

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**  
**E.L.C MISC NO. E035 OF 2025**

**WILLY IRERI NAMU & 6 OTHERS .....**  
**PLAINTIFF/APPLICANT**

**VERSUS**

**NANCY MUTHONI NGARI & 2**  
**OTHERS.....DEFENDANT/RESPONDENT**

**RULING**

**BACKGROUND**

Before the Court is a Notice of Motion Application dated 14th October 2025 filed by the Plaintiffs/Applicants, Willy Ireri Namu and 6 others. The application is expressed to be brought under Article 159 of the Constitution of Kenya and all other enabling provisions of law. The Applicants seek the following orders:

1. That this Honourable Court be pleased to grant the Applicants leave to appeal against the decision of the Honourable S.K. Mutai, Senior Principal Magistrate, delivered on 17th April 2019 at Embu, out of time.
2. That this Honourable Court do order a stay of execution of the judgment and decree made by the Honourable S.K. Mutai, Senior Principal Magistrate, delivered on 17th April

2019 at Embu, pending the hearing and final determination of the Applicants' intended appeal.

3. That the costs of this application be provided for.

### **ISSUES FOR DETERMINATION**

Having carefully considered the application, the affidavits, the further affidavit, the replying affidavit, and the written submissions filed by both parties, this Court identifies the following issues for determination:

1. Whether the Applicants have established sufficient grounds to be granted leave to appeal out of time against the decree of 17th April 2019.
2. Whether a stay of execution of the said decree is warranted pending the intended appeal.

The right of appeal from a subordinate court to the Environment and Land Court is governed by Section 79G of the Civil Procedure Act, Cap 21, which provides that every appeal shall be filed within thirty (30) days from the date of the decree or order appealed against. The proviso to that section further grants the court a discretion to admit an appeal out of time where the appellant satisfies the court that there was good and sufficient cause for not filing the appeal in time.

The parameters for the exercise of that discretion are well settled. In *Leo Silla Mutiso v Rose Hellen Wangari*, Nairobi Civil Application No. 255 of 1997, the Court of Appeal held that the matters to be taken into account include: first, the length of the delay; second, the reason for the delay; third,

the prospects of the appeal succeeding if the application is granted; and fourth, the degree of prejudice to the respondent if the application is granted. These principles were subsequently amplified in *Fakir Mohamed v Joseph Mugambi & 2 Others* [2005] eKLR, where the Court of Appeal confirmed that the court's discretion under Rule 4 is unfettered and that the listed factors, while not exhaustive, provide the essential analytical framework.

More recently, the Supreme Court in *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others* [2014] eKLR restated the following principles: that extension of time is not a right but an equitable remedy available only to a deserving party; that the applicant bears the burden of satisfying the court; that whether the discretion is exercised depends on a case-by-case analysis; that the delay must be explained to the satisfaction of the court; that the court must weigh any prejudice that would be suffered by the respondent; and that the application must have been brought without undue delay.

### **ANALYSIS AND DETERMINATION**

The decree sought to be appealed was delivered on 17th April 2019. The present application was not filed until 14th October 2025 — a delay of approximately six (6) years and six (6) months. This delay is by any measure inordinate and calls for the most cogent and satisfactory explanation from the Applicants. The Court is mindful that the longer and

more unexplained the delay, the heavier the burden that shifts to the applicant to demonstrate both a sufficient cause and a meritorious appeal. No mechanical formula excuses such an extended period of inaction, and the court must be satisfied that justice demands an exception to the strict statutory timeline.

The Applicants attribute the delay to the following: that their father, Ileri Mugai, the original defendant in Embu PMCC No. 134 of 1993, passed away on 12th May 2016; that his advocate, Morris Njagi, without the authority or consent of the family, substituted Naomi Wanjuki Ileri (the deceased's wife) as the defendant; that at the time of substitution, Naomi Wanjuki Ileri was seriously ill and incapable of appearing in court or giving instructions; and that she never signed any Ad Litem or substitution application, rendering the substitution null and void. The Applicants further contend that upon discovering these irregularities — particularly through prior proceedings in ELC E011 of 2023 — they resolved to seek leave to appeal.

This Court has carefully scrutinised this explanation. The Applicants are, by their own admission and by the Respondents' concession at paragraph 4 of the Replying Affidavit, the children of Ileri Mugai, who was the original defendant in Embu PMCC No. 134 of 1993. The decree was delivered on 17th April 2019. The Applicants have not provided any credible explanation as to why, in the period

from April 2019 to October 2025, they took no steps whatsoever to challenge the decree. The 1st Applicant deposes that the issue of the alleged illegal substitution was already known to them during the litigation of ELC E011 of 2023, yet no contemporaneous effort was made at that stage to seek leave to appeal. The explanation for the delay of over six years is therefore unsatisfactory.

