



REPUBLIC OF KENYA



**Kamau v Theuri (Civil Application E025 of 2025)
[2025] KECA 1182 (KLR) (2 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1182 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E025 OF 2025**

JM MATIVO, JA

JULY 2, 2025

BETWEEN

DANIEL KANYINGI KAMAU APPLICANT

AND

GRACE WANGUI THEURI RESPONDENT

(Being an application for leave to file appeal out of time arising from the judgment and decree of the Environment and Land Court of Kenya at Nakuru (A.O. Ombwayo, J.) dated 19th October, 2023 in ELC Case No. 123 of 2016)

RULING

1. Vide application dated 24th February 2025 brought under section 3A of the [Appellate Jurisdiction Act](#), rules 4 and 41 of the Court of Appeal Rules, 2022, the applicant prays, that:
 1. Spent
 2. Pending the hearing of this application inter partes, this Honourable Court be pleased to stay execution of the judgment delivered in Nakuru ELC No. 123 of 2016 on 19th October 2023 the decree arising therefrom and all consequential orders against the Applicant.
 3. Pending the hearing and determination of this application this Honourable Court be pleased to stay execution of the judgment delivered in Nakuru ELC No.123 of 2016 on 19th October 2023 the decree arising therefrom and all consequential orders against the Applicant.
 4. The Honourable Court be pleased to enlarge time and grant issue its leave for the Applicant to file his notice of appeal and memorandum of appeal.



5. This Honourable Court be pleased to stay execution of the judgment delivered in Nakuru ELC No.123 of 2016 on 19th October 2023 the decree arising therefrom and all consequential orders against the applicant pending the hearing and determination of the intended appeal.
6. Costs of this application be provided for.
2. The application is premised on the grounds listed on the face of the application and the applicant's supporting affidavit sworn on 24th February 2025. The grounds in support of the application are that:
 - (a) the delay in filing the appeal was inadvertent as the delivery of judgment and other subsequent rulings were never communicated to him by his erstwhile advocate;
 - (b) mistakes of counsel ought not be visited upon him since he is entitled to a right to be heard;
 - (c) the intend appeal is not frivolous and has high chances of success.
3. In his submissions dated 25th March 2025, the applicant cited the High Court decision in Hellen Wanza Macker, Benard Njoroge Gathu & Ano. HCC Miscellaneous Application 286 of 2009 in support of the holding that delay is excusable if it is caused by other factors,
4. In opposition to the application, the respondent filed his replying affidavit sworn on 4th February 2025. The salient averments are:
 - (a) the application is frivolous and an abuse of the Court's time and is meant to deny her enjoyment of the fruits of Judgment;
 - (b) no plausible reason has being given for the delay in filing a notice of appeal;
 - (c) it is the duty of the applicant to follow up his case regularly and keep himself updated seeing that it is him who would be affected by any negative outcome;
 - (d) the respondent will suffer prejudice because of the continued denial of enjoyment of her property which the applicant unlawfully occupies.
5. In her submissions dated 28th March 2025, the respondent cited the case of Bartilol & 3 Others vs. Bartilol & Ano. [2024] eKLR in submitting that a serious litigant cannot dump their files with counsel for a period of over one year without care of what is happening especially in a matter concerning land.
6. The instant application as drafted is omnibus in nature. This is because it seeks a variety of orders that cannot, under our rules, be heard and determined together by a single judge. (See rule 55 of the rules of this Court). Therefore, prayers (1), (2), & (5) of the instant application are not properly before me. The only prayers that are properly before me are prayers (4) and (6). Therefore, I will only consider those two prayers which fall within the remit of a single judge.
7. I have considered the application, the affidavit in support thereto and its annextures, the replying affidavit and the written submissions by both counsel. The only question for determination is whether the applicant has met the threshold for the exercise of this Court's discretion to merit the leave sought. The application is governed by rule 4 of this Court's rules which provides:

“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.”

8. The Supreme Court of Kenya pronounced itself in the question of extension of time in the case of *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR, and stated as follows:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

9. This application will stand or fall on the question whether the applicant has tendered sufficient reasons for not filing his Notice of Appeal and Record of Appeal within the stipulated time and whether the respondent will suffer any prejudice should the application be allowed. The applicant’s reason for the delay is that he was never informed of the delivery of Judgment by his erstwhile advocate and as a result, mistakes of counsel should not be visited upon him. In her rejoinder, the respondent maintained that a serious litigant cannot dump files with counsel for a period of over one year without caring what is happening especially in a matter concerning land.
10. In granting leave, the court has to balance the competing interests of the applicant with those of the respondent. (See *M/s Portreitz Maternity vs. James Karanga Kabia Civil Appeal No 63 of 1997*). The basic principle is that the Court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore and the prospects of success of the appeal. These facts are interrelated; they are not individually decisive. There is a further principle which is applied and that is, without a reasonable and acceptable explanation for the delay, the prospect of success is immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for enlargement of time should be refused.
11. In order for this Court to exercise its discretion in favour of an applicant, the applicant must provide a satisfactory explanation for the period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to the application, irrespective of the applicant’s prospects of success. Importantly, extension of time is not for the mere asking. A party is required to make out a case entitling it to the Court’s indulgence, and give a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.
12. I have carefully considered the applicant’s explanation for the delay of one year and two months. The applicant is passing all the blame to his counsel for the failure. This sounds attractive. However, the applicant is not telling this Court what he himself was doing during this period. The applicant is silent on the efforts he made (if any) to follow up his case and be apprised of the progress. This Court in *Bi-Mach Engineers Limited vs. James Kahoro Mwangi* [2011] eKLR, reiterated the duty of an applicant to follow up on instructions given to an advocate. It stated:

“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up on the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy.”



13. On the chances of the intended appeal succeeding, I am guided by the sentiments of this Court in Athuman Nusura Juma vs. Afwa Mohamed Ramadhan [2016] eKLR where this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

14. I have evaluated the reason offered for the delay. Guided by the authorities cited herein above, I find that the delay one year and two months is inordinate and it has not been sufficiently explained. Accordingly, the applicant does not merit the exercise of this Court’s discretion for the above stated reasons. I accordingly dismiss the applicant’s notice of motion application dated 24th February 2025 with costs.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF JULY, 2025.

J. MATIVO

.....

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

