



Kenya National Highways Authority v Port Properties Limited & another (Civil Application E090 of 2024) [2025] KECA 1529 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KECA 1529 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E090 OF 2024
AK MURGOR, JA
OCTOBER 3, 2025**

BETWEEN

KENYA NATIONAL HIGHWAYS AUTHORITY APPLICANT

AND

PORT PROPERTIES LIMITED 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

(An application for extension of time to file and serve and/or deem the Notice of Appeal dated 10th November, 2021 as properly served against the Judgment and decree of the Environment and Land Court of Kenya at Mombasa (L. Naikuni, J.) Dated and delivered on 28th October, 2021 in ELC Pet No. 29 OF 2020)

RULING

1. In this application, the Applicant, Kenya National Highways Authority seeks for time to be extended for filing and serving a Notice of appeal, or to have the Notice of appeal dated 10th November 2021 deemed as properly filed and served against the Judgment of the Environment and Land Court delivered on 28th October, 2021.
2. In the Notice of motion dated 5th September 2024 brought under Sections 3A and 3B of the [Appellate Jurisdiction Act](#) and Rules 4 and 77(2) of the [Court of Appeal Rules](#), the Applicant seeks for orders that;
 - i) The Notice of appeal dated 10th November 2021 and the letter requesting for proceedings stamped and filed in the Environment and Land Court on 16th November, 2021 be deemed as properly filed and served; or
 - ii) in the alternative, the Court be pleased to grant leave to extend the time for issuance of a notice of intention to appeal from the Judgment of the Environment and Land Court at Mombasa dated 28th October, 2021; and



- iii) the costs of this application be provided for.
3. The application is brought on grounds that the Applicant is a statutory corporation established under the *Kenya Roads Act*, empowered with authority to acquire property for the performance of its strategic national function, which is the construction, maintenance and rehabilitation of national highways and trunk roads within the country.
 4. It was contended that vide Gazette Notices No. 405 of 2014, the 2nd Respondent, the National Land Commission (the Commission) gazetted for acquisition the 1st Respondent, Fort Properties Limited's two parcels of land being Land Reference Nos. MN/VI/4931 and part of Land Reference No. MN/VI/4929 (the suit properties) for the construction of the New Kipevu Terminal Link Road; that the road terminated before encroaching on Land Reference No. MN/VI/4929 hence the second parcel remained unaffected; that since Land Reference No. MN/VI/4929 was never acquired by the Commission, by a Kenya Gazette No. 1701 of 19th February, 2017, the Commission degazetted acquisition of Land Reference No. MN/VI/4929, but acquired 1.6853 Hectares of Land Reference No. MN/VI/4931 which it valued at Kshs. 242,950,000.
 5. It was also contended that the 1st Respondent was dissatisfied by the decision and petitioned the Environment and Land Court for declaratory orders for; payment of Kshs. 242,950,000, and mesne profits on the unacquired parcel Land Reference No. MN/VI/4929. The Court allowed the Petition vide its judgment dated 28th October, 2021 and ordered the payment of a mesne profit of Kshs. 200,000 per month; degazettment of Land Reference No. MN/VI/4929, and vacant possession.
 6. Aggrieved by part of the decision, the Applicant lodged a Notice of Appeal dated 10th November, 2021 via an email dated Friday, 12th November 2021 at 11:52AM together with a letter requesting for typed proceedings dated 12th November, 2021, which was during the Covid-19 pandemic when physical filing of pleadings had been interrupted; that the copies of the Notice and Letter were sent via email and copied to opposing counsel, at email addresses: xxxmombasa@court.go.ke; and xxxmombasaxx@gmail.com; xxxxxxxxxxxadv@gmail.com; xxxxxuthia@gmail.com; and copied to xxxxxxxxxxxwin56@gmail.com.
 7. It was further contended that subsequently, the 1st Respondent sought garnishee proceedings against the Applicant and attached its operations bank account domiciled at Cooperative Bank of Kenya. Thereafter, the Applicant appointed the law firm of M/s Prof. Albert Mumma & Company Advocates to represent it after delivery of the Judgment in place of its previous in-house counsel, Mr. Nathaniel Munga; that the new counsel took over the matter pursuant to an order of 21st June 2023 and proceeded on the premises that the Notice of appeal and the letter requesting for proceedings had both been duly filed in this Court and served; but upon further perusal of the court file, counsel discovered that although the Letter requesting for proceedings dated 12th November, 2021 was stamped as filed on 16th November, 2021, a copy of the Notice of appeal duly stamped as filed was missing from the court file.
 8. The Applicant further asserted that, out of abundance of caution by a Notice of motion dated 15th September, 2023 filed in the Environment and Land Court, it sought for extension of time to deem the Notice as properly filed; that a decision dismissing the application was not rendered by the trial court until 24th April, 2024. The Applicant was aggrieved and sought for a stay of execution of the Ruling under Rule 5(2)(b) of this *Court's Rules*, particularly against the orders of garnishee absolute by way of a motion dated 30th April 2024; that this Court allowed the motion on 21st June, 2024; that by way of the instant application, the Applicant now seeks for time to be extended to the file the Notice of



appeal in this Court given the inadvertent error of having filed for extension in the trial court. It was asserted that the delay is not inordinate or unreasonable and has been duly explained.