Moreover, the Court notes that the Respondents have averred at paragraph 9 of the Replying Affidavit that the decree was executed and the land transferred to the Respondents. While the 1st Applicant contests this in the further affidavit by stating that no surveyor or land registrar has physically been present on the ground, the question of execution raises a further impediment to the granting of the application, as it suggests that the rights sought to be preserved by an appeal may have already crystallised in the Respondents' favour.

Even if the Court were to look past the inordinate delay, the Applicants must demonstrate that the intended appeal is not frivolous and has reasonable prospects of success. The Applicants raise the following substantive grounds: the alleged illegal substitution of Naomi Wanjuki Ireri in place of the deceased defendant without her consent or proper Ad Litem appointment; conflict of interest on the part of the advocate who drafted the sale agreement and simultaneously represented the Defendants; discrepancy between the land area stated in the sale agreement (2.43

acres) and the actual search results (3.10 acres); and the absence of witnesses to the sale agreement.

The Court observes that these are potentially arguable grounds, particularly the question of the validity of the substitution and the alleged conflict of interest of the advocate. However, the weight to be accorded to these grounds must be viewed in the context of the very long delay and the absence of any annexed draft memorandum of appeal. A court granting leave to appeal out of time does not prejudice the merits of the appeal, but an applicant who seeks such leave strengthens their case considerably by exhibiting a coherent draft memorandum of appeal. In the present application, no such memorandum has been placed before the Court.

The Respondents depose that the decree has been executed and the land transferred in their favour. They further assert, with some justification, that the Applicants are vexatious litigants who have persistently filed multiple applications in various forums rather than complying with the decree. The Applicants have lived on the suit land and developed it, including burying relatives thereon. These facts point in two competing directions: on the one hand, granting leave would cause significant prejudice to the Respondents, who have held the benefit of a decree for over six years and who assert that the land has already been transferred; on the

other hand, the Applicants contend they have developed the land and would suffer irreparable harm if evicted.

On balance, however, the Court is persuaded that the prejudice to the Respondents outweighs the equities in the Applicants' favour. The Respondents, as the beneficiaries of a decree that has stood undisturbed for over six years, are entitled to the reasonable expectation that litigation has concluded. The right of a successful litigant to enjoy the fruits of a judgment must be respected. As was stated in *M/S Portreitz Maternity v James Karanga Kabia*, Civil Appeal No. 63 of 1997, that right must be weighed against any just cause for depriving the successful party of that right. No such just cause has been sufficiently demonstrated here.

The Court further notes the Respondents' objection that the Notice of Motion does not clearly state the case number in respect of which leave is sought. While the 1st Applicant clarifies in the further affidavit that the decree sought to be appealed is that in Embu PMCC No. 134 of 1993, delivered on 17th April 2019, this ambiguity in the framing of the application reflects poorly on its overall competence. Courts have consistently held that applications must be clear and specific in order to enable the respondent to respond meaningfully. The Respondent in this case was nonetheless able to understand and respond to the application, and the Court does not place excessive weight on this formal

deficiency. It is, however, a reflection of the state of the application as a whole.

The Applicants have also invoked Article 159(2)(d) of the Constitution of Kenya, which enjoins courts to administer justice without undue regard to procedural technicalities. This constitutional provision is a valuable corrective tool where technicalities would otherwise defeat substantive justice. However, Article 159(2)(d) cannot serve as a blanket waiver of all procedural requirements. The statutory period of thirty days within which to file an appeal is not a mere technicality — it reflects the important public interest in finality of litigation. An applicant seeking to rely on Article 159(2)(d) must still show sufficient cause for the delay. As this Court has found, the Applicants have failed to do so.

The prayer for stay of execution is predicated entirely on the grant of leave to appeal. Having declined to grant leave to appeal out of time, the prayer for stay of execution is incapable of standing on its own. Furthermore, even if leave had been granted, the applicable test under Order 42 Rule 6 of the Civil Procedure Rules requires the applicant to demonstrate that substantial loss would result if the stay is not granted, that the application has been made without unreasonable delay, and that such security as the court orders has been given. None of these conditions have been satisfactorily addressed in the application before the Court.

The prayer for stay of execution is accordingly declined.

**ORDERS**

In the premises and for the foregoing reasons, this Court makes the following orders:

1. The Notice of Motion Application dated 14th October 2025 is hereby dismissed in its entirety.
2. Leave to appeal out of time against the decree of the Honourable S.K. Mutai, Senior Principal Magistrate, delivered on 17th April 2019 in Embu PMCC No. 134 of 1993, is declined.
3. The prayer for stay of execution of the said decree is declined.
4. The costs of the application shall be borne by the Applicants and are awarded to the Respondents.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT EMBU THIS 14<sup>TH</sup> DAY OF MAY, 2026.

HON. E.C CHERONO

**ELC JUDGE, EMBU**

In the presence of:

1. M/S Beth Ndorongo for the Respondent
2. 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, & 7<sup>th</sup> Applicants-present

### 3. M/S Ruth C/A