

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ELC MISC. APPLICATION NO. E001 OF 2025

PAUL KILONZI

APPLICANT

VERSUS

MULATYA KAMUTI

RESPONDENT

RULING

1. By a motion on notice dated 11/3/2025 and filed in court on 13/3/2025, the applicant - PAUL KILONZI - wishes, *inter alia*, to get from this court an order for leave to file appeal out of time and an order for stay of execution of judgement. He also wants stay of other post - judgement orders issued in Civil Suit No. CM ELC No. E020 of 2022, Mwingi. The application is expressed to be brought under Sections 3A, 79G and 95 of Civil Procedure Act (Cap 21), Article 159 (2) of the Constitution of Kenya, 2010, Order 22 Rule 22, Order 42

Rule 6, Order 50 Rule 6, Order 5, Rule 1 all of Civil Procedure Rules, 2010, and all other enabling provisions of the law. It is brought against the respondent - MULATYA KAMUTI.

2. In the lower court, the respondent had impleaded the applicant seeking, *inter alia*, a transfer of land parcel No. MWINGI/MWINGI/3450 in Mwingi adjudication area, to himself for the reason that he had bought the land from the applicant. The lower court heard the matter and on 10/8/2023 delivered a judgement in favour of the respondent.

3. More specifically, the application as filed came with five (5) prayers - which were itemized as 1, 2, 3, 4 and 5 - but some of them - specifically prayers 1 and 3 - were for consideration at the ex-parte stage. The two prayers are moot now. The prayers to consider now are three - prayers 2, 4, and 5 and I now take liberty to set them out herein ad verbum:

Prayer 2: That this honourable court grant leave to the applicant to appeal out of time against the judgement of the honourable I. G. Ruhu (SRM) in

Mwingi – Magistrate Court CM ELC Suit No. E020 of 2022 delivered on 10th August 2023.

Prayer 4: That pending the hearing and determination of the appeal an order do issue to stay the execution of judgement and all other consequential and/or subsequent orders emanating from Chief Magistrate’s court at Mwingi CM ELC Suit No. E020 of 2021.

Prayer 5: Costs of the application be in the cause.

4. The grounds on which the prayers are premised are on the face of the application and are further elaborated in the supporting affidavit that came with the application. Briefly stated, the applicant averred that delay in filing the appeal was caused by factors beyond his control. He said that he only got a copy of the judgement sometimes in March 2025 and upon reading it, he felt aggrieved. He then decided to file appeal and hence came to court via this application without delay. According to him, his appeal has good chances of success.

5. The court first entertained this application ex-parte on 17/3/2025. At that stage, the court directed that the application be served. The matter came up in court again on 3/4/2025 and the respondent, though served, did not show up. The matter came up in court yet again on 28/5/2025 and the respondent still did not turn up despite being served. The applicant wanted the application allowed but the court directed that submissions be filed.
6. Thereafter, submissions dated 4/7/2025 were filed. In the submissions, the applicant reiterated that the delay in filing the appeal was caused by factors beyond his control. He wanted to appeal, he said, but the court proceedings took long to be typed. He got the typed judgement sometimes in February 2025. To persuade the court to grant him the prayers he is seeking, he proffered and quoted the cases of **Paul Musili Wambua -vs- Attorney General & 2 others [2015] eKLR and Mwangi & Another -vs- Muiruri (Civil Appeal No. 237 of 2023) KEHC 5830 (KLR) 23rd May 2024) (Ruling).**

7. In the cases aforesaid, it was emphasized that whether or not to grant leave to appeal out of time is a matter of court's unfettered discretion with the only rider being that the discretion itself has to be based on reasons, and not on whims or caprice (See Paul Musili's case - supra). Further, in cases where the delay in filing the appeal arises from failure by the court to furnish proceedings on time, the court should not be quick to drive an intending appellant from the seat of justice (See Mwangi's case - supra).
8. Ultimately this court was urged to allow the application.
9. I have considered the application as filed and the submissions on record. It would have been necessary to get the respondent's input but there is unfortunately no response from that side.
10. In the Supreme Court's case of **Mwambora & 9 others - vs- Spine Properties (K) Limited & 50 Others: (Petition (Application) 27 (E031) of 2022 [2023] KE SC 12 (KLR) (Civ) (17th February 2023)** (Ruling) the apex court delineated the principles applicable as follows:

- (a) *Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court.*
- (b) *A party seeking extension of time had the burden of laying a basis to the satisfaction of the court.*
- (c) *Whether or not the court should exercise the discretion to extend time was a consideration to be made on a case - to - case basis.*
- (d) *Whether there was a reasonable reason for delay is also a factor to consider. The delay should be explained to the satisfaction of the court.*
- (e) *Whether there would be any prejudice suffered by the respondents if the extension was granted.*
- (f) *Whether the application had been brought without undue delay, and*

(g) *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

11. I think it is also useful to add that it is necessary to consider whether allowing the application promotes the overriding objective in civil cases which require that the court should aim at achieving the just, expeditious, proportionate, and affordable resolution of disputes.

12. The position taken by the Supreme Court in Mwambora's case (supra) is actually an affirmation of principles spelt out in a long line of Court of Appeal cases including that of **Edith Gichungu Koine -vs- Stephen Njage Thoithi [2014] eKLR** where Odek, JA (as he then was) rendered himself as follows with regard to what should guide the court:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to respondent if the application is granted, and

whether the matter raises issues of public interest, among others.”

13. As pointed out earlier, this is a matter that has no rebuttal from the other side. It seems clear from the explanation for the delay given by the applicant that it is the court, not himself, that should be blamed. It apparently took time to prepare or type proceedings and make them available.
14. Prima facie, there was a delay of over one year. Such delay would obviously and ordinarily seem inordinate. But if, as alleged by the applicant, it arose from the court's failure and/or inability to furnish proceedings on time, then the blame for such delay should not be visited on the applicant.
15. This is an application that was not opposed and it would have been right to allow it even without requiring filing of submissions. But because of the overarching need to explain to the satisfaction of the court the reasons for the delay this court directed that the submissions be filed.
16. My considered view is that on the basis of what has been made available for the court to consider, there is need to allow the application. I therefore allow the application

herein in terms of prayers 3 and 4. Costs, which actually form the basis of prayer 5, are to be in the cause.

RULING DATED, SIGNED and DELIVERED in open court at **KITUI** this **7TH DAY** of **MAY, 2026**.

In the presence of,

Court Assistant - Musyoki

Applicant - present

Respondent - absent

M/s Mwikali for the Applicant

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI