



REPUBLIC OF KENYA



**KENYA LAW**  
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**Juma & another v Khaki & 2 others (Civil Application E013 of 2025)  
[2025] KECA 1692 (KLR) (24 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1692 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E013 OF 2025  
P NYAMWEYA, JA  
OCTOBER 24, 2025**

**BETWEEN**

**SAIDI JUMA ..... 1<sup>ST</sup> APPLICANT**

**NGOLO BAYA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**HUSSEINALI M. KHAKI ..... 1<sup>ST</sup> RESPONDENT**

**MOHSIN A. KHAKI ..... 2<sup>ND</sup> RESPONDENT**

**MUSLIM M. KHAKI ..... 3<sup>RD</sup> RESPONDENT**

*(An application for extension of time to file Record of Appeal with respect to the Judgment delivered by the Environment and Land Court at Mombasa (Kibunja J.) on 1st July 2024 in ELCC NO. 35 of 2019 as consolidated with MISC ELC/E063/2020)*

**RULING**

1. The applicants herein were the defendants in Mombasa ELCC NO. 35 of 2019 as consolidated with Mombasa MISC ELC E063 2020, in which the Environment and Land Court (Kibunja J.) delivered a judgment dated 1<sup>st</sup> July 2024 that dismissed the applicants' claim for adverse possession with respect to the suit property, being plot number 344 1 MN (CR 1852), upheld the respondents' claim of ownership of the said property, and gave orders of eviction and injunction against the applicants. Being aggrieved, the applicants lodged a Notice of Appeal on 10<sup>th</sup> July 2024 of even date. The applicants have now filed an application in this Court by way of a Notice of Motion dated 14<sup>th</sup> February 2025, seeking orders for extension of time to file and serve the Memorandum and Record of Appeal against the said judgment, and that this Court specifies the period or terms to be complied with.
2. The application is expressed as being brought pursuant to section 3A and 3B of the *akn ke act 1977 15 Appellate Jurisdiction Act* and Rule 4 of the Court of Appeal Rules. The main grounds for the



application are that the delay in filing the record of appeal was occasioned by a delay in procuring the certified typed proceedings of the trial Court, and the applicants' financial constraints. The application is supported by an affidavit sworn on 14<sup>th</sup> February 2025 by one Fredrick Karisa, who was an applicant in with Mombasa MISC ELC E063 2020, in which he detailed the actions taken by the applicants and their advocates after the delivery of the subject judgment, including the requests for certified proceedings on 8<sup>th</sup> July 2024, which were availed by the Deputy Registrar of the Environment and Land Court ("ELC") on 16<sup>th</sup> December 2024 together with a Certificate of Delay. The applicants stated that they are men of meagre means, and struggled to raise funds due to the prevailing harsh economic climate; their intended appeal is meritorious and has high chances of success, and they will suffer grave injustice if the orders sought are not granted since their and other families are currently occupying the suit property; and are at jeopardy of being evicted by the respondents.

