

**IN THE COURT OF
APPEAL AT
NYERI
(CORAM: ODUNGA, JA (IN
CHAMBERS) CIVIL APPLICATION NO.
E149 OF 2025**

BETWEEN

ELISHA MBOGO.....APPLICANT

AND

MARION KAARI MBUI.....RESPONDENT

*(Being an Appeal against the decision and judgment of the Environment and
Land Court at Embu (Y.M Angima J.) delivered on 25th October 2018*

in

***ELC Case No. 176 of 2018 [OS] Formerly Civil Suit No. 164 of 2002
[OS]***

RULING

1. The applicants moved this court by a Motion on Notice dated 15th September 2025 seeking leave to file Notice of Appeal and an appeal out of time against the judgment of **Angima J.** delivered on 25th October 2018. It was sought that the annexed Draft Notice of Appeal and Memorandum of Appeal be filed in Court be deemed duly filed.
2. It was averred by the applicant: that he promptly instructed his former advocates, Chuma Mburu & Company Advocates,

to file a Notice of Appeal and a Memorandum of Appeal and
that although the Notice of Appeal dated 6th November
2018

was filed despite having been made to believe that an appeal, being Civil Appeal No. 35 of 2019, had equally been filed; that he made several follow ups at the court registry in Embu where he were informed that the court file was unavailable; that through his counsel on record, Mbiyu Kamau & Company Advocates, they were informed that the file was under lock and key and would only be released at the time of being transferred to this Court; that as a result of the inability to access the file, it was impossible for them to file necessary documents and proceed with the appeal; that he consequently, complained to the Commission on Administrative Justice (Ombudsman) to inquire into the delay but vide a letter dated 25th October 2024, was referred back to court for further clarification; that it was upon inquiry at the court registry that he discovered that Civil Appeal No. 35 of 2019 involved unrelated parties and that no appeal had ever been filed on his behalf; that the delay was caused by the previous counsel's misrepresentation which was further compounded by the Covid 19 pandemic which commenced in March 2020 and which restricted access to the court registry and judiciary

operations; that through his

advocates on record, he previously filed an application dated 9th June 2025 seeking leave to appeal out of time, which was struck out on 17th July 2025 purely on a technicality having been filed under the wrong provisions of the law.

3. In opposition, the respondent averred: that there was no accompanying letter to the Deputy Registrar, requesting for certified copies of the proceedings for purposes of appeal and no letter was exhibited showing any follow up with the Deputy Registrar for the same; that the contents of the letter dated 14th December, 2020 do not reveal any Complaint by the applicant to the Deputy Registrar on the allegations that they had been misinformed that the trial court file was under key and lock nor a follow up to know whether proceedings were ready for purposes of appeal; that the said letter does not bear any court stamp as proof that it was availed to the Court's Registry and/or the Deputy Registrar; that the letter was drawn two years, one month and two weeks since the delivery of the judgement and two years, one month and one week since the Notice of Appeal

was lodged which is past the prescribed 60 days for lodging
a Record of Appeal; that the applicant did not

disclose a reasonable cause as to why he had to wait for 4 years 8 months before seeking leave from the court to appeal out of time if indeed he had interest and/or intention to appeal against the decision; that the WhatsApp messages and complaint on missing file to the Ombudsman cannot be construed as a complaint on missing file to the Deputy Registrar; that as at 21st March, 2019 when the ELC Court granted conditional stay, the firm of Chuma Mburu & Co Advocates had replaced with the current Appellant/Applicant's Advocate "Mbiyu Kamau & Co Advocates" who filed their Notice of Change of Advocate; that the applicant's previous Advocates, Chuma Mburu & Co Advocates, could not be blamed for the delay in filing the appeal within the stipulated timeline since they were no longer in record as per the Notice of Change dated 20th March, 2019 and filed on 21st March, 2019 and any information of whether a Record of Appeal had been filed before the Court would only have emanated from his advocate on record; that the operations of the court were not closed during the Covid 19 pandemic but were only scaled down; that since 1 year, 4 months and 1 week had

elapsed since the applicant

lodged his Notice of Appeal, the Notice had since abated; that while normal court operations resumed on 19th February 2021, the applicant did explain why he did not approach the Court then, secure certified copy proceedings and seek reinstatement of his Notice of Appeal and proceed to institute the Appeal if at all he had the intention of doing so; that it is almost seven years since the ELC Court delivered its judgement and twenty- three years since the suit was instituted; that no viable or reasonable cause has been availed by the applicant to warrant the inordinate delay; with the Notice of Appeal having abated and the applicant having not sought leave of the Court for revival of the same, it would be improper and unprocedural to seek leave to file Record of Appeal out of time; that allowing the application would only occasion great prejudice to the respondent and subject him further expenses which are not within his reach as a senior citizen; and that the application should be dismissed with Costs to me.

