



Ndung'u (Suing as the Administrator Ad Litem of the Estate of John Ndung'u Mbugua) v Kinde Properties Limited (Civil Application E048 of 2025) [2025] KECA 1818 (KLR) (7 November 2025) (Ruling)

Neutral citation: [2025] KECA 1818 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E048 OF 2025
F SICHALE, JA
NOVEMBER 7, 2025**

BETWEEN

DAVID KAMAU NDUNG'U (SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF JOHN NDUNG'U MBUGUA) APPLICANT

AND

KINDE PROPERTIES LIMITED RESPONDENT

(Being an Application for Extension of Time to Lodge an Appeal against the Ruling of the Environment & Land Court (A. Omollo J), dated 11th July 2024 in (Nairobi ELC No. 357 of 2019))

RULING

1. Before me is the motion on notice dated 4th February 2025, brought under Article 159 (2) (d) of *the Constitution*, Sections 3A and 3B of the *Appellate Jurisdiction Act*, Rules 4, 5 (2) (b), 41 and 49 of the Court of Appeal Rules 2022 and all other enabling provisions of the Law in which David Kamau Ndung'u("the applicant") herein, seeks the following orders;
 - i. Spent.
 - ii. That the applicant be granted leave to file appeal out of time against the Ruling of Lady Justice A. Omollo dated 11th July 2024 delivered in Nairobi ELC No 357 of 2019.
 - iii. That upon prayer (2) above being allowed, the record of appeal annexed to this application be deemed as duly filed.
 - iv. That the cost of this application be provided for by the respondent."



2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed inter alia that the impugned ruling was delivered on 11th July 2024 and that being dissatisfied with the same he instructed his previous advocates to appeal against the same.
3. That subsequently thereafter, his previous advocate informed him that he had filed a Notice of Appeal and the appeal but when he enquired about progress of the same, he became evasive and when he learnt that he had not filed the same, he instructed his present advocate to come on record in place of his previous advocate.
4. He further deposed that he has an arguable appeal as the learned judge struck out the suit without hearing the same on merit.
5. The motion was opposed vide a replying affidavit sworn on 25th February 2025, by Wachira Nderitu, a director of the respondent who deposed inter alia that the instant application was made in bad faith and was meant to mislead the Court into re-litigating issues that had been heard and determined in a myriad of suits pertaining to the subject matter and dating as far back as the year 1985.
6. He further deposed that a Notice of Appeal institutes an appeal and to the extent that the applicant had failed to either lodge or serve such a Notice of Appeal, there exists no appeal for which the applicant seeks an enlargement of time.
7. The applicant in his submissions basically reiterated the contents in the supporting affidavit to the motion and submitted that the delay in filing the appeal was not intentional as the same was caused by his previous advocate who failed to follow his instructions to file the appeal and became uncooperative and that when he discovered that the matter had not been filed in court, he instructed his current advocate and that in view of the above, there were good and sufficient reasons for this Court to exercise its discretion in his favour.
8. On the other hand, it was submitted for the respondent that the applicant had not adduced any evidence to substantiate his allegations in that whereas he alludes to issuing instructions to his former advocates, he did not demonstrate by way of evidence that such instructions were issued and equally there was no evidence to demonstrate that legal fees were indeed paid as alleged.
9. It was further submitted that whereas the applicant avers that he found out about the failure to file an appeal on 19th December 2024, there was no explanation as to why the instant application was filed 2 months since the appointment of his current advocates.
10. On prejudice, it was submitted that the respondent would be greatly prejudiced if the application was allowed as the hearing of a counter claim that seeks the eviction of the applicant from the suit premises would be held in abeyance and the respondent continues losing income on the subject premises as the applicant continues his illegal occupation of the same.
11. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
12. The principles upon which this Court exercises its discretion pursuant to Rule 4 to extend time or not have now taken a well beaten path. The Court has wide and unfettered discretion in deciding whether to extend time or not. However, in exercising its discretion, the Court should do so judiciously.
13. See *Mwangi vs. Kenya Airways Limited* (2003) KLR 486 where this Court stated thus:

“Over the years, the Court has set out guidelines on what a single Judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance, in



Leo Sila Mutiso V Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1997 (unreported), the Court expressed itself thus;

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are; first the length of the delay, secondly, 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.”

14. In the instant case and as regards the length of the delay, the impugned ruling was delivered on 11th July 2024 and to date, no Notice of Appeal has ever been filed. Additionally, the instant motion was filed on or about 4th February 2025. There has therefore been a delay of about 7 months which delay I consider to be inordinate.
15. Turning to reasons proffered for failing to file the appeal on time, it was contended by the applicant that the same was due to the fact that his previous advocate failed to follow his instructions to file the appeal and later became uncooperative, despite depositing the sum of Kshs 100,000/= for purposes of prosecuting the appeal.
16. I do not consider the reasons given for failing to file the appeal on time to be plausible for the following reasons. First of all despite the applicant contending that his previous advocate had informed him that he had filed a Notice of Appeal he does not state when the same was allegedly filed and neither has he annexed a copy of the same.
17. Secondly, despite stating that he had given his previous advocate instructions to pursue the appeal, he does not state when these instructions were given and neither has adduced any evidence either in terms of correspondences or otherwise to substantiate the allegations. Additionally, there is no evidence to support the allegations that he had deposited a sum of Kshs 100,000/= with the said advocate for purposes of prosecuting the appeal.
18. Further, despite stating that he learnt that the appeal had not been filed when the same up for hearing on 19th December 2024, he has not again explained why it took him almost 2 months to file the instant application that was filed on or about 4th February 2025.
19. Given the circumstances of this case, I consider the reasons given for the delay not to be reasonable/ plausible and ultimately therefore, I am of the considered opinion that the delay herein has not been sufficiently explained to the satisfaction of this Court.
20. As to the arguability or otherwise of the intended appeal, I cannot make a determination of this issue sitting as a Single Judge and I will therefore not delve further on the same.
21. Finally on prejudice, I am satisfied that the respondent will stand to suffer great prejudice if the instant application is allowed as the hearing of the counter claim that seeks eviction of the applicant from the suit property will be held in abeyance.
22. On the other hand no prejudice will be suffered by the applicant as he is currently in occupation of the suit property.
23. Taking into totality all the circumstances of this case, I am of the considered view that the applicant has not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time.



24. Accordingly, the applicant's motion dated 4th February 2025, is without merit and the same is hereby dismissed in its entirety with costs to the respondent.

It is so ordered.

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

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

