

**IN THE COURT OF
APPEAL AT NAKURU
(CORAM: WARSAME, J.A. IN
CHAMBERS) CIVIL APPLICATION NO. E
067 OF 2025 BETWEEN**

**FREDRICK HEZRON AWUOR OSUMBA.....APPLICANT
AND**

**KENYA NATIONAL ASSURANCE LTD.....1ST
RESPONDENT GARAM INVESTMENTS
2ND RESPONDENT MACAO PROPERTIES
.....3RD RESPONDENT GEOFFREY NGUGI alias GEOFFREY
NYAMBURA4TH RESPONDENT NAKURU DISTRICT LAND
REGISTRAR.....5TH RESPONDENT**

*(An Application for extension of time and leave to appeal out of time
against the Ruling of the High court of Kenya at Nakuru (H.I. Ong'udi, J)
delivered on 17th December, 2024*

*in
HCCC No. 188 OF 2011)*

RULING

1. The applicant, Fredrick Hezron Osumba, has filed an application dated 12th June 2025 seeking extension of time to file an appeal out of time under Rules 4, 41, 43, 44 and 49 of the Court of Appeal Rules, seeking to challenge the ruling delivered on 17th December 2024 by Hon. Lady Justice H.I. Ong'udi.
2. The genesis of this matter lies in a long-running dispute over land parcel Nakuru Municipality Block 7/332. The applicant

filed suit in the High Court against the respondents, seeking injunctive relief relating to a mortgage over the suit property. This suit was dismissed on 8th February 2017 for want of prosecution.

3. More than three years later, through an application dated 2nd December 2020, the applicant sought reinstatement of the suit. A ruling on this application was delivered on 29th July 2021, wherein the Honourable Court reinstated the suit with specific conditions, including that it be set down for hearing within thirty days from the date of the ruling, failing which the dismissal orders would be automatically reinstated.
4. The applicant's former advocates wrote to the Deputy Registrar on 26th August 2021 requesting a hearing date. However, instead of issuing a hearing date, the Deputy Registrar listed the matter for mention on 21st September 2021. The applicant now contends that his former advocates did not attend Court on that date and did not notify him that the matter had been scheduled for mention.
5. Critically, by 30th August 2021, the thirty-day period

stipulated in the orders of 29th July 2021 had expired. The suit had not

been set down for hearing. Consequently, in accordance with the clear terms of the court's order, the dismissal orders were automatically reinstated on that date. The applicant's suit stood dismissed once again, this time by operation of the court's own order.

6. On 5th October 2021, more than a month after the automatic reinstatement of the dismissal orders, the applicant filed an application seeking extension of time within which to fix a hearing date. It is critical to note that this application did not seek to set aside the automatic reinstatement of the dismissal orders or to reinstate the suit afresh. It merely sought an extension of time to fix a hearing date for a suit that, by operation of law, had already been dismissed.
7. In a ruling dated 17th December 2024, Ong'udi J. dismissed the application and held the Court was functus officio as the orders dismissing the suit were reinstated on 29th August 2021. Consequently, the to the trial court.
8. Following the ruling of 17th December 2024, the applicant's former advocates filed an application dated 22nd December

2024 seeking stay of execution against the ruling and leave
to

introduce new evidence. A draft Notice of Appeal was annexed to that application, but critically, the Notice of Appeal itself was never filed. This application was eventually withdrawn with no order as to costs on 4th June 2025 when the Court directed the applicant to file the substantive appeal.

9. The applicant deposes that upon conducting due diligence while preparing the record of appeal, he discovered that his former counsel had failed to file the Notice of Appeal despite having prepared it and annexed it to the December 2024 application. Acting in person, the applicant then filed the Notice of Appeal on 24th May 2025, approximately five months after the impugned ruling was delivered. The current application seeking extension of time was filed on 12th June 2025, roughly six months after the judgment.
10. In essence, the applicant places the entire blame for the delay squarely at the feet of his former advocates, Messrs. K. Tito & Advocates, for failing to file the Notice of Appeal timeously despite annexing a copy to an application dated 22nd December 2024.

