

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELCL MISC. APPL. NO. E039 OF 2025

EMILY MUTHONI NDIGA 1ST
APPLICANT

SARAH THAARA NDWIGA2ND
APPLICANT

VERSUS

JUSTA WAWIRA (sued on behalf of the estate of JOHN NTHIGA
NTHAKANIO)

RESPONDENT

RULING

Before this Court is a Notice of Motion Application filed under Certificate of Urgency dated 22nd December 2025, in which the Applicants seek, inter alia: (i) an interim order of stay of execution of the Judgment and Decree delivered on 12th June 2025 in Runyenjes SPM-ELC No. 16 of 2020; (ii) leave to file an appeal out of time against the said Judgment; and (iii) an order of stay of execution pending the hearing and determination of the intended appeal.

The Respondent filed a suit in Runyenjes SPM-ELC No. 16 of 2020 challenging the validity and legality of the Applicants' title to land parcels Nos. KYENI/MUFU/3607, KYENI/MUFU/5896

and KYENI/MUFU/5897. On 12th June 2025, the subordinate court delivered Judgment in favour of the Respondent, extinguishing the Applicants' title to the subject land. The Applicants were reportedly aggrieved by the Judgment and purportedly instructed their then-advocates, M/s Kijaru Njeru & Co. Advocates, to file an appeal. It was only when the 1st Applicant visited the Environment and Land Court at Embu that she discovered no appeal had been lodged and that the statutory period for filing the same had already lapsed. The Applicants now move this Court for leave to appeal out of time and for stay of execution of the trial court decree.

ISSUES FOR DETERMINATION

The Court has distilled the following issues for determination:

1. Whether the Applicants have established sufficient cause to warrant an extension of time to file an appeal out of time.
2. Whether the Court should grant a stay of execution of the Judgment and Decree of Runyenjes SPM-ELC No. 16 of 2020.

The jurisdiction of this Court to extend time is governed by Rule 4 of the Court of Appeal Rules, 2022 (as applicable to the Environment and Land Court by virtue of Section 30 of the Environment and Land Court Act), and Section 79G of the Civil Procedure Act, Cap 21 Laws of Kenya, which provides that every appeal from a subordinate court shall be filed within thirty (30) days of the date of the decree or order appealed against.

The principles governing extension of time are well settled in Kenyan jurisprudence. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [2000] eKLR, the Court of Appeal held that the discretion to extend time must be exercised judicially and having regard to the following factors: (i) the length of the delay; (ii) the reason for the delay; (iii) the chances of the intended appeal succeeding if time is extended; and (iv) the degree of prejudice to the respondent if the application is granted.

The applicant's cited authority of *Paul Wanjohi Matenge v Duncan Gichane Mathenge* [2013] KECA 199 (KLR) is also instructive, wherein the Court underscored that while the right of appeal is a substantive right, it must be exercised within the framework of the law and that unexplained or inordinate delay is sufficient reason to deny extension.

On the question of stay of execution, the relevant test is provided under Order 42 Rule 6 of the Civil Procedure Rules, 2010, which requires that: (i) the applicant demonstrates that substantial loss may result unless the order is made; (ii) the application has been made without unreasonable delay; and (iii) security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon the applicant.

ANALYSIS AND DETERMINATION

The Judgment sought to be appealed was delivered on 12th June 2025. The present application was filed on 22nd December 2025, some six (6) months after the delivery of the Judgment. The statutory period for filing an appeal is thirty (30) days. The delay is therefore in the region of approximately five (5) months beyond the statutory deadline — a delay that is substantial and calls for an unimpeachable explanation.

The Applicants' explanation for the delay is essentially twofold: first, that they instructed their then-advocates, M/s Kijaru Njeru & Co. Advocates, to file the appeal; and second, that either the law firm failed to act, or that the delay was attributable to the court registry in the typing of the Judgment. The Respondent contests this explanation and challenges the Applicants to produce documentary evidence of such instructions, such as receipts for payment of legal fees or correspondence with the law firm.

This Court has carefully considered both positions. While the negligence of an advocate has been recognized in certain circumstances as a ground for extension of time (see *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR) the applicant bears the threshold obligation of providing cogent and credible evidence to establish the alleged instructions and the advocate's failure to act upon them. In the present case, the Applicants have offered no supporting documentation: there are no instructions in writing, no correspondence with the

advocate, no receipts of fees paid, and no affidavit from the said advocate explaining or acknowledging the omission.

Furthermore, the Applicants have not disclosed when exactly they first became aware of the delay. The 1st Applicant deposes only that she "just today learnt" that no appeal was lodged, without anchoring this discovery to any specific date or explaining why a litigant actively monitoring such a crucial matter took approximately six months to discover this omission. In *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR, the Court of Appeal emphasized that an applicant must account for each day of the delay. The Applicants have failed to do so.

On the alternative explanation — that delay was attributable to the court registry's typing of the Judgment — this Court notes that the Judgment was delivered on 12th June 2025. Even if there were some delay in the typing of the formal Judgment, a diligent litigant could and should have obtained the typed Judgment within a reasonable time and filed the appeal accordingly. No evidence has been tendered to demonstrate that any effort was made to obtain the typed Judgment within the statutory period, or that the court registry was in any way responsible for the failure to appeal.

Despite the foregoing concerns regarding the sufficiency of the explanation for the delay, this Court is mindful that the subject matter of the dispute is immovable property — a fundamental

asset whose deprivation may have grave and irreversible consequences for the Applicants. The overarching interests of justice and the right to access to justice enshrined in Article 48 of the Constitution of Kenya, 2010, as well as the overriding objective principle under Section 1A of the Civil Procedure Act, require that courts lean in favour of substantive justice over procedural technicalities, particularly where the subject matter is land.

The Court also notes that the Applicants have annexed a Draft Memorandum of Appeal (ETN-2) to their application. It raises grounds challenging, *inter alia*, the jurisdiction of the subordinate court. Whilst the Respondent contests the merits of the draft grounds with vigour and argues that the appeal has nil prospects of success, this Court is not in a position to make a final determination on the merits at this interlocutory stage. It suffices to note that some of the grounds raised — particularly the question of jurisdiction — are not entirely frivolous and raise matters that would benefit from consideration by this Court on appeal.

Balancing all the foregoing considerations — the length and inadequately explained delay on one hand, and the constitutional imperative of access to justice, the immovable nature of the subject property, and the presence of arguable grounds of appeal on the other — this Court finds it just and equitable to exercise its discretion in favour of granting leave to file the appeal out of time, albeit on strict terms.

The Applicants additionally seek a stay of execution of the Judgment and Decree pending the hearing and determination of the intended appeal. The applicable test under Order 42 Rule 6 of the Civil Procedure Rules, 2010 requires the Applicants to demonstrate: (i) that substantial loss may result unless the stay is granted; (ii) that the application has been made without unreasonable delay; and (iii) security for the due performance of the decree.

On the question of substantial loss, this Court is satisfied that the subject matter — being agricultural land parcels — is unique and irreplaceable. Execution of the decree would result in the Applicants being dispossessed of the land, and if the intended appeal succeeds, such dispossession may be difficult or impossible to reverse. The potential for substantial and irreversible loss is therefore made out.

On the question of delay, the application for stay was filed alongside the application for leave, which has been found to be sufficiently proximate to the discovery of the omission to file the appeal, even if the overall delay from the date of Judgment is substantial. This Court will not penalize the Applicants twice for the same delay.

On the question of security, given that the Applicants' land is itself the subject matter of the dispute, this Court finds that the requirement of security is adequately met by the nature of

the property in dispute and the undertaking of the Applicants to prosecute their appeal with diligence. However, the Court will impose a condition on the stay to ensure the Applicants do not deal with the suit property in any manner pending the appeal.

ORDERS

In the premises, and for the reasons set out above, this Court makes the following Orders:

3. The Application for extension of time to file an appeal out of time against the Judgment and Decree delivered on 12th June 2025 in Runyenjes SPM-ELC No. 16 of 2020 is hereby ALLOWED.
4. The Applicants shall file and serve the Memorandum of Appeal and all accompanying documents within thirty (30) days from the date of this Ruling, in default of which this leave shall lapse automatically and without further order of this Court.
5. A stay of execution of the Judgment and Decree of Runyenjes SPM-ELC No. 16 of 2020 is hereby granted, pending the hearing and determination of the intended appeal, on the condition that the Applicants shall not alienate, charge, lease, encumber, or otherwise deal with the suit land parcels Nos. KYENI/MUFU/3607, KYENI/MUFU/5896 and KYENI/MUFU/5897 in any manner whatsoever pending the determination of the appeal.

6. The Applicants shall with reasonable expedition take all necessary steps to prosecute the intended appeal, including but not limited to requesting the proceedings of the subordinate court within 30 days from the date hereof.
7. Costs of this Application shall be in the cause of the intended Appeal.

DATED, DELIVERED AND SIGNED AT EMBU THIS 14TH DAY OF
MAY, 2026

HON. E.C CHERONO
ELC JUDGE, EMBU

Ruling read/delivered in the presence of:

1. Mr. Momanyi Gichuki for the Respondent
2. Applicants-present
3. M/S Ruth C/A