and 51 Rule 1** of the **Civil Procedure Rules, 2010**, and all other enabling laws. They seek the following orders from this court: -

a) THAT, by way of substitution, the names of Agnes Gathaiya alias Joan Agnes Wairimu Gathaiya and Peter Ndegwa Gathaiya be made parties to these proceedings as the plaintiffs.

b) THAT the costs of this application be in the cause.

2. The motion is premised on the grounds of the body thereof and the supporting affidavit of Agnes Gathaiya, deposed on the instant date. Concisely, she informs the court that the plaintiff in the present suit died on 27 April 2025. Nevertheless, on 3 September 2025, the **Nairobi High Court, in Succession Cause No. E466 of 2025**, issued a Grant of Probate with Will annexed to herself and Peter Ndegwa Gathaiya for the purpose of prosecuting this suit. To safeguard the interests of the deceased's estate, it is necessary for an order of substitution to be issued.

3. None of the parties opposed the motion

a. The plaintiff is guilty of unreasonable delay.

b. No sufficient reason has been given for failure to file the appeal within the statutory timelines.

c. The plaintiff does not have an arguable and meritorious appeal.

d. The motion has not met the threshold required in law to merit the grant of the orders sought.

e. The motion is frivolous and an abuse of court process, and as such should be dismissed with costs.

4. Regarding the 2nd defendant, he opposed it via his replying affidavit, sworn on 30 September 2025, where he succinctly states that the reasons provided by the plaintiff do not constitute sufficient cause to grant leave to file a notice of appeal out of time. Moreover, during the period from 11th to 14th July 2025, the judiciary provided that time-sensitive pleadings be shared with the respective court stations via the provided email addresses, with copies forwarded to certain email addresses for processing; however, no evidence has been provided to show that the plaintiff complied.

5. Furthermore, the ruling was delivered on 17 June 2025, and the statutory deadline for filing the notice of appeal expired on 1 July 2025. One of the reasons given was CTS outages; however, these outages occurred between 11th and 14th July 2025, after the statutory period had already expired.

Additionally, despite attributing the delay to the e-filing system outage, the motion was filed more than a week after the outages were reported, demonstrating a lack of urgency. Additionally, upon delivery of the impugned ruling, the plaintiff's advocates expressed their intention to appeal, and the court informed them that they had 14 days to file the notice of appeal.

6. Accordingly, following the court's directions, the motion was argued through written submissions filed by the law firms representing all parties. In compliance, **Ms. Otwal & Partners LLP** for the plaintiff dated **26 January 2026**; **Ms. Henia Anzala & Associates** for the 1st defendant dated 16 December 2025; and **Ms. KMK Africa Advocates LLP** for the 2nd and 3rd defendants dated 5 February 2026. Thus, having carefully considered the motion, its grounds, affidavits, submissions, legal framework, and relevant jurisprudence, including those relied upon by counsel, the key issue for determination is **whether the plaintiff has satisfied the legal threshold for granting leave to file a notice of appeal out of time**. We will now proceed to analyse and determine this issue.

7. Concerning this issue, the relevant law that confers this court as a court of equal status with the High Court, with jurisdiction to entertain motions seeking leave to file a notice of appeal out of time to the Court of Appeal against the decisions of this

court is found in **Section 7** of the **Appellate Jurisdiction Act**, which provides as follows: -

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

8. This provision of law has been subject to judicial interpretation by courts of concurrent jurisdiction with this court and the Court of Appeal. ***Refer to Trimborn Agricultural Engineering Limited V David Njoroge Kabaiko & Another [2000] KECA 9 (KLR), Loise Chemutai Ngurule & another v Wilfred Leshwari Kimung’en & 2 others [2015] KEELC 447 (KLR), and Sammy Kuria Ndung’u v Samuel Mbugua Ikumbu [2021] KEHC 7665 (KLR).*** This court hereby affirms these decisions and of particular interest is the binding Court of Appeal decision in **Trimborn (Supra)**, which held that although a superior court possesses jurisdiction under **Section 7** of the **Appellate Jurisdiction Act** to extend time for a litigant intending to file a notice of

appeal to the Court of Appeal for the first time and prior to any action taken at the Court of Appeal, such authority ceases once the intended appellant has undertaken any step at the Court of Appeal. In this instant, there is no evidence that the plaintiff has taken any step at the Court of Appeal; hence, the motion is properly before this court.

9. In regard to the prevailing jurisprudence and as submitted by all the parties, the decision of the apex court, **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**, espoused the guiding non-exhaustive principles that guide courts in entertaining applications of this nature. In this decision, the apex court summarised the non-exhaustive principles 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.”**

10. Further, in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] KECA 701 (KLR)**, a Court of Appeal decision relied upon by the 2nd and 3rd defendants, which this court concurs with, the binding decision stated: -

“[12] The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

11. In considering the motion, this court has to bear in mind that though it has unfettered discretion, it must exercise its

judicious discretion which is anchored on reason, material, and evidence placed before it. Furthermore, the circumstances of each case are unique, as even a single day can be tantamount to delay, and each case must be considered on its own set of conditions.

12. Respecting the first point for consideration of delay, and although not addressed in the plaintiff's submissions, the instant motion was filed on 22 July 2025, which was slightly over a month since the impugned ruling was rendered, which is not inordinate. Consequently, this court, in disagreement with the 1st defendant, finds that there was no delay in filing the present motion.

13. As for the second point concerning a reasonable and satisfactory explanation, which all parties in their submissions addressed, this court, upon deliberation of the reasons for the delay, concurs with the defendants that the two reasons advanced by the plaintiff are not satisfactory to warrant the exercise of discretion in the plaintiff's favour, as shall be demonstrated shortly.

14. The first reason for the delay that the plaintiff posited is that he was still contemplating whether he should appeal due to risks and costs. With all due respect to the plaintiff, the decision to lodge the notice of appeal was clearly his responsibility from the moment the decision was made in

court, in the presence of his counsel, who, as his duly authorised agent, informed the court that he had instructions to appeal, and the court informed him he had 14 days. Having procrastinated and dawdled his decision for a month, he cannot now complain about his own negligence and laxity. In this court's humble opinion, delayed indecisiveness does not amount to good and sufficient reasons for the delay.

15. The plaintiff's second reason pertains to the CTS outages. To support this claim, he submitted notices issued by the judiciary dated 11 and 14 July 2025. This court has reviewed these notices and, in agreement with the 2nd and 3rd defendants, finds no nexus between them and the delay in question, as the court's decision was made on Tuesday, 17 June 2025. The plaintiff had 14 days to file his notice of appeal, which was due by Tuesday, 1 July 2025, well before the disruption occurred. Moreover, the circumstances in **Nyongesa v Lukuyu [2025] KECA 1044 (KLR)**, a decision relied upon by the plaintiff, are distinguishable from this case since, in the present instance, his counsel was aware of the ruling, attended its delivery, and the court uploaded it onto the CTS on 18 June 2025.

16. Additionally, having found in the impugned ruling that this suit was *res judicata* and considering there is allegedly another appeal in the Court of Appeal in **Nairobi Civil Appeal No.**

E067 OF 2023, it is undeniable that the defendants will suffer prejudice.

17. Utmost, this court concludes, finds, and holds that the motion does not meet the legal threshold to warrant the exercise of discretion in favour of the plaintiff. It also finds that the notice of motion dated 22 July 2025 is not merited. It is dismissed. It is trite law that costs follow the event, and costs are awarded to the defendants as the plaintiff is unsuccessful.

Orders accordingly.

Delivered and Dated at Machakos this 5th day of May, 2026.

**HON. A. Y. KOROSS
JUDGE
05.05.2026**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms. Kanja Court Assistant

Miss Odero for 5th defendant.

Miss Ngulukyo for 2nd and 3rd defendants.

ORIGINAL