



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Ibrahim, Njoki, Lenaola & Ouko, SCJJ)

SC APPLICATION NO. E021 OF 2025

- BETWEEN-

MARGARET ATIENO DERRY alias

MARGARET ATIENO KASYOKIAPPLICANT

-AND-

TOBIAS OCHIENG LWANGO.....RESPONDENT

(Being an application for extension of time to file a Notice of Appeal and seeking stay of execution of the Judgment of the Court of Appeal at Kisumu (Asike-Makhandia, H.A. Omondi and L. Kimaru, JJ.A dated 21st February 2025 in Civil Appeal No. E221 of 2022)

Representation

Ms. Muyoka h/b for Mr. Opiyo for the Applicant
(*E.S Ochieng & Co. Advocates*)

Mr. Odhiambo for the Respondent
(*Odhiambo Denis & Associates Advocates*)

RULING OF THE COURT

[1] UPON CONSIDERING the Notice of Motion dated 7th July 2025, the supporting affidavit sworn on 7th July, 2025 by **Margaret Atieno Derry alias Margaret Atieno Kasyoki** and submissions also dated 7th July 2025 and filed

on 30th July 2025, wherein the applicant seeks a stay of execution and extension of time to file her notice of appeal against the judgment of the Court of Appeal in **Civil Appeal No. E221 of 2022**. The applicant therein submits that the impugned judgment was delivered on 21st February 2025, was not immediately available to the parties, and was only posted and made accessible one week later. As a result, the applicant was unable to lodge her notice of appeal within the prescribed fourteen-day time frame and first sought an extension of time at the Court of Appeal in **Margaret Atieno Kasyoki Vs Tobias Ochieng Lwango** (Civil Application No. EO38 of 2025). However, with the import of the decision of the Court of Appeal in **Otieno Vs Ngani** (Civil Application 67 of 2028) [2025] KECA 473 (KLR) explained to her, she had no option but to withdraw the same and file the instant application. According to her, in that context, the six-month delay was occasioned by circumstances beyond her control, and she is willing and able to provide a sum of Kshs. 100,000/= as security for costs. The applicant also proposes to deposit any other reasonable security for costs within 90 days in a joint advocates' account opened by counsel having conduct of the matter; and

[2] UPON ALSO CONSIDERING the respondent's replying affidavit, sworn on 30th July 2025, by **Tobias Ochieng Lwango**, as well as submissions dated 7th August 2025, both filed on 25th August 2025, wherein the respondent states that the Court of Appeal judgment was initially scheduled for delivery on 7th February 2025, but was deferred to be delivered on notice. The judgment was eventually delivered on 21st February 2025 and uploaded on the e-filing platform on 4th March 2025. As of that date, the statutory period for lodging an appeal had not yet lapsed. He submits in that regard that the applicant has failed to provide any adequate or satisfactory reasons for the delay, thus not justifying the orders sought. He, however, agrees to the proposal for the deposit of reasonable security for costs in the name of the advocates conducting this matter, should the extension be granted, but notes that he has two certificates of costs issued by the trial court and the first appellate court, totaling Kshs. 228,160/= and Kshs. 182,820/=, respectively,

amounting to Kshs. 411,430/=, for which he has issued a formal demand for payment. He submits in addition that, it was upon issuance of this demand that the applicant moved the Court of Appeal in the instant application, which then prompted the filing of the present application. The respondent therefore urges that, should the Court issue the orders sought, it ought to take into account the two certificates of costs and equally consider that there is an outstanding bill of costs at the Court of Appeal payable by the applicant.

