



**Kairu v Njau & 6 others (Civil Application E061 of 2025)
[2025] KECA 1967 (KLR) (21 November 2025) (Ruling)**

Neutral citation: [2025] KECA 1967 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E061 OF 2025
F SICHALE, JA
NOVEMBER 21, 2025**

BETWEEN

PETER NYAGA KAIRU APPLICANT

AND

ESTHER WANJIKU NJAU 1ST RESPONDENT

LUCY NJOKI NJAU 2ND RESPONDENT

JUJA SUPERHIGHWAY WELFARE GROUP.. 3RD RESPONDENT

DINARA VESTURE LIMITED 4TH RESPONDENT

SCHOLASTICA WAMBUI KIBATHI 5TH RESPONDENT

PAUL KAMAU KIBATHI 6TH RESPONDENT

BALCON HOUSING COMPANY LIMITED 7TH RESPONDENT

(Being an Application for an Injunction and Extension of Time and Leave to Appeal out of Time against the Judgment of the Environment and Land Court (L.Mbugua J) dated 2nd May 2019 in Thika ELC Case No. 275 of 2017)

RULING

1. Before me is the motion on notice dated 29th January 2025, brought under Sections 3 (1), (2) & 3, 3A, 3B of the *Appellate Jurisdiction Act*, CAP 9 Laws of Kenya; Rules 4, 5(2) (b), 31 43 and 49 of the Court of Appeal Rules 2022; Article 50 and 159 of *the Constitution* of Kenya 2010 and all other enabling provisions of the Law in which Peter Nyaga Kairu (“the applicant”) herein, seeks the following orders;

“i. Spent.



- ii. Leave be granted to the appellant to file an appeal out of time against the judgment of Hon Lady Justice Lucy Mbugua dated 2nd May 2019 in Thika ELC Case No. 275 of 2017 (formerly Nairobi High Court Civil Case No. 162 of 2005), within 21 days of this court’s order or other reasonable timeline to be given by the court.
 - iii. Upon grant of the leave, the Honourable Court be pleased to issue an injunction restraining the respondents, whether by themselves, agents or any person whatsoever acting on their behalf, from building on, alienating, subdividing, transferring, selling or otherwise in any manner interfering with the properties known as Land Reference Number 4148/12 and 4148/13 pending hearing and determination of the appeal herein.
 - iv. The costs of this application be provided for.”
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 judgment was delivered on 2nd May 2019 and that being dissatisfied with the same, he filed an appeal against the same being Nairobi Civil Appeal No. 302 of 2019, which was struck out on 28th February 2024, due to irregularities in the Amended Notice and Record of Appeal dated 14th April 2022.
 3. He further deposed that the delay herein was regrettable and explained in that; he had initially complied with the requisite timelines for filing the appeal save for lapses in drafting by his then counsel who was indisposed and flew out of the country for treatment many times and subsequently succumbed to cancer on 28th August 2022.
 4. He further deposed that he had an arguable appeal and that the respondents would not be prejudiced in any way which cannot be compensated by way of damages if the orders were granted and in the event of the appeal being unsuccessful.
 5. The motion was opposed vide a replying affidavit sworn on 25th February 2025 by the 1st respondent who deposed inter alia that the applicant had taken over 5 years to file an appeal that complies with procedural rules and regulations of the court and that the applicant’s initial Memorandum of appeal dated 5th July 2019, was exclusively filed against her even though the main suit before the Superior Court involved multiple parties.
 6. She further deposed that after realizing the mistake, the applicant without leave of this Honourable Court then purported to file an Amended Memorandum of Appeal in defiance of the orders given by Hon. Justice Lesiit, JA declining an application for leave to amend Memorandum of Appeal and attempted to introduce a new party who was not part of the proceedings before the Superior Court and that it then took the applicant almost an entire year to decide whether or not to file another appeal after the initial appeal was struck out on 28th February 2024.
 7. There was no response on part of the 2nd-7th respondents despite having been served with a copy of the hearing notice on 6th October 2025 at 1:28PM.
 8. It was submitted for the applicant that he had complied with the requisite timelines in filing the appeal but the same was struck out due to lapses in drafting of the documents by his counsel.
 9. It was further submitted that the said counsel was undergoing treatment for cancer and she unfortunately succumbed to the illness on 28th August 2022 and being elderly, he could not have known of the irregularities in filing of the appeal and that further, he suffers from various health