9. It was averred that the Applicant has fully paid the awarded sum of Kshs. 242,950,000 for acquisition of Land Reference No. MN/VI/4931 hence no prejudice whatsoever shall be suffered by the 1st Respondent in allowing the Applicant's appeal against the disputed interest and mesne profits in respect of Land Reference No. MN/VI/4929 which was never acquired nor occupied by the Applicant and for which the Commission has already degazetted.
10. It was further averred that in the event that the Applicant is denied the opportunity to appeal against the trial Judge's decision, the Kenyan taxpayer stands to suffer irreparable harm and damage as they will be condemned to pay the colossal sums of over Kshs. 768,670,675 for land which was not only degazetted, but for which a different statutory corporation, Kenya Ports Authority had in fact acquired; that allowing the impugned Judgment awarding mesne profits and interest would lead to a double payment and unjust enrichment of the 1st Respondent at the expense of the already overburdened taxpayers.
11. The Applicant contended that it has an arguable appeal with high chances of success and in support of this contention, it annexed a copy of the draft Memorandum of Appeal which set out the grounds in summary that:

The learned Judge was in error in law and in fact in awarding mesne profit calculated at Kshs. 200,000 per month from 2nd June, 2015 to the month vacant possession is given without proof of actual occupation of the property; in ordering the publishing in Kenya Gazette the degazettement of the cancelled portion of Land Reference No. MN/VI/4929 in disregard the degazetting of 19th February, 2017, and in directing that vacant possession of the cancelled portion, without the provision of any evidence of actual possession and in total disregard of evidence that Land Reference No. MN/VI/4929 was unaffected by the New Kipevu Terminal Link Road; in awarding the 1st Respondent interest on the compensation award for Land Reference No. MN/VI/4931 at the prevailing court interest rate with effect from 21st March 2014 without any legal basis and in violation of Section 117 of the Land Act, amongst other grounds.

12. The motion was supported by the affidavit of Ms. Muendo the Assistant Director Survey Mapping, Survey Department, Directorate of Highway Design and Safety of the Applicant sworn on 15th July 2024 and a Further Affidavit sworn on 30th May 2025 which largely reiterated the contents of the motion.
13. The 1st Respondent filed a replying affidavit opposing the application sworn on 4th June 2025 by Mr. Ketan Patel, the Director of the 1st Respondent where it was deposed that the Applicant has already filed another appeal before this Court being Civil Appeal No. E047 of 2024, KENHA vs Fort Properties Limited in which the Applicant successfully challenged the garnishee orders; that to-date the Record of appeal has not been filed in that appeal prompting the 1st Respondent to apply for a dismissal of the Notice of Appeal; that therefore this application for extension of time has been brought in bad faith.
14. It was further averred that despite the degazettement of Land Reference No. MN/VI/4929 the 1st Respondent does not have access to the suit properties and that though the Applicant contends that the acquisition amount has been paid, to the contrary, a balance of the amount awarded remains unpaid and due to the 1st Respondent; that no explanation has been provided for the delay, and the Applicant has not demonstrated what steps it has taken besides the emails sent, and which were not received; that



- the Applicant has taken various steps in pursuit of payment, but to no avail. It was finally averred that the application is an afterthought and a delaying tactic aimed at prejudicing the 1st Respondent.
15. When the motion came up for hearing on a virtual platform, learned Senior Counsel Prof. Mumma appeared for the Applicant, while learned counsel Mr. Matheka appeared for the 1st Respondent. There was no appearance from the National Land Commission.
 16. Relying on the Applicant's written submissions, counsel for the Applicant submitted that in the Judgment arising from the 1st Respondent's petition the learned Judge awarded the 1st Respondent mesne profits and interest for unlawful possession of Land Reference No. MN/VI/4929.
 17. It was further submitted that the Notice of appeal and request for proceedings were filed during the Covid-19 pandemic, and that a stamped letter requesting for proceedings was available, but they were unable to trace the Notice of appeal, and that all efforts to locate the receipts were unsuccessful; that, upon noticing the shortcomings, and out of abundance of caution by a Notice of motion dated 15th September, 2023 the Applicant filed for extension of time in the Environment and Land Court so as to have the Notice of appeal deemed as properly filed; that a decision dismissing the application was not rendered by the trial court until 24th April, 2024, nearly one year later, which would explain the delay in the filing of the application to extend time. It was also submitted that there has been no inordinate delay in the filing of this application, that the intended appeal has high chances of success, and there would be no prejudice occasioned to the 1st Respondent were time to be extended.
 18. For his part counsel for the 1st Respondent also submitting orally stated that the 1st Respondent has been denied use or possession of Land Reference No. MN/VI/4929 to date and there is no averment in the Applicant's affidavit that the property has been released to the 1st Respondent. Counsel further submitted that no Notice of appeal was filed and that no reason for delay in bringing this application has been presented to the Court, and that time for filing has since lapsed on the 11th November 2024; that the application for extension in the Environment and Land Court was dismissed for the reason that no explanation for the delay in filing the application was provided. Counsel argued that the instant application is an afterthought that the Applicant should have paid the outstanding amounts; that the major shareholder of the 1st Respondent has since passed on, and no steps or action has been taken on the part of the Applicant in respect of lodging of the appeal.
 19. Under rule 4 of the *Court of Appeal Rules*, this Court has jurisdiction to extend time in a matter such as this in the following terms:

“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 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.”
 20. This Court in the case of *Leo Sila Mutiso vs Hellen Wangari Mwangi* [1999] 2 EA 231 set out the principles to be applied in exercise of its discretion in determination of any application under rule 4 thus:

“...the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”



21. Guided with respect to whether the delay has been explained, the Judgment appealed against was delivered on 28th October 2021. The Notice of appeal dated 11th November 2021 was alleged to have been filed on 21st November 2021 together with the letter bespeaking the proceedings. And this application was filed on 5th September 2024.
22. The Applicant has explained that the Notice of appeal and the letter bespeaking the proceedings were filed under the Judiciary E-filing system during the period of the Covid pandemic; that when the new counsel took over the proceedings, they were unable to trace the Notice of appeal, or receipt evidencing payment of filing; that despite every effort made to trace the stamped and served Notice of appeal, all their efforts have been unsuccessful. It is for this reason that they filed a Notice of motion seeking to extend time for filing of the Notice of appeal in the trial court on 15th September 2023. Thereafter, a decision dismissing the application was not rendered by the trial court until 24th April, 2024, nearly one year later.
23. A review of the Applicant's motion, the affidavits in support and the annexures, shows that a Notice of appeal dated 10th November 2021 signed by the Applicant's previous Nathaniel Munga, and the letter requesting for proceedings dated 12th November 2021 have been attached. Without any material evidence disproving the filing of the Notice of appeal, I am prepared to accept that during filing of the Notice, an error may have occurred considering that e-Filing system was newly introduced at the time, and most counsel were yet to familiarize themselves with the system, that the Notice of appeal dated 11th November 2021 was filed at the same time as the letter bespeaking the proceedings.
24. As concerns the filing of the application seeking to extend time in the trial court, this was indeed an error, and clearly displays a lack of counsel's appreciation of this [Court's Rules](#) with respect to applications seeking for extension of time in this Court. Be that as it may, it was an error that has clearly cost the Applicant precious time, seeing as they have had to wait for almost a year before a decision was rendered by the trial court. So that, when the explanation that it took a significant amount of time and effort to trace the Notice of appeal that was filed, and, that it took the trial court almost a year to render a decision on the application seeking to have time extended in that court, I consider that the period of delay up to dismissal of the trial court's decision has been adequately explained.
25. As concerns the period subsequent to the trial court's decision, and upto the filing of the instant application, I do note that the Applicant's counsel has severally reiterated that it moved with speed to file the instant application. And, it is not lost on the Court that, from the date counsel received instructions to the date this application was filed, counsel was engaged in other court activities including seeking orders of stay of execution of the orders of the trial court which application was allowed by a ruling of this Court of 21st June 2024. The undertaking of various court filings and the period it took to prepare this application would, in my view, adequately explain the delay for the period up to the filing of the instant application.
26. All in all, having analysed the material advanced by the Applicant to explain the delay, I am satisfied that it has been sufficiently explained.
27. As to whether the intended appeal has high chances of success, from the grounds of appeal set out on the draft memorandum of appeal, it cannot be overlooked that the Applicant has raised some fundamental issues, which should be ventilated before this Court. And given the exorbitant sums involved, the payment of which, the Applicant contends will be prejudicial to not only itself but also the Kenyan taxpayer in the event the appeal were to succeed, my view is that on a balance of probabilities there is greater prejudice that will be occasioned to the Applicant, rather than the 1st Respondent should I decline to extend this application.



28. In sum, the Applicant having satisfied the requirements of rule 4, I hereby do exercise my discretion to extend time for filing the Notice of appeal, and for the Notice of appeal dated 10th November 2021 to be deemed as properly filed.

29. In so finding, I make the following orders:

- i. the Notice of Appeal dated 10th November 2021 to be deemed as properly filed;
- ii. the Applicant to serve the Notice of Appeal on the Respondents within 7 days from the date of this ruling;
- iii. the Memorandum and Record of Appeal to be lodged and served in accordance with rule 86 of this Court's Rules; and
- iv. Costs in the appeal.

It is so ordered.

DATED AND DELIVERED IN MOMBASA THIS 3RD DAY OF OCTOBER, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a True copy of the original Signed

DEPUTY REGISTRAR