[3] NOTING that the dispute between the parties relates to the property known as **KISUMU/PANDPIERI/1833**, the applicant has alleged that she is the registered owner of the same, having bought and obtained title to it, while the respondent disputed the claim and urged that the suit property is ancestral land and, that he was entitled to a claim of adverse possession; and

[4] FURTHER NOTING that the trial court, the Environment and Land Court on first appeal, and the Court of Appeal on second appeal all determined that the applicant had not proved her claim to the suit property, and that the respondent's claim of adverse possession could not be determined since the trial court lacked jurisdiction to determine the same:

[5] WE NOW OPINE as follows:

- i. In ***Otieno Vs Ngani*** (supra), the Court of Appeal reiterated that it is only the Supreme Court that can extend the time for filing a notice of appeal to it. In the determination, the court applied its mind to this Court's decision in ***Kenya Revenue Authority & 2 Others Vs Mount Kenya Bottlers & 4 Others*** [2022] KESC 3 (KLR) in which we emphasized that the extension of time for filing an appeal to the Supreme Court must be sought under the Supreme Court Rules, 2020, and not under the Court of Appeal Rules. An earlier determination on the same was made by the Court of Appeal in ***Patel Vs Lagat*** (Civil Application E048 of 2021) [2022] KECA 509 (KLR).

ii. Rule 36 (1) of the Supreme Court Rules 2020 provides that a person who intends to appeal to the Court shall file a notice of appeal within fourteen (14) days from the date of judgment or ruling which is the subject of appeal. Rule 15 (2) of the Rules provides that the Court may extend the time limited by the Rules or by any decision of the Court.

iii. This Court set the guiding principles for extension of time in ***Salat Vs The Independent Electoral and Boundaries Commission & 7 Others***, [2014] KESC 12 (KLR) as follows:

“

- a. 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;***
- 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, is a consideration to be made on a case- to- case basis;***
- d. Where there is a reasonable [cause] for the delay, [the same should be explained] to the satisfaction of the Court;***
- e. Whether there will be any prejudice suffered by the respondents, if extension is granted;***
- f. Whether the application has been brought without undue delay; and***
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”***

iv. In ***County Executive of Kisumu Vs County Government of Kisumu & 8 others***, [2017] KESC 16 (KLR) this Court emphasized the need for an applicant, in an application for extension of time, to satisfactorily declare and explain the whole period of delay to the Court.

- v. Applying the above principles to the instant case, it is clear that there was a delay in the posting of the judgment of the Court of Appeal after its delivery. The judgment was delivered on 21st February 2025 and uploaded on the e-filing platform on 4th March 2025. The applicant had sought extension of time to file an appeal before us at the Court of Appeal in ***Margaret Atieno Kasyoki Vs Tobias Ochieng Lwango***, (Civil Application No. E038 of 2025), but applied for its withdrawal through a letter dated 29th April 2025. There is, however, no indication on record that the aforesaid letter received any attention from the Court of Appeal in line with Rule 54 of the Court of Appeal Rules, 2022.
- vi. Further, despite the omission by the Court of Appeal in posting the judgment, which limited the period available to the applicant to lodge a notice of appeal by seven (7) days, the applicant has neither explained the delay in filing the notice of appeal within the remaining period of 7 days nor explained the delay in bringing this application from 29th April 2025 to 7th July 2025, a period of 69 days. Without a satisfactory explanation of delay for that period, we can only find that the application has been brought after unreasonable and unexplained delay. The prayer for stay of execution and the attendant consideration of security for costs as proposed by the applicant is also contingent upon the grant of leave to file the notice of appeal out of time, a relief we have declined. Accordingly, we find no merit in the application before us and hereby dismiss the same.
- vii. The respondent, being the successful party, is entitled to costs of the application in line with the principle that costs follow the event as articulated in ***Rai & 3 Others v Rai & 5 Others*** [2013] KESC 21 (KLR).

[6] Consequently, and for the reasons afore-stated, we make the following orders:

- i. The Notice of Motion dated 7th July 2025 and filed on 30th July 2025 is hereby dismissed.***

ii. The Applicant shall bear the costs of the application.

It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of November 2025.

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**P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT**

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**M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT**

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**NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT**

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**I. LENAOLA
JUSTICE OF THE SUPREME COURT**

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**W. OUKO
JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR
SUPREME COURT OF KENYA**