3. The applicants' advocates filed written submissions dated 13<sup>th</sup> July 2025 in which the above averments were reiterated, and cited various decisions of this Court, including *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* (1999) 2 EA 231, *County Government of Narok & Another vs Mwavali* (2024) KECA 390 (KLR) and *Thuita Mwangi vs Kenya Airways Ltd* (2003) eKLR on the criteria that guides the exercise of the discretion under Rule 4 of the Court of Appeal Rules. Also cited was the decision in *MSA vs KMKA* (2024) KECA 1222 (KLR) where this Court held that financial hardship and procedural complexities may, when reasonably explained and documented, justify the delay.
4. On the cause for delay, the applicants submitted that the present application was filed on 18<sup>th</sup> February 2025, which constitutes a delay of approximately two months after receipt of the Certificate of Delay, which duration was not inordinate and is excusable in the circumstances. Among the factors cited as contributing to the delay were the voluminous nature of the pleadings in the trial Court, the intervening end-of-year judicial recess and holiday closures, and financial constraints that delayed payment of instruction fees to their advocates.
5. The respondents opposed the application in a replying affidavit sworn on 9<sup>th</sup> July 2025 by the 1<sup>st</sup> respondent, and deponed that the applicants have not accounted for four months delay in following up on the progress of the typing of the proceedings, and have not by way of evidence demonstrated that they are men of meagre means, thus the allegation that they were financially constrained to instruct their advocates to file the Memorandum of Appeal and Record of Appeal within time does not hold water.
6. The respondents' advocates reiterated these averments in written submissions dated 14<sup>th</sup> July 2025, and cited the decision by the Supreme Court of Kenya in *County Executive of Kisumu vs County Government of Kisumu & 8 others* (Civil Application 3 of 2016) [2017] KESC 16 (KLR) that extension of time is not a right of a party and is an equitable remedy that is only available to a deserving party at the discretion of the Court, who has the burden of laying a basis to the satisfaction of the court. The respondents also relied on the decision by this Court in *Ruhangi vs Registrar of Companies & 2 others* (Civil Appeal (Application) E228 of 2023) [2023] KECA 834 (KLR) that it is not enough for a party to merely make an allegation regarding the circumstances of the delay, the allegation ought to be accompanied with persuasive evidence to make it plausible.
7. I heard the application on 17<sup>th</sup> July 2025 on this Court's virtual platform when learned counsel Ms. Waithera holding brief for learned counsel Mr. Obinju, appeared for the applicants, while learned counsel Mr. Abaja Mogaka appeared for the respondents. Both counsel highlighted their respective written submissions. I have considered the arguments put forth by the parties, and am alive to the principles that apply to an application for extension of time under Rule 4 of the Court of Appeal Rules of 2022, which have been the subject of many decisions of this Court and the Supreme Court of Kenya. In summary, the Court of Appeal confirmed in the case of *Leo Sila Mutiso vs Rose Hellen*



Wangare Mwangi, (supra) that the decision whether or not to extend time for appealing is essentially discretionary, taking into account the length of delay and reason for the delay.

8. In the case of Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others, Supreme Court of Kenya Application No. 16 of 2014, the Supreme Court of Kenya set down the underlying principles that a Court should consider in exercising its discretion as being:

- i. 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;
- ii. A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court;
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether the respondents will suffer any prejudice if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

9. The Supreme Court of Kenya also pronounced as follows in the case of Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR:

"the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

10. The instant application for extension of time was filed on 18<sup>th</sup> February 2025, approximately six months after the delivery of the judgment by the ELC, and two months after 16<sup>th</sup> December 2024, when the Certificate of Delay that accompanied the certified typed proceedings was received by the applicants. It is notable in this respect that Rule 84 of the Court of Appeal Rules of 2022 provides as follows:

84.

- (1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—
  - a. a memorandum of appeal, in four copies;
  - b. the record of appeal, in four copies;
  - c. the prescribed fee; and
  - d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule



- (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.
- (3) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent..

11. The only requirement for reliance on the proviso to sub-rule (1) is that of service of a copy of the application for certified proceedings on the respondent. The respondents herein do not contest that there was such service of the application, and blame the applicants for the delay in following up on the delivery of certified proceedings, which was an eventuality which was not within the applicants' control. As regards evidence of their financial constraints, the applicants did annex correspondence with their advocates seeking indulgence to raise the court and legal fees they were required to pay to lodge their appeal against the subject judgment. Lastly, I also note that the time to file a Record of Appeal started to run after receipt of the Certificate of Delay on 16<sup>th</sup> December 2024, and the delay in filing the application for extension of time was of four days only, after the expiry of the sixty days provided by Rule 84(1) of the Court of Appeal Rules.
12. I am therefore persuaded that sufficient cause for the delay in filing the application for leave has been demonstrated by the applicants, and that the delay was not inordinate in the circumstances. I am also of the view that the respondents have not demonstrated the prejudice they will suffer if the extension for time is granted. Consequently, the application dated 14<sup>th</sup> February 2025 is found to be merited. The applicants are accordingly granted leave to file and serve the Memorandum and Record of Appeal against the judgment delivered by the Environment and Land Court (Kibunja J.) on 1<sup>st</sup> July 2024 in Mombasa ELCC N0. 35 of 2019 as consolidated with Mombasa MISC ELC E063 2020, within thirty (30) days of the date of delivery of this ruling. Each party shall meet their own costs of the application.
13. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF OCTOBER, 2025.**

**P. NYAMWEYA.**

..... **JUDGE OF APPEAL**

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

Deputy Registrar

