



REPUBLIC OF KENYA



**KENYA LAW**  
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**Giathi v Mwiriki (Civil Application E042 of 2025)  
[2025] KECA 1077 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1077 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E042 OF 2025  
LA ACHODE, JA  
JUNE 20, 2025**

**BETWEEN**

**SAMUEL KAHIA GIATHI ..... APPLICANT**

**AND**

**ISAAC MWORIA MWIRIKI ..... RESPONDENT**

*(Being an application for extension of time to appeal against the  
Judgment and Decree of the Environment and Land Court at  
Nyandarua (Angima J) dated 3rd October, 2024 in ELC NO. 60 OF 2018)*

**RULING**

1. By a Notice of Motion dated 9<sup>th</sup> April, 2025, Samuel Kahia Giathi the applicant herein, seeks for an extension of time to file appeal against the judgment delivered on 3<sup>rd</sup> October 2023, in the Environment and Land Court (ELC), at Nyandarua, in ELC No. 60 of 2018 by Angima J. The application is brought under Article 48 of the Constitution of Kenya, Section 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya and rules 4, 43 and 49 of the Court of Appeal Rules, 2020.
2. The grounds of the application set out on the face of the motion and deposed in the supporting affidavit sworn by the applicant on 9<sup>th</sup> April 2025, and his supplementary supporting affidavit sworn on 15<sup>th</sup> May 2025, sare that the learned Judge delivered a judgment in ELC No. 28 of 2023 against the applicant on 3<sup>rd</sup> October 2024, declining to quash or set aside the judgment/decreed dated 20<sup>th</sup> September, 2022. That the resulting effect of the decision was that the applicant was to pay damages and costs, despite the respondent having constructed structures encroaching on a public road reserve, and the applicant's land described as Nyandarua/Melangine 12848.
3. The applicant states that amongst the grounds he intends to raise on appeal are that the learned Judge misdirected himself in law and in fact, by holding that the respondent adequately proved his claim for special damages and awarding him the same, when the respondent failed to strictly prove the alleged



special damages as required by law. Further, that the judgment was against the weight of the evidence and failed to adequately address the issues raised by the applicant.

4. The applicant deposes that the delay in filing the appeal was due to inadvertent clerical error in the advocate's office, which resulted in the file together with the advocate's instructions on the filing of the appeal, being filed away in the archives among concluded files. The file was thus, not forwarded to the advocate for timely preparation and filing of the appeal. The advocate only became aware of the error on 25<sup>th</sup> March 2025 when the respondent forwarded a notice to show cause to him, whereupon he took immediate steps to rectify the situation, including filing this application.
5. The applicant deposes that the oversight which resulted in the delay was neither deliberate, nor was it attributable to the applicant. That it is regretted and should not be visited upon the applicant.
6. The applicant filed written submissions dated 15<sup>th</sup> May 2025, through the firm of M/s Ndegwa and Company Advocates and reiterated the depositions in his affidavits.
7. The respondent filed grounds of opposition dated 5<sup>th</sup> May 2025, through the firm of Waichungo Martin & Company Advocates. He avers that the Notice of Appeal dated 18<sup>th</sup> October, 2024 was filed out of time, that the delay in filing the appeal is unexplained and inordinate and, that a second appeal to the Court of Appeal can only be on points of law and not on facts as per the applicant's draft memorandum of appeal. He did not file submissions.
8. The Court's mandate in the exercise of the discretion to extend time otherwise limited by the rules, or decision of this Court, or Superior Court is donated by Rule 4 of this [Court's Rules 2022](#) and is unfettered. It provides that:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

9. I have considered the principles that guide this Court in the exercise of that discretion. As stated in [Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others](#), Supreme Court of Kenya Application No. 16 of 2014, 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. A party who seeks an extension of time bears the burden of laying a basis to the satisfaction of the Court.
10. I note that the impugned judgment was delivered on 3<sup>rd</sup> October 2024. The Notice of Appeal was lodged on 18<sup>th</sup> October 2024 and was therefore filed out of time. There was no leave sought or granted to file the Notice of Appeal out of time, neither has the applicant asked this Court to deem it as properly filed.
11. Regarding the period of, and the reason for the delay, the applicant had 60 days as provided under rule 84(1), to institute the appeal upon filing the Notice of Appeal. This Notice of Motion is dated 9<sup>th</sup> April, 2025 placing it some 3 months out of time. The applicant's sole reason for the delay is that there was inadvertent error on the part of his advocate who erroneously filed away the file in the archives, instead of preparing and filing the appeal.



12. On mistakes said to arise from the applicant's advocate the Court of Appeal in the case of *Rajesh Rughani v Fifty Investments Limited & Another* (2016) eKLR pronounced itself thus:

“In *Habo Agencies Limited vs Wilfred Odhiambo Musingo* [2015] eKLR, this Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

There is no evidence on record of the applicant following up or making inquiries of his case from his advocate.

13. With regard to whether the intended appeal is arguable and has chances of success, the applicant intends to argue on appeal that the learned Judge misdirected himself in law and in fact, by holding that the respondent adequately proved his claim for special damages and awarding him the same, when he failed to strictly prove the alleged special damages as required by law. Further, that the judgment was against the weight of the evidence and failed to adequately address the issues raised by the applicant. However, his being a second appeal the Court of Appeal it is trite that it is generally limited to issues of law and not facts.
14. Consequently, the application dated 9<sup>th</sup> April, 2025, is found to have no merit and is dismissed with cost to the respondent.

It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 20<sup>TH</sup> DAY OF JUNE, 2025.**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

