

**IN THE COURT OF
APPEAL AT
KISUMU**

(CORAM: KIMARU, JA (IN CHAMBERS))
CIVIL APPEAL (APPLICATION) NO. E077 OF
2025

BETWEEN

SISIRIA NYABOKE NYAKOE.....1ST
APPLICANT

VINCENT MAOBE NYAKOE.....2ND APPLICANT

AND

JEMIMAH MORAA NYABOGA.....RESPONDENT

(Being an application for extension of time to serve the notice of appeal out of time from the Judgment of the Environment and Land Court of Kenya at Kisii (S. Munyao, J) dated 1st February, 2023

in

ELC No. 168 of 2015)

RULING

1. The applicants, **Sisiria Nyaboke Nyakoe** and **Vincent Maobe Nyakoe**, moved the Court by notice of motion essentially under **Rule 4** of the **Court of Appeal Rules** seeking to be granted extension of time to file and serve the respondent with the notice of appeal and the record of appeal out of time. The applicants explain the reasons for delay in lodging the appeal in time to be; that they

instructed their former advocates to file the appeal after the delivery of the Judgment on 1st February, 2023. A notice of appeal was duly filed on 19th February, 2023. A letter

bespeaking of the typed copies of proceedings and Judgment was sent to the Deputy Registrar of the Superior Court. However, there was no follow up by the said advocates due to the fact that soon thereafter the said firm closed shop and left Kisii Town.

2. Efforts by the applicants to trace the said advocates through the Law Society, Kisii Branch were in vain. That is when the applicants made the decision to instruct another advocate to proceed with the appeal. One of the applicants, in the intervening period, was involved in a road traffic accident that resulted in a debilitating spinal injury. It was for the above reasons that the applicants were not able to file the appeal in time. The applicants state that they have a good appeal with high chances of success. The dispute involves ancestral land.
3. The applicants further explained that they were hampered in lodging the appeal in time due to the fact that their former advocates closed shop with their file, thereby forcing their new advocate to prepare the record of appeal from the court file. The applicants urged the Court to exercise its discretion in their favour and allow the application. The application is

supported

by the annexed affidavit of **Sisiria Nyabokey Nyakoe**, the 1st applicant and other grounds stated on the face of the motion.

4. The application is opposed. **Jemimah Mora Nyaboga**, the respondent, swore a replying affidavit in opposition to the application. The respondent stated that she was the registered owner of the parcel of land that is the subject of the intended appeal. She was in occupation of the land but had been harassed and intimidated by the applicants and their agents who entered into the suit parcel of land and cut trees therein. The respondent acknowledges that after the Judgment was rendered by the Superior court, the applicants lodged the notice of appeal in time. The respondent, however, deponed that the present application had not been served on her. She only became aware of its existence when she was served with the hearing notice by the Court. The respondent pointed out that she was not served with the notice of appeal within **seven (7) days** of the same being filed as required under **Rule 79(1)** of the **Court of Appeal Rules**. The respondent swore that the period of nearly two years that it took the applicants to file the present

application was inordinate and inexcusable. It is for the
above

reasons that the respondent is convinced that the applicants failed to lay sufficient basis for the Court to exercise its discretion in their favour. She urged the Court to dismiss the application.

5. Both counsel for the applicants and the respondent filed written submission in support of their respective opposing positions. This Court has considered the application, the supporting affidavit, the replying affidavit and the written submissions filed herein. Both counsel appreciate that in considering this application, this Court is exercising judicial discretion under the mandate given to it by **Rule 4** of the **Court of Appeal Rules**. The Court is further guided by established principles as enunciated in **Leo Sila Munyao Mutiso v. Rose Hellen Wangari Mwangi [1999] 2 EA 231** where the Court held thus:

“The decision whether or not to extend time is discretionary. The Court in deciding whether or not to grant an extension of time takes into account the following matters: first, the length of the delay, second, the reasons for the delay, thirdly, (possible), 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.”

6. In the present application, the applicants explained the reason for the delay in serving the notice of appeal upon the respondent in time. It is common ground that the notice of appeal was lodged in time. The applicants state that upon instructing their former advocates on record, they assumed that they would file the appeal in time. It was subsequently thereafter that they learned that the appeal had not been filed. When they sought to seek clarification from their former advocates, they were unable to trace him in Kisii due to the fact that the office had been closed. They sought assistance for Law Society Kisii branch to no avail. It was then that they decided to instruct their present advocates. During the intervening period, one of the applicants was involved in a road traffic accident which incapacitated him for a while. The applicants further explained that it took time for their new advocate to reconstruct the record of the Superior court for appeal purposes from the court file hence the delay.

7. The respondent was not convinced that the applicants were deserving of the exercise of this Court's discretion in their favour. The respondent pointed out that the period of delay

of nearly two years was in ordinate. No good reasons were

advanced for the delay. The fact that the applicants could not contact their former advocate was inexcusable to persuade the Court to grant their application. The respondent urged the Court to consider the totality of the circumstances of the application and find that the applicants failed to meet the threshold for this Court to grant the prayer sought in their application.

8. This Court, having considered the rival submissions takes the following view; the applicants have established to the satisfaction of the Court that they are deserving of the exercise of judicial discretion in their favour by this Court. The applicants lodged the notice of appeal in time. They wrote the letter bespeaking of typed copies of the proceedings and Judgment in time. However, due to the failure by their former advocate to serve the said pleadings in time, they are now before this Court. This Court is convinced that they made effort to trace their former advocate. The fact that their former advocates closed shop in Kisii town has not been disputed by the respondent. It was not an event of their making. The delay in filing the present application has been explained by the

incapacitation of one of the applicants due to a road traffic accident during the intervening period. This Court's mind has been weighed by the fact that the intended appeal will resolve the land dispute between the parties to this application, may be, with finality.

9. In the premises therefore, the application has merit. It is hereby allowed. The applicants are granted leave to serve the duly filed notice of appeal upon the respondent within **seven (7) days** of today's date. The record of appeal shall be filed and served within **forty-five (45) days** of today's date. the respondent shall have the costs of this application in any event.

Dated and delivered at Kisumu this 19th day of November, 2025.

L. KIMARU

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**JUDGE OF
APPEAL**

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

Signed

DEPUTY REGISTRAR