4. When the application was called out for virtual hearing on 5th November 2025, learned counsel, **Ms Wayiego**, held brief for

Mbiyu Kamau for the applicant while ***Ms Nzele Magdaline***

appeared for the respondent. Both counsel relied on their submissions which I have considered.

5. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the Court of Appeal Rules are now well settled. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain matters that the Court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly, whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal; and fourthly, whether the respondent will be unduly prejudiced if the application were to be granted. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations.

6. Those principles were restated by **Waki, JA** in **Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR** as follows:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”

7. On its part, the Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, Supreme Court Application No. 16 of 2014 [2014] eKLR**, while expressing itself on the matter opined that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a

consideration on a case to case basis; that delay should be explained to the satisfaction of the

court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

8. In ***Leo Sila Mutiso v Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231***, this Court set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly, the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondents can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
9. In this case, the decision sought to be appealed against was delivered on 25th October 2018. The application is dated

15th

September 2025, 7 years after the decision. Seven years delay is *prima facie* inordinate. In this case the reason for the delay is that the applicant's advocates failed to act on the applicant's instructions to file the appeal within the prescribed period, despite his advocate informing him that Civil Appeal No. 35 of 2019 had been filed. According to the applicant he made several follow ups at the court registry in Embu but was informed that the file was unavailable as the file was under lock and key. Due to his failure to make any headway, he complained to the Commission on Administrative Justice but the Commission referred him back to the court. It is then that he discovered that the appeal had, in fact, never been filed and that the number he had been given was in respect of a totally different appeal. In addition, the advent of Covid 19 compounded his challenges. Although he had fled a similar application dated 9th June 2025, the same was struck out on 17th July 2025 on the grounds that it was filed under the wrong provisions of the law.

10. Although the applicant averred that he made several efforts to trace the court file, the only evidence of such efforts are a letter dated 14th December 2020 addressed to the Registrar

of the High

Court, Embu and a ticket generated by the Commission on Administrative Justice which was responded to by a letter dated 25th October 2024.

11. This Court in **Kenya Ports Authority v Silas Obengele [2006] 2 KLR 112** graphically held that whenever there is a delay, even for one day, there must be some explanation for it otherwise an extension may not be granted. Therefore, when the period of the delay is great, the Court must scrutinise the facts more carefully, to be sure that a sufficient reason can be given for the extension of time, so that the successful litigant is not lightly deprived of his interest. Since rules are made to be observed, when there has apparently been excessive delay, the Court requires to be satisfied that there is an adequate excuse for the delay or that the interests of justice are such as to require the indulgence of the court upon such terms as the Court considers just. See **Shah Bharmal v Santosh Kumari [1961] EA 679.**

12. One of the questions that the court has to ask is whether the application for extension of time was promptly made and if not, good cause must be shown for the entire period of the delay. See **Mohammed Sharrif Omar v Abdalla Fatuma**

Orata Sarapapi

Civil Application No. Nai. 249 of 1995 and ***Diamond Trust of Kenya Ltd v Bidali [1995-98] 1 EA 45.***

13. In this case, it is clear that no attempt was made to explain the entire period of the delay. The dates when actions were allegedly taken are missing. There are gaps in between explanations which are not accounted for. For example, what action did the applicant take soon after the Covid 19 restrictions were lifted?
14. In my view there was no sufficient explanation for the inordinate delay in taking the necessary steps towards the filing of the appeal. In the premises, I find the application unmerited and I dismiss it with costs to the respondent.
15. It is so ordered.

Dated and delivered at Nyeri this 28th day of November, 2025.

G. V. ODUNGA

.....

JUDGE OF APPEAL

*I certify that this is the
true copy of the original
signed*

DEPUTY REGISTRAR