11. On the strength of this explanation, the applicant seeks orders admitting the Notice of Appeal as having been filed on time, or alternatively, granting an extension of time to file the same out of time. He contends that the intended appeal raises serious and arguable issues with high prospects of success, as evidenced by the annexed draft Memorandum of Appeal which challenges, inter alia, the trial court's finding that it was functus officio. The applicant submits that the delay occasioned by his former counsel's inadvertent mistake should not prejudice an innocent litigant who is desirous of prosecuting his appeal on the merits. He further avers that no prejudice will be suffered by the respondents if the application is allowed, as they continue to enjoy quiet and exclusive possession of the suit property.
12. The 1st and 2nd Respondents have filed a comprehensive and compelling replying affidavit dated 11th July 2025, sworn by Tabitha Mumbi Mwaniki, vehemently opposing the application on multiple substantive grounds. First, the respondents submit that the intended appeal is nugatory and futile. The application dated 5th October 2021 only

sought extension of time to fix a

hearing date and did not seek to reinstate the suit so even if this appeal succeeds, the suit remains dismissed, rendering the intended appeal merely an academic exercise with no practical utility.

13. Second, the respondents contend that the applicant's suit lacks merit and locus standi. The 1st Respondent sold the suit property through public auction on 27th February 2011 and relinquished any interest in it. The 3rd Respondent, Macao Properties Limited, acquired the property in good faith, paid valuable consideration, and has been the registered proprietor for fourteen years. Since Macao Properties is not a party to the underlying suit, no injunction can issue against the 1st and 2nd Respondents who no longer have any interest in the property, and no orders can be obtained against the registered proprietor.
14. Fourth, the respondents submit that the delay has not been satisfactorily explained. They characterize the blame placed on previous counsel as merely a scapegoat tactic which the applicant has consistently employed to explain his various lapses. Furthermore, contrary to the applicant's averments,

both counsel attended Court on 21st September 2021, but
the

applicant was not ready to take a hearing date and instead sought leave to amend the Plaint, contrary to the court's orders.

15. Lastly, the respondents assert that they will suffer substantial prejudice if the application is granted. Extending time will cause anguish, prejudice and hardship to the 1st and 2nd Respondents who sold the property fourteen years ago and no longer have any interest in it. They also emphasised the applicant's consistent pattern of laxity and non-compliance throughout this litigation.
16. The principles governing applications for extension of time are well settled. As stated in **Abdul Aziz Ngoma vs. Mungai Mathayo [1976] eKLR**, this Court's discretion to extend time under Rule 4 only comes into existence after 'sufficient reason' for extending time has been established. As further elaborated in **Fakir Mohamed vs. Joseph Mugambi & two others, Civil Application No. Nai. 332/04**, relevant factors include the period of delay, the reason for the delay, the chances of the appeal succeeding if granted, the degree of prejudice to the respondent, the

effect on public administration, and the importance of compliance with time limits.

17. I have carefully considered the application, the replying affidavit, the historical context of this litigation, and the applicable legal principles. Having done so, I am satisfied that this application lacks merit and must be dismissed for the following reasons. First, the appeal has no chances of success. The application dated 5th October 2021 sought only an extension of time to fix a hearing date. It did not seek to set aside the automatic reinstatement of the dismissal orders or to revive the suit. The dismissal became effective by operation of law on 29th August 2021 when the applicant failed to comply with the clear thirty-day deadline. The trial court had no jurisdiction to extend time for setting down a dismissed suit for hearing. The orders of 29th July 2021 were clear and self-executing. They required no further judicial intervention to take effect. This elementary error underscores why the learned Judge correctly found that the court was functus officio. The applicant's remedy, if any, lay in seeking reinstating and reviving the suit, not in seeking an extension to comply with orders that had already lapsed. Even if this Court were to grant the extension sought and the

appeal were to succeed, the

underlying suit would remain dismissed. An appellate court does not sit to determine academic questions.

18. Second, beyond the futility of the appeal, the explanation proffered for the delay is wholly inadequate when examined against the applicant's conduct throughout this litigation. The suit was filed in 2011 and dismissed in 2017 after six years of inaction by the applicant. Three years elapsed before reinstatement was sought. When reinstatement was granted with explicit conditions, those conditions were not met. The pattern reveals not isolated mistakes by counsel, but chronic failure by the applicant to prosecute his claim without diligence. Blaming his advocates for the latest delay rings hollow against this backdrop.
19. In the end, I find no merit in this application and dismiss it with no orders to cost.

Dated and delivered at Nakuru this 21st day of October, 2025.

M.WARSAME

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR