

KENYA / JUDGMENT

Itegi v Kabuchu [2026] KECA 1681 (KLR)

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COURT

Court of Appeal

BEFORE

JM Mativo

CASE / FILE NUMBER

Civil Application E091 of 2026

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Itegi v Kabuchu (Civil Application E091 of 2026) [2026] KECA 1681 (KLR) (16 September 2026)
(Ruling)

Neutral citation:

[2026] KECA 1681 (KLR)

Republic of Kenya

In the Court of Appeal at Nakuru

Civil Application E091 of 2026

JM Mativo, JA

September 16, 2026

Between

Rose Nyambura Itegi

Applicant

and

Anne Gathoni Kabuchu

Respondent

(Being an application to lodge a notice of appeal out of time against the ruling and orders of the High Court of Kenya at Nyandarua (K. Waweru, J.) dated 19th May 2026 in P&A Cause No. E006 of 2025 Formerly Nyahururu P&A No. 23 of 2018)

Ruling

1. Rose Nyambura Itegi (the applicant), in her application dated 18th June 2026 principally seeks extension of time within which to lodge and serve a notice of appeal against the ruling delivered on 19th May 2026, and an order that the draft notice of appeal annexed thereto be deemed as duly filed and served upon payment of the requisite court fees. The application is brought under Rules 4, 43 and 49 of the Court of Appeal Rules, 2022, Sections 3A and 3B of the Appellate Jurisdiction Act, and Articles 48, 50 (1) and 159 (2) of the Constitution.

2. The salient grounds in support of the application are: (a) the impugned ruling was delivered on 19th May 2026, and that the 14 days stipulated under Rule 77 (2) of the Court of Appeal Rules, 2022, within which to lodge the notice of appeal lapsed on or about 2nd June 2026; (b) prior to the delivery of the impugned Ruling, she had filed an application dated 7th May 2026, seeking to set aside an erroneous consent on the mode of distribution and to stay the implementation of the confirmed grant; (b) she reasonably believed the said application would be heard and determined before any appellate steps became necessary, especially since the learned Judge had created a legitimate expectation that the application would be heard on 11th June 2026; (c) however, when the matter came up for hearing on 11th June 2026, the Superior Court declined to hear her pending application and instead directed the parties to comply with the ruling delivered on 19th May 2026; (d) by this time, the time for filing the notice of appeal had already lapsed, prompting her to move with promptitude to institute the current proceedings; (e) the applicant is elderly, aged 67 years, and she was unwell during the material period between the delivery of the ruling and the first two weeks of June 2026; (f) she relies on a medical report to demonstrate that she was indisposed and unable to give firm instructions to her advocates in good time.

3. In her replying affidavit sworn on 1st July 2026 in opposition to the application, the respondent contends that: (a) the intended appeal is an afterthought, the applicant only decided to appeal after she failed to obtain favourable orders in her application dated 7th May 2026; (b) the applicant was present in Court during the confirmation of the grant and cannot claim to have been condemned unheard.

4. The applicant filed submissions dated 10th July 2026 mainly arguing that she has demonstrated diligence and she has provided compelling reasons for the delay, including health issues. Further, she is basically asking this Court to exercise its discretion in her favour. She argued that the principles to be considered in an application of this nature include the period of delay, reasons for the delay and chances of the success of the appeal and the degree of prejudice to be suffered by the respondent. The applicant maintains that the delay was justified and that she brought the application without delay and the need for the Court to emphasize fairness. The applicant maintained that her intended appeal is arguable and that it is not frivolous. For instance, the applicant argues that she seeks to challenge the interpretation of Section 40 of the Law of Succession Act regarding division of an estate among polygamous houses. She relied on *Mary Rono vs. Jane Rono & Another* [2005] eKLR, *Grace Samson Komen vs. Willian Kiprop Komen and 2 Others* [2015] KECA 818 (KLR) and *Koech & Another vs. Chemutai & 2 Others* [2022] KECA 1309 (KLR). She also seeks to challenge the validity of the consent recorded before the trial court based

on alleged ignorance of material facts. Lastly, the applicant was denied a fair hearing because her application was pending when the impugned orders were made, and, in any event, the respondent will not suffer any prejudice.

5.The applicant cited *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi*, Civil Application No. NAI 255 of 1997 in support of her submission that the Court's discretion to extent time is unfettered but must be exercised judicially. Relevant considerations include length of the delay, reasons for the delay, chances of the appeal succeeding and prejudice to the respondent. The applicant maintained that the delay is short, explained and the appeal is arguable.

6.The applicant also cited *Fakir Mohamed vs. Joseph ugambi & Others* [2005] eKLR in support of the assertion that there is no limit on the factors to be considered so long as they are relevant. She also cited *Nicholas Kiptoo Arap Salat vs. Independent Electoral and Boundaries & 7 others Commission* [2014] eKLR in support of the holding that extension of time is an equitable remedy. Further, mistake of counsel should not be visited on the client.

7.The respondent in her submission dated 28th August 2026 in opposition to the application cited among other decisions *Fakir Mohamed vs. Joseph Mugambi & others* (supra) in support of her submission that under Rule 4, this Court exercises wide discretion guided by settled principles such as among others the period of the delay, reasons for the delay and the prospect of the success. The respondent submitted that the applicant was required to file the notice of appeal within 14 days from 19th May 2026 but filed the instant application after a delay of 31 days. Further, much as the applicant claims she was sick, she was throughout the proceedings represented by an advocate. Further, the delay was not inordinate.