- conditions and had recently undergone kidney transplant in India and that these unfortunate circumstances were beyond his control hence the delay was excusable.
10. On prejudice, it was submitted that no prejudice would be occasioned to the respondents as they had already been served with the Notice of Appeal on time and they were therefore anticipating the appeal.
 11. On the other hand it was submitted for the 1st respondent that the delay herein was not occasioned by inadvertence or lack of knowledge but was a deliberate act of negligence and indifference to the due process of law and that as the matter presently stands, there was no Notice of Appeal filed, served and/or on record in respect of this suit.
 12. It was further submitted that the applicant cannot come to seek leave before this Honourable Court to file an appeal out of time whereas his entire appeal was struck out.
 13. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the 1st respondent's replying affidavit, the rival submissions by the parties, the cited authorities and the law.
 14. 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.
 15. See *Mwangi vs. Kenya Airways Limited* (2003) KLR 486 where this Court stated thus:
 16. In the instant case and as regards the length of the delay, the impugned judgment was delivered on 2nd May 2019 and the applicant filed a Notice of Appeal on the same day.
 17. The Notice of Appeal was subsequently struck out on 28th February 2024 and the instant application was filed on or about 29th January 2025. There has therefore been a delay of about 6 years from the date of the impugned judgment which delay from the circumstances of this case and for reasons I shall alluded to shortly I do not consider to be inordinate.
 18. Turning to the reasons preferred for the delay, it was contended that the applicant had initially complied with the requisite timelines in filing the appeal save for lapses in drafting by his then counsel, that in the course of filing the appeal his counsel was indisposed and flew out for treatment many times and she eventually succumbed to cancer on 28th August 2022 and until the striking out of the appeal, he would not have known of these lapses being an uneducated 65 year old citizen.
 19. It was further contended that he suffers from a myriad of health conditions including diabetes and high blood pressure and he had recently undergone a kidney transplant in India in October 2024 and that these series of unfortunate events were beyond his control hence the delay.
 20. I have looked at the annexures annexed to the motion and indeed note that the applicant is sickly and elderly.
 21. Given the circumstances of this case, I consider the reasons given for the delay to be reasonable/ plausible and ultimately therefore, I am of the considered opinion that the delay herein has been sufficiently explained to the satisfaction of this Court. The procedural lapses in drafting the court documents cannot certainly be attributed to the applicant and it would be unfair to fault him for these lapses when he is not personally liable.
 22. This Court is also alive to the fact that on 28th February 2024, the applicant's Amended Notice of Appeal was struck out and subsequently on 25th November 2024, the applicant's appeal was withdrawn. It is not clear why the appeal was withdrawn but be that as it may, the striking out or



withdrawing of the appeal are not some of the factors that this Court takes into account in deciding applications of these nature as set out in the Mwangi case (supra).

23. As to the arguability or otherwise of the intended appeal, I cannot make a determination on this issue sitting as a Single Judge and I will therefore not delve further on the same.
24. Finally on prejudice, I am satisfied that no prejudice will be occasioned to the respondents if the instant motion is allowed as they had initially been served with the Notice of Appeal that was subsequently struck and they have therefore been all along well aware of the applicant's intention to appeal against the impugned decision.
25. On the contrary, if the instant motion is not allowed, the applicant will have been completely shut out from the seat of justice.
26. Regarding the prayer for an injunction. This Court sitting as a Single Judge cannot make a determination on the same and I will therefore make no further comment regarding the same.
27. Taking into totality all the circumstances of this case, I am of the considered view that the applicant has 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.
28. Accordingly, the applicant's motion dated 29th January 2025, is merited and the same is hereby allowed in terms of prayer 2 only.
29. The applicant shall proceed to file the appeal within a period of 14 days from the date of this ruling failure to which these orders shall stand vacated.
30. The costs of this motion shall abide the outcome of the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST 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

