



**Nalinya v Vincent (Civil Application E190 of 2024)
[2025] KECA 1448 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1448 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E190 OF 2024
MSA MAKHANDIA, JA
JULY 31, 2025**

BETWEEN

AGGREY MAKARI NALIANYA APPLICANT

AND

JULIANA NASAMBU VINCENT RESPONDENT

(Being an Application for Extension of time to file Notice of Appeal out of time from the Judgment of the Environment & Land Court at Bungoma, (Cherono, J.) dated 14th November, 2024 in ELC Appeal No. E026 of 2023)

RULING

1. The Application, the subject of this ruling is dated 18th December, 2024 and filed in person by the applicant. Two prayers sought are that leave be granted to the applicant to lodge a notice of appeal out of time and that costs of the application be provided for. The grounds in support of the application are that: the applicant was sued by the respondent in Bungoma Chief Magistrate Court Environment and Land (“the ELC”), Case No 142 of 2020 over the ownership of land parcel Number East Bukusu/ North Kanduyi/395 (“the suit property”); the suit was subsequently heard and dismissed; upon dismissal of the suit on 3rd February, 2023, the respondent preferred an appeal in Bungoma ELC Appeal No E026 of 2023; on the 14th November 2024 the respondent’s appeal was allowed in its entirety; and among the Orders granted in the appeal was a permanent injunction against the applicant and cancellation of the title issued to the applicant.
2. Though counsel for the applicant was present when the ELC delivered the Judgment in the appeal, he did not immediately notify him of it until the 15th December, 2024 after the applicant had written a letter to him demanding to know the position of the appeal. It was then that his counsel forwarded a copy thereof on or about 1st December, 2024, by then the Statutory period for lodging a notice of appeal had lapsed.



3. The applicant desires to challenge the entire Judgment delivered in the appeal; the delay in lodging a notice of appeal within time was not deliberate but was occasioned by delay by his then counsel in communicating the judgment to the applicant; counsel had taken time to communicate to the applicant until the applicant intervened through a letter dated 14th December, 2024, hence he did not condone the inaction by his counsel which has led to the delay; the intended appeal is not frivolous and thus leave should be granted to the applicant; the delay of 25 days in lodging a notice of appeal was not in any event inordinate; no prejudice at all will be occasioned to the respondent if leave sought is granted; the applicant who is in possession and occupation of the suit property on the other hand faces imminent danger therefrom and if that happens he is likely to suffer great prejudice and thus the need to grant the prayers sought.
4. The respondent has opposed the application by way of a replying affidavit sworn on the 17th Day of January 2025. He deposed that: the applicant was not in occupation of the suit property or a portion thereof as claimed; the suit property was never at any given time sold to the applicant; judgment was delivered in the presence of counsel for the applicant and therefore there was no justification for the delay; delay in any event, has not been sufficiently explained; and application was meant to delay the respondent's enjoyment of the fruits of his judgment given his advanced age of 81 years which the applicant was simply taking advantage of to frustrate him. He therefore prayed for the dismissal of the application.
5. In his submissions in support of the application, the applicant merely reiterated what he had stated in the grounds in support of the application as well as the supporting affidavit. I therefore see no need to rehash the same. On her part, the respondent filed written submissions that were irrelevant to the application as they address the substantive appeal instead of the application at hand.
6. Being an application for extension of time the considerations that go into its success or failure were laid down by the Supreme Court of Kenya in the case of *Kenya Revenue Authority & 2 v Mount Kenya Bottlers & 4 others* [2022] KESC 3 (KLR) thus:
 - 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 who seeks extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. whether the court should exercise the discretion to extend time was a consideration to be made on case-to- case basis;
 - d. whether there was a reasonable reason for the delay. 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 the election petitions, public interest should be a consideration for extending time.
7. However, as it has been constantly stated time without number, the considerations are not a closed shop. See *Njoroge v Kimani* [2022]KECA (KLR). It is not disputed that the applicant has not filed notice of appeal. The judgment, the subject of the intended appeal was delivered on 14th November, 2024. The instant application was filed on 18th December, 2024. The delay was therefore of about 25 days. In my view this delay, by any stretch of imagination cannot be said or termed as inordinate.



8. What were the reason(s) for the delay? Failure by the applicant's then counsel to communicate the contents of the judgment to the applicant in time and seek his further instructions. The narration has not been controverted by the respondent's sufficiently or at all. The respondent's only answer was that the judgment was delivered in the presence of the applicant's advocate. To my mind, this cannot be a sufficient rebuttal to the applicant's assertion. I accept that the reason(s) given for the delay was not foreseeable and therefore excusable. Indeed, it was plausible. It should always be remembered that whether or not to grant extension of time is always discretionary and should therefore be exercised judicially, on sound reason rather than whimsically, caprice or sympathy. Is the intended appeal arguable with overwhelming chances of success? Without saying much so as not to compromise and embarrass the court that may eventually hear the intended appeal should the application be allowed; I will not say much. Suffice to state that it may well be arguable.
9. On prejudice to be suffered by any of the parties to the application, I am satisfied that no substantial prejudice will be suffered by the respondent in the event that the application is allowed considering that the applicant has undoubted right of appeal. I think the prejudice alluded to by the respondent such as old age and frustrations or denial of enjoyment of the fruits of his judgment are the usual pitfalls in litigation. It is not such heavy burden that the respondent cannot withstand. On the other hand there is real and imminent danger of the applicant being evicted from the suit property.
10. Having said that much, I would allow the application as prayed.
Costs of the application shall however abide the outcome of the appeal.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

