



**Mbatiah v Hightower alias Hightower Faizal Wilber EARL (Sued as the
Legal Representative of the Estate of Wilber Hightower (Deceased)) (Civil
Appeal E131 of 2025) [2025] KECA 1833 (KLR) (7 November 2025) (Ruling)**

Neutral citation: [2025] KECA 1833 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL E131 OF 2025
K M'INOTI, JA
NOVEMBER 7, 2025**

BETWEEN

MARK KITHINJI MBATIAH APPLICANT

AND

**NAJAHAIT FAIZAL HIGHTOWER ALIAS HIGHTOWER FAIZAL WILBER
EARL (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF
WILBER HIGHTOWER (DECEASED)) RESPONDENT**

*(Application for extension of time to appeal from the judgment and decree of the Environment
& Land Court at Meru (Yano, J.) dated 30th January 2025 in ELCC No. 149 of 2017 (OS)*

RULING

1. The applicant, Mark Kithinji Mbatiah, filed a suit in the Environment & Land Court (ELC) at Meru against Wilber Hightower (deceased), claiming to be entitled to be declared as owner of the property known as LR No Ntima/Igoki/1496 (the suit property) through adverse possession. The suit property was at all material times registered in the name of the deceased. As a matter of fact, the applicants' own land borders the suit property. In the course of the proceedings, the deceased passed on and was substituted by his widow, the respondent Najahait Faizal Hightower.
2. After hearing the suit, the ELC, by a judgment dated 30th January 2025 found that the applicant had not proved that he was in occupation of the suit property for the requisite period of 12 years and that if at all he had entered the suit property, it was with the permission of the deceased. Further, that the applicant had unsuccessfully attempted to obtain consent from the Land Control Board to transfer the suit property to himself, purposing that it was a gift from the deceased. Accordingly, the court dismissed the suit with costs.



3. The applicant did not file a notice of appeal within 14 days from the date of the judgment or at all, as is expected of a person who is aggrieved by decision of a superior court. Instead, on 19th August 2025, some seven and half months after delivery of the ELC judgment, the applicant filed the present application, seeking extension of time to appeal.
4. There is only one reason put forth in his supporting affidavit to explain the delay in lodging the notice of appeal, namely that since 2023, he has been regularly in hospital and was not able to instruct his advocates to appeal. That explanation is repeated in his written submissions dated 29th September 2025.
5. In addition, the appellant submits that the discretion of the Court under rule 4 of the Court of Appeal Rules is unfettered and that he has sufficiently explained the delay. He relies on a number of decisions, among them Paul Wanjohi Mathenge v. Duncan Gichane Mathenge [2013] eKLR KECA 199 (KLR); Salat v. IEBC & 7 Others [2014] KESC 12 (KLR) and Ngei v. Kibe & Another [2021] KECA 243 (KLR) on the principles that should guide the Court in an application for extension of time.
6. It is also the applicant's submission that his intended appeal has high chances of success based on the annexed draft memorandum of appeal in which he faults the ELC (interchangeably referred to as trial judge and trial magistrate) for misinterpreting the law on adverse possession; for failing to hold that he was in possession of the suit property since 1984; and for determining the suit against the weight of evidence.
7. Lastly, applicant relies on Article 159(2)(d) of *the Constitution* and rule 1(2) of the Court of Appeal Rules to submit that the Court should eschew technicalities and invoke its inherent powers to extend time.
8. The respondent opposed the application vide a replying affidavit sworn on 7th October 2025 and written submissions dated the same day. It is the respondent's contention that the application is incompetent because the applicant had not filed a notice of appeal and that the Court has no jurisdiction to entertain the application because a notice of appeal is a jurisdictional prerequisite. In support of the submission he relies on the decisions in Salat v. IEBC & 7 Others (supra); Apungu Arthur Kibira v. IEBC & 2 Others [2018] KECA 447(KLR); Bogonko v. Ndege [2024] KECA 351 (KLR); and Tsilla Nkirote Muthomi v Zipporah Kambura Muthomi [2025] KECA 345 (KLR).
9. It is also the respondent's contention that the applicant has not placed before the Court sufficient material on the basis of which the Court can exercise discretion in his favour. It is contended that the applicant has not presented any evidence of having applied for submissions and that the medical reports relied upon by the applicant indicate he was indisposed even at the time of trial and that could not have prevented him from lodging the notice of appeal.
10. I have carefully considered this application. I need to dispose of the jurisdictional issue raised by the applicant founded on lack of a notice of appeal. I believe that the binding decision of the Supreme Court in Salat v. IEBC & 7 Others (supra) speaks to the practice in the Supreme Court. The practice as regards extension of time in this Court is governed by rule 4 of the Court of Appeal Rules, which provides as follows:
 - “ 4. The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of 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.” (Emphasis added).



11. What I understand rule 4 to mean is that a party can apply for extension of time whether before or after doing an act, in this case, before filing a notice of appeal, or after filing a notice of appeal out of time. The decision in *Apungu Arthur Kibira v. IEBC & 2 Others* has no application here because it did not involve extension of time. It dealt with an appeal which was already filed, but was found to be founded on a defective notice of appeal. Similarly, the decision in *Tsilla Nkirote Muthomi v. Zipporah Kambura Muthomi* is not applicable as it arose from an application for stay of execution where the applicant had not filed a notice of appeal.
12. As regards the merits of the application, while it is true that the discretion of the Court to extend time under rule 4 is wide and unfettered, it is a discretion that is intended to assist a party to proceed with his or her appeal if there is a good reason as to why there was noncompliance with the prescribed time. However, the discretion of the Court has to be exercised judiciously and on reason, rather than arbitrarily and on whim. Extension of time is not a right of a party and neither is it granted as a matter of course. The applicant has to satisfy the Court why he or she did not comply with the prescribed timelines. Being an equitable remedy, the applicant must show that he or she is deserving of the remedy and above all, has to be truthful and honest in the explanation that is put forward. A party who is demonstrated to lack candour or is keen to mislead is not deserving of an equitable remedy.
13. Further, an applicant cannot wish away timelines prescribed by the law by dismissing them as mere technicalities to be shunned under Article 159(2) (d) of *the Constitution* or aberrations curable under the Court's inherent jurisdiction. The timelines prescribed by the law are intended to realise the principle and value expressly spelt in Article 159(2) (b) *the Constitution* that justice shall not be delayed. Hence those timelines cannot be wished away.
14. Indeed, in *Odinga v. IEBC & 3 Others* [2013] KESC 2 (KLR), the Supreme Court held that Article 159(2) (d) of *the Constitution* cannot be read or applied in a manner that ousts the provisions of other clear Articles of *the Constitution* or provisions of the law. In dismissing an argument similar to that made by the applicant in this case, the Supreme Court held:

“The article (159 (2) (d)) simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law. In the instant matter before us, we do not think that our insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a procedural technicality; it is a constitutionally mandated technicality.”
15. It is equally a basic principle that a party cannot invoke the inherent powers of the Court where the matter in question is expressly provided for or regulated by a provision of the law. The applicant cannot ask the Court to invoke its residue inherent powers where rule 4 expressly provides for extension of time and the circumstances under which the Court can extend time. The short of it is that the applicant must bring himself within the parameters of that rule and provide a good explanation for failure to comply with the rules.
16. The factors that guide the Court in determining whether or not extend time include the period of delay; the reasons or the explanation for the delay; the conduct of the parties; the prejudice that each of the parties stands to suffer; the balance between the rights of a party who has a judgment in its favour against the right of a party to pursue an appeal; the public interest issues implicated in the appeal; and whether, on prima facie basis, the intended appeal raises bona fide issues or is a mere frivolity. Each application depends on its peculiar circumstances and the fact that the Court allowed or disallowed



extension of time in one case does not mean it will do so in a different case. (See *Leo Sila Mutiso v. Helen Wangari Mwangi* [1999] 2 EA [1999] EA 231 and *Imperial Bank Ltd (In Receivership) & Another v. Alnashir Popat & 18 Others* [2018] eKLR).

17. The judgment that the applicant wishes to appeal was delivered on 30th January 2025. Under rule 77(2) the applicant was obliged to file a notice of appeal within 14 days from the date of the judgment. That did not happen until seven and half months later when the applicant made the present application. To wait for seven and half months to take action that requires 14 days is clearly inordinate delay.
18. As I indicated earlier, the only reason advanced by the applicant is his illness. He has attached among other documents what purports to be a medical report dated 8th September 2025 from Meru Teaching & Referral Hospital. Other than the fact that it is attributed to a doctor known simply as “Dr. Paul”, it appears not to be a genuine medical report, but one that is tailor-made and contrived for this particular application. That is why, instead of allowing the Court to draw its own inference, states:

“Impact on Legal Obligations

It is my professional opinion that the patient’s illness has contributed to a delay in pursuing and or filing his court appeal within the stipulated timelines. The recurrent hospital visits, follow-ups, and the general physical strain from the above chronic illness are consistent with the reasons advanced from delay.

Conclusion

Based on the medical evidence and treatment records available, it is confirmed that the patient has been unwell since 2017, with ongoing health complications requiring continuous management. The said medical conditions are valid grounds to explain the delay in filing an appeal.” (Emphasis added).

19. Other than the fact that I am not persuaded of the genuineness of the said “medical report”, the applicant has lived with his medical condition since 2017, the very year he filed the suit in the ELC. With that illness he was able to conduct the trial in the ELC and there is no evidence of deterioration or any other supervening illness that he has suffered after the judgment. His explanation begs the question, how was the applicant able to issue instructions to file this application, but not to file a notice of appeal for a whole 7 and half months? A *Tsilla Nkirote Muthomi v Zipporah Kambura Muthomi* as has been stated time and again, a notice of appeal is a one-page formal document that does not require any special effort to draw.
20. It is my finding that the applicant has not been candid with the Court. He has attempted to mislead and has not truthfully explained the reason for his failure to file the notice of appeal within the prescribed period. When the Court finds that the delay involved is inordinate and is not explained, it is not obliged to consider all the other factors. In the circumstances of this particular application, I find that the applicant has proved himself unworthy of an equitable remedy.
21. Accordingly, I dismiss the application dated 19th August 2025 with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF NOVEMBER, 2025.

K. M’INOTI

.....

JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

