



**Chege & another (Suing as the Personal Representative of Paul Ngigi Mungai) v  
Kimani & 2 others (Suing as Representatives of Hallelluyah Gospel Church Karuri)  
(Civil Application E401 of 2024) [2025] KECA 1327 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1327 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E401 OF 2024  
F TUIYOTT, JA  
JULY 18, 2025**

**BETWEEN**

**GEORGE WAINAINA CHEGE ..... 1<sup>ST</sup> APPLICANT  
ELIZABETH WANJUHI CHEGE ..... 2<sup>ND</sup> APPLICANT  
SUING AS THE PERSONAL REPRESENTATIVE OF PAUL NGIGI MUNGAI**

**AND**

**JOHN KANYORO KIMANI ..... 1<sup>ST</sup> RESPONDENT  
SERAH WAMBUI KAMAU ..... 2<sup>ND</sup> RESPONDENT  
FRANCIS MWANGI ..... 3<sup>RD</sup> RESPONDENT  
SUING AS REPRESENTATIVES OF HALLELLUYAH GOSPEL CHURCH  
KARURI**

*(Being an application for extension of time to file an Appeal out of time from the judgment of Environment and Land Court at Thika (Grace Kemei, J.) Dated 13th June, 2024 in ELC NO. 798 OF 2017 (OS) Consolidated with ELC NO. 40 of 2018 (OS))*

**RULING**

1. In this application, by way of an amended Notice of Motion dated 3<sup>rd</sup> September, 2024 said to be brought pursuant to rule 4 of the rules of this Court, the applicants bring an omnibus application for the following orders;
  - a. Leave of this Court to file and serve an appeal out of time against the decision of Grace Kemei, J. delivered on 13<sup>th</sup> June, 2024 in Thika ELC No. 798 of 2017 (OS) consolidated with ELC No. 40 of 2018 (OS);



- b. A stay of execution of the said decision; and
  - c. Leave of this Court for the firm of M N Ndiritu & Co Advocates to come on record after judgment.
2. In support of the application is the affidavit of Rhoda Njeri Ngige, the personal representative of the 2<sup>nd</sup> appellant. She deposes that once the judgment was delivered on 13<sup>th</sup> June, 2024, in the presence of her then advocates Chege Kibathi & Co Advocates LLP, she immediately instructed them to lodge an appeal and they informed her that they had filed the same and served the respondent's advocates. That while following up on the requested typed proceedings for the purpose of the appeal, it was brought to her attention that the notice of appeal had not been paid for and therefore not signed by the Deputy Registrar. She contacted her then advocates and informed them of the lapse and then immediately paid for it. She argues that while the notice of appeal was uploaded on the judiciary e-filing portal in time, the delay in paying for it was an omission on the part of the advocates and she urges this Court not to allow such an error to prejudice their right to appeal.
  3. The application is opposed by the respondent via the replying affidavit of John Kanyoro Kimani, one of the officials of the respondent, sworn on 11<sup>th</sup> November, 2024. He contends that it is clear that the notice of appeal was never filed within the stipulated timelines and the applicant cannot then rely on the mistake of counsel in failing to comply with the timelines. In relying on the equity maxim that equity aids the vigilant and not the indolent, he urges this Court to dismiss the application as the applicants have not demonstrated sufficient reasons for the inordinate delay in filing their appeal.
  4. The parties' filed submissions are substantially a regurgitation of the positions taken in their respective affidavits.
  5. The application before me, in the main, is for leave to file a notice of appeal out of time. The second prayer seeks a stay of execution against the impugned judgment. The third is for leave of this Court to allow the firm of M N Ndiritu & Co Advocates to come on record after judgment.
  6. On the stay of execution application, it must be common learning that the jurisdiction of a single Judge of this Court is restricted by Rule 55 of the Rules of this Court. An application for stay of execution is not a single Judge matter.
  7. On the issue of the firm of M N Ndiritu & Co Advocates coming on record in place of the firm of Chege Kibathi Advocates LLP, it is not opposed and I grant it for what it's worth as a notice of change of advocates has been filed and there is already compliance with Rule 23 on change of advocates.
  8. I now turn to the Rule 4 application. The discretion granted to this Court by the said provision must be exercised judiciously and as a guide are the well settled principles restated in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR):-

“The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors...”
  9. The notice of appeal dated 24<sup>th</sup> June, 2024, although presented for filing within the timelines prescribed by Rule 77(2), was however not paid for and thus not lodged in due time. The applicants noticed this error and the same was only paid for on 19<sup>th</sup> July, 2024, when the timelines had past.



10. The reasons herein fall on mistake of counsel. This Court has often stated that while a mistake of counsel may be excused, the discretion to do so is not automatic. The nature and quality of the error together with the possible implication of pardoning it must be considered. So too is the conduct of the applicant. See for example *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR, where this Court remarked:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side...”

11. Here, the applicants would not have discovered that the notice of appeal was not properly lodged had they not made a diligent follow up on their matter. The delay occasioned when the notice of appeal was finally properly paid for and lodged on 19<sup>th</sup> July 2024 was a month’s delay. That delay is not so inordinate. Similarly, the application herein was brought a few days later on 1<sup>st</sup> August 2024 and later amended on 3<sup>rd</sup> September, 2024 and was fairly prompt. In addition, the respondent does not allege or establish that it will suffer any prejudice if extension is allowed.

12. The application of 3<sup>rd</sup> September, 2024 is allowed in the following terms. The notice of appeal already filed is deemed as duly filed and served. The applicants shall within sixty (60) days hereof file and serve the record of appeal. Costs of this application shall be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JULY 2025.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

