



Paschal (Prosecuting as the Personal Representative of the Estate of Pascal Mule Nzyuko) v Muthoka & 2 others (Environment and Land Appeal E002 of 2023) [2025] KEELC 2940 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2940 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E002 OF 2023
EO OBAGA, J
MARCH 27, 2025**

BETWEEN

**JOSEPHAT KILUVA PASCHAL APPLICANT
PROSECUTING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
PASCAL MULE NZYUKO**

AND

**DANIEL MUTUNE MUTHOKA 1ST RESPONDENT
JOHN MUTISYA MUTHOKA 2ND RESPONDENT
JULIUS MUTINDA MUTHOKA 3RD RESPONDENT**

RULING

1. Before this Court for determination is the Notice of Motion dated 9th October, 2024 brought under the provisions of Sections 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act* in addition to Order 50 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.
2. The following orders have been sought by the Applicant: -
 1. [Spent]
 2. [Spent]
 3. An Order of enlargement of time be issued regarding the orders issued on 15/11/23 for stay of proceedings vide Tawa MCELC Case No.175 of 2019 pending the hearing and determination of the main appeal.
 4. The Appellant herein Pascal Mulei Nzyukobe substituted with the Applicant herein Josephat Kiluva Paschal.



5. The Lower Court File vide Tawa MCELC Case No. 175 of 2019 be availed.
6. Costs of the application be provided for.
3. The application is premised on the grounds appearing on its face together with the supporting affidavit sworn by Josephat Kiluva Paschal on even date.
4. The Applicant averred that he was granted 45-days conditional stay of proceedings of Tawa MCELC Case No. 175 of 2019 pursuant to the ruling dated 15/11/2023. That by the time the said ruling was delivered, his Advocate had already passed away on 31/10/2023. The Applicant added that Pascal Mule Nzyuko also met his death on 20/11/2023 and that non-compliance with the conditional orders of stay of proceedings and delay in substitution thereof was occasioned by the delay in issuance of the deceased's death certificate which was issued on 11/07/2024.
5. The Applicant went on to state that the Applicant was issued with a limited grant of letters of administration ad litem on 31/07/2024 vide Tawa P&A Miscellaneous Application No. E025 of 2024. He added that Tawa MCELC Case No. 175 of 2019 is slated for mention on 24/10/2024 and since this court is clothed with the requisite jurisdiction to grant the orders sought, it is in the interest of justice that the application be allowed. That the orders sought will help to fast-track the appeal otherwise the Applicant will suffer substantially.
6. Opposing the application, Julius Mutinda Muthoka swore a replying affidavit on 28th October, 2024 on his behalf and his Co-respondents. He averred that the Applicant had already been delaying the finalization of the matter herein since delivery of the ruling of 15/11/2023. He added that the Applicant was already acting for Pascal Mule Nzyuko (deceased) as the guardian ad litem and therefore he was aware or ought to have been aware of the ruling delivered on 15/11/2023.
7. The Respondent averred that the 45-days conditional stay lapsed on 30/12/2023 and that he consequently moved the lower court for hearing of Tawa MCELC Case No. 175 of 2019. The Respondent contended that the Applicant sat on his right to prosecute the present appeal and that from the indolence portrayed, the Applicant has lost interest in prosecuting the appeal. He added that no draft record of appeal had been attached to demonstrate seriousness on the part of the Applicant.
8. The Respondent contended that the present Counsel was previously appearing in the matter as an associate for PTM Kisongoa advocates prior to the demise of Mr. Kisongoa Advocate and as such, Counsel has had conduct of the matter since inception. The Respondent contended that the Applicant has failed to demonstrate the threshold for grant of the orders sought and is therefore not deserving of the court's discretion.
9. The Applicant swore a supplementary affidavit on 4th November, 2024. In reply, he contended that his capacity to prosecute the appeal herein as guardian ad litem ceased upon the demise of Pascal Nzyuko on 20/11/2023. He reiterated that the Acts of God and the delayed issuance of the Deceased's death certificate made compliance with the conditional stay orders impossible. The Applicant contended that he duly applied for the substitution of the deceased Appellant within the one-year limitation period.
10. The Applicant averred that after the demise of his previous advocate who was in a sole proprietorship, the current advocates had no capacity to act on his behalf and thus they had to file the requisite Notice of Change of Advocates. He insisted that the application herein had been made in utmost good faith and therefore ought to be allowed.



11. The application was disposed of by way of written submissions. In the Applicant's submissions dated 20th November, 2024, Counsel reiterated the contents of the supporting affidavit. Counsel cited the provisions of Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules on the submission that this court has inherent jurisdiction to enlarge the time that has been limited for any act.
12. Counsel contended that the availability of the lower court file is a prerequisite before the Appellate court gives directions regarding disposal of the Appeal. Counsel urged the court to allow the application herein with costs.
13. In the Respondents' submissions dated 21st January, 2025, Counsel contended that the time for filing and service of the appeal lapsed on 30/12/2023 and the present application was filed on 9/10/2024. Counsel submitted that there had been inordinate delay in the filing of the present application and hence the Applicant was not deserving of the orders sought. Counsel opined that it was the duty of the Applicant to pursue this matter and therefore he ought to have known the strict timelines issued by the court. It was contended that the delay in filing the record of appeal had not been satisfactorily explained.
14. Counsel further submitted that in the event the lower court file is availed, then the Respondents will suffer great prejudice as the hearing and determination of the matter will be delayed. Counsel urged the court to find that the Applicant was undeserving of the orders sought.
15. The only issue for determination is whether the Applicant has demonstrated merit in the application for enlargement of time on the ruling of this court delivered on 15/11/2023.
16. Enlargement of time is a discretionary power vested with this court in accordance with the provisions of Section 95 of the *Civil Procedure Act* which outline as follows: -
Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.
17. The principles to be considered in an application for extension of time were laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR as follows: -

“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;



4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
18. Under Section 1A of the *Civil Procedure Act*, the overriding objective and the duty of this Court is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.
19. The Applicant attributed his delay in non-compliance with the orders of this court dated 15th November, 2023 as the demise of his father the Appellant, Pascal Nzyuko on 20/11/2023 just five days after this court’s ruling. In addition, his former advocate Mr. Paul Kisongoa also passed away pending issuance of the said ruling on 31/10/2023 and hence he was faced with the conundrum of substitution as he could not proceed in the same capacity as he was before.
20. The Applicant confirmed that he was issued with a limited grant of representation ad litem on 31/07/2024 and the present application was made on 11/10/2024. The reasons presented for non-compliance are reasonable and satisfactory. It is not in doubt that nobody can anticipate the divine Acts of God which in this case hampered due compliance.
21. In the end, this Court’s discretion has properly been invoked and the Applicant is entitled to enlargement of time as prayed. The appropriate orders are as follows: -
1. An Order of enlargement of time is hereby issued for a limited duration of Forty-five (45) Days for the Applicant to comply with the Ruling delivered on 15th November, 2023 herein.
 2. The Applicant Pascal Mule Nzyuko is substituted by Josephat Kiluva Paschal.
 3. The Lower Court File TAWA MCELC CASE NO. 175 OF 2019 to be availed.
 4. Costs in the cause.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF MARCH, 2025.

In The Presence Of:

Mr. Mukula for Appellant/Applicant.

Ms. Nzilani for Respondent.

Court assistant - Steve Musyoki