8.Regarding the likelihood of the success of the applicant's intended appeal, the respondent submitted that the parties filed a written consent which was adopted by the Court, therefore, Section 40 of the Law of Succession Act cannot be invoked because the distribution of the estate is pursuant to the consent, therefore, the appeal has no prospects of success.

9.The key issue for determination is whether the applicant has satisfied the requisite threshold to warrant the exercise of this Court's discretion in granting the orders sought. The principles governing the exercise of discretion under Rule 4 of the Court of Appeal Rules are well settled. The Court must consider the length of the delay, the reasons for the delay, the chances of the intended appeal succeeding, and the degree of prejudice to the respondent if the application is granted. These considerations were affirmed in *Tongkwang & Another vs. Lokere & Another* [2026] KECA 32 (KLR), where this Court held that a plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour.

10.With regard to the period of delay, the impugned ruling was delivered on 19th May 2026, and the prescribed 14 days lapsed on 2nd June 2026. The present application was lodged on 18th June 2026, after a delay of 16 days. An "inordinate delay" means a delay that is excessive, immoderate or goes beyond what is reasonable or excusable in the circumstances of the case. (See *Lelei vs. Bittok* (Civil Appeal (Application) 041 of 2022) [2025] KECA 746 (KLR) (6 May 2025) (Ruling)).Settled jurisprudence from this Court dictates that applications should be granted

liberally unless the applicant is guilty of unexplained and inordinate delay. (See *Njoga vs. Nairobi City Water & Sewerage Company Ltd* (Civil Appeal (Application) E485 of 2025) [2026] KECA 943 (KLR) (15 May 2026) (Ruling)).

11.This Court evaluates an "inordinate delay" not by a rigid mathematical formula, but through specific context-driven criteria. The law does not state that a specific number of days automatically constitutes an inordinate delay. (See *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR). A delay of two weeks without any explanation can be deemed inordinate, whereas a delay of six months supported by a compelling explanation (such as medical incapacitation or systemic delay in obtaining court proceedings) might be deemed reasonable. However, delays stretching into multiple years (e.g., 5 years) are almost strictly treated as inherently inordinate.

12.A long delay accompanied by a plausible, honest and satisfactory explanation ceases to be "inordinate" or fatal to the application. Conversely, even a relatively short delay that is completely unexplained or met with nonchalance by the will be treated as inordinate and unconscionable. The definition of inordinate delay heavily relies on whether the lapse of time fundamentally compromises justice. Under Rule 4, the Court balances the applicant's right to be heard against the degree of prejudice the respondent would suffer. A delay becomes legally "inordinate" when it disrupts the finality of litigation, meaning it unfairly prevents a successful litigant from enjoying the fruits of their judgment.

13.As to the cause of the delay, the applicant explains that she was diligently pursuing her application dated 7th May 2026, which was still pending before the Superior Court. The necessity to pursue an appeal arose only after the Court declined to entertain the application on 11th June 2026. A litigant who is actively pursuing an application seeking to set aside the very consent upon which the confirmed grant is founded cannot reasonably be characterized as indolent or lacking an intention to challenge the impugned ruling. I therefore find this explanation is plausible.

14.Furthermore, the applicant's explanation of ill-health is supported by a medical report from Asoyon Renal & Outpatient, dated 17th June 2026. The report confirms that the applicant suffers from multiple chronic conditions, including heart failure with preserved ejection fraction, hypertension and impaired renal function, which materially restricted her capacity for sustained physical and administrative activity during the material period. Under Rule 4 of the Court of Appeal Rules, 2022, sickness backed by verifiable medical reports is widely recognized as a "good cause" and a plausible reason to grant an extension of time. (See *Njoroge vs. Odhiambo & 3 Others* (Civil Application E399 of 2025) [2026] KECA 211 (KLR) (6 February 2026) (Ruling)).

15.However, courts reject mere assertions or self-diagnosis of illness. The medical documentation (admission notes, treatment chits, discharge summaries, or a doctor's report) must be contemporaneous with the exact period of the delay. If the medical notes fail to explain the specific timeline or show how the illness directly incapacitated the applicant, the extension may be denied. The applicant availed medical documents which have not been questioned. I am satisfied that the sickness in this case constitutes a satisfactory explanation for the delay.

16.The Court views delay in a descending scale of importance alongside the merits of the case. If an intended appeal raises weighty issues of public importance or has high chances of success, the Court is sometimes willing to overlook a lengthy delay. However, if the delay is deemed heavily inordinate and unexplained, the Court will dismiss the application without even evaluating whether the appeal is arguable. To my mind, the delay in this case is not inordinate and it has been satisfactorily explained.

17.Regarding the prospects of success of the intended appeal, I have considered the draft memorandum of appeal. The question whether the applicant's grounds challenging the consent are merited is basically a matter for determination during the hearing of the appeal. Whether the confirmation of the grant was founded upon an erroneous consent is an issue for determination during the hearing of the appeal. It will suffice for me to say that these are arguable grounds.

18.As to whether the respondent will be prejudiced if the extension of time is granted, the respondent has not demonstrated any specific prejudice she stands to suffer if the extension is granted, which cannot be compensated by an award of costs. It is in the interests of both parties to have the appeal heard and determined on merits so that the dispute can resolved once and for all. Accordingly, I am satisfied that the application is merited. Consequently, the application dated 18thJune 2026 is hereby allowed. The applicant is granted leave to file and serve her notice of appeal within 14 days from today. The costs of this application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF SEPTEMBER, 2026.J.
MATIVO.....JUDGE OF APPEAL I certify that this is a true copy of the
original.DEPUTY REGISTRAR.

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