

**IN THE COURT OF
APPEAL AT NAIROBI**

[CORAM: SICHALE JA (IN CHAMBERS)]
CIVIL APPEAL (APPLICATION) NO. E058 OF
2025

BETWEEN

FRANCIS KIRIMA M'IKUNYUA.....APPLICANT
AND
ELIZAPHAN KANYORO MWANGI.....RESPONDENT

*(Being an Application for Extension of Time to Lodge an Appeal
against the Judgment of the Environment & Land Court
(Omange J), dated 17th October 2024*

in
**(Nairobi ELCA No. E122 OF
2022)**

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RULING

1. **Francis Kirima M'ikunyua** (“*the applicant*”) herein, has by the motion on notice dated **5th February 2025**, brought pursuant to the provisions of **Rule 4 of the Court of Appeal Rules and Article 159 of the Constitution of Kenya** invoked the jurisdiction of this Court sitting as a Single Judge seeking the following orders:

“i. Spent.

ii. THAT this Honourable Court be pleased to grant leave to the applicant to file an appeal out of time against the judgment of the ELC Court that was delivered on the 17th day of October 2024.

iii. THAT the Memorandum of Appeal annexed herein be deemed as duly filed and any other consequential documents thereupon subject to the payment of the requisite fees.
iv. THAT the cost 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 17th October 2024 and that he had instructed his advocates to lodge an appeal against the same, but unfortunately his advocate had been in and out of hospital hence the delay in filing the appeal.
3. He further deposed that the intended appeal was arguable with high chances of success due to the fact that he had never testified in the matter and neither was he a party to the misdeeds of his advocate and that if the instant application was not allowed, he would stand to suffer irreparable loss.
4. The motion was opposed vide a replying affidavit sworn by the respondent on **13th February 2025**, who deposed *inter alia* that the Court should take note of the applicant's conduct in the matter ever since the judgment was delivered in 2020 and that the applicant's conduct was designed solely to frustrate her and delay her enjoyment of the fruits of the judgment, which

conduct both

the trial and the Superior Court had taken cognizance of, in dismissing the applicant's application for stay and the subsequent appeal.

5. She further deposed that the application as filed had been overtaken by events as the intended appeal was premised on an application seeking to set aside the judgment entered in CMCC 422 of 2016, which judgment had already been executed and property transferred in her favour.
6. It was submitted for the applicant that the delay in filing the instant application was not intentional, as the same was occasioned by his previous advocate who was unwell and failed to file the appeal within the timelines set, despite having received instructions and that further the appeal was arguable and meritorious and would be rendered nugatory if the extension was not granted.
7. On the other hand, it was submitted for the respondent that the impugned judgment was delivered on 17th October 2024, in the presence of both parties and the applicant did not lodge any notice of intention to appeal and the statutory timelines lapsed on 31st October 2024 and the instant application had been

brought more than 3 months after the lapse of the statutory timelines.

8. Turning to prejudice, it was submitted that allowing the instant application would occasion immense prejudice on the respondent as it would be subjecting her to endless litigation over a matter that had been overtaken by events and that in dismissing the applicant's applications which was the main intended appeal, both the trial court and the Superior Court had taken cognizance of the applicant's delaying tactics aimed at frustrating the respondent over an issue that had been overtaken by events.

9. Consequently, I was urged to dismiss the motion with costs to the respondent.

10. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the further affidavit, the rival submissions by the parties, the cited authorities and the law.

11. 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.

12. 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.”

13. In the instant case and as regards the length of the delay, the impugned judgment was delivered on **17th October 2024**. The Notice of Appeal therefore, ought to have been filed within **14 days** from **17th October 2024**, i.e. on **31st October 2024**.

14. The instant motion was filed on or about **5th February 2025**, a period of slightly over **3 months** from the date of the impugned judgment which delay I consider to be inordinate from the circumstances of this case.

15. Turning to reasons proffered for failing to file the appeal on time, it was contended that the same was occasioned by the fact that the

applicant's advocate on record was in and out of hospital, hence the delay in preparing the documents for lodging the appeal.

16. I have looked at the letter from Arrow Medical Centre dated 15th September 2024, which has been annexed to the motion showing that the applicant's then counsel had sought medical services from the facility from 15th August 2024, up to the date of the letter and that further, he had been treated at the facility for the past 4 years.

17. I further note that the impugned judgment was delivered on 17th October 2024, long after the applicant's counsel had sought treatment at the facility.

18. It is instructive to note that the applicant's counsel was present in court when the judgment was delivered on 17th October 2024 and at no point in the proceedings was his health an issue.

19. I am therefore in agreement with the contention by the respondent that it is obvious that the alleged sickness happened long before the judgment was delivered and in view of the above, I do not find the reasons proffered for the delay to be reasonable/plausible.

20. 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.

21. As to the arguability or otherwise of the intended appeal, this Court is also alive to the fact that the judgment has since been executed and the suit property has since been transferred to the respondent and in any event, I cannot make a determination of this issue sitting as a Single Judge and I will therefore not delve further on the same.

22. Finally on prejudice, it has not been demonstrated to the satisfaction of this Court, the prejudice that the applicant would suffer, if the instant motion were to be disallowed. On the contrary, I am satisfied that the respondent would suffer immense prejudice if the instant motion was to be allowed as the suit property has since been transferred in her name and the intended appeal has therefore been overtaken by events.

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 **5th 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 21st day of November, 2025.

F. SICHALE

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

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

Signed

DEPUTY

REGISTRAR.