

**IN THE COURT OF
APPEAL AT
NYERI**

(CORAM: ALI-ARONI, J.A. (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. E185 OF
2023

BETWEEN

JAPHET KIRIMI RINKANYA
(Sued as the Legal Representative of the
Estate of GLADYS KATHUNI M'RINKANYA).....APPLICANT

AN

D BONIFACE MUTWIRI

KUNGANIA
(Suing as the Legal Representative of the
Estate of M'KUNGANI M'BAGINE).....RESPONDENT

*(Being an application for an extension of time to file a
supplementary record of appeal out of time against the
Judgment and Decree of the Environment and Land Court at
Meru (Nzili, J.) delivered on 2nd November, 2022*

in

ELC No. 22 of 2019)

RULING

1. Before the Court is an application by way of a notice of motion dated 4th March 2025, brought under **rules 43, 44, 49, 94(3)(4)** of the Court of Appeal Rules 2022 (the Rules)

and **Article 159** of the Constitution seeking for an extension of time to file the supplementary record of appeal out of time and for the record of appeal filed and served on 2nd October 2023, be deemed properly filed.

2. The application is predicated on the grounds on the face of the application and rehashed in the supporting affidavit of **Japhet Kirimi Rinkanya**, the applicant, sworn on 4th March 2025, where he deposed that the notice of appeal was filed and served within time; there were delays in obtaining the certified copies of the proceedings and the judgment; and during the intervening period, the respondent filed an application which necessitated the amendment of the judgment and decrees; the amended judgment and decree, along with the certificate of delay were issued on 8th May 2024; the advocate handling the matter and who filed the initial record of appeal left the firm representing him; out of caution the record of appeal was filed within time but without the certificate of delay and the certified copies of the judgement and the decree; the documents were left out of a genuine mistake by the former counsel and should not be visited upon the applicant; no prejudice will be suffered by the respondent if the prayers are granted.

3. The respondent, **Boniface Mutwiri Kungania**, filed a replying affidavit sworn on 30th October 2025, objecting to the applicant's motion on several grounds. He deposed that the prayers sought are misplaced, as no time limit is prescribed for filing a supplementary record; the record of appeal though dated 2nd October 2023, was filed and paid for on 5th October 2023, and not served until 24th October 2025; meaning the record of appeal was filed and served out of time and without leave; the annexed certificate of delay dated 8th May 2024 relates only to a later request for post-

judgment proceedings and the

amended judgment (requested on 6th November 2023), and not to the original request for proceedings and judgment made almost a year earlier on 4th November 2022; the original proceedings and judgment were certified on 13th June 2023, and no reason has been given for failing to file the record of appeal within 60 days of that date; the applicant's prayer No. 4, seeking to have the original record of appeal deemed properly filed is an attempt to validate an otherwise incompetent record through the back door; furthermore, the respondent asserted the minor amendment of the judgment on 26th July 2023, only corrected the land parcel number and acreage unit, and was not a justifiable reason for the late filing of the original record.

4. The respondent also raised a procedural breach, stating that the request for the post-judgment proceedings (which led to the certificate of delay) was neither copied to nor served upon him or his advocates, contrary to the Rules (**rule 84(2)** and the proviso to **rule 84(1)** of the Rules).
5. Finally, the respondent challenged the jurisdiction of the Court to hear the application for leave to file a supplementary record, arguing that this power is bestowed upon the Deputy Registrar under **rule 90** of the Rules. The application is seen as a tactical maneuver to delay the hearing of the respondent's own earlier application, filed on 17th November 2023, to strike out the main appeal, which is yet to be listed for hearing.

6. Learned counsel for the applicant filed submissions and a list of authorities, both dated 27th November 2025.
Counsel

structured the submissions around three core issues. On whether the applicant has demonstrated sufficient cause to warrant leave for filing the supplementary record of appeal out of time. On this issue, counsel submitted that the supplementary record is deemed crucial for the proper and fair determination of the appeal, as it contains material evidence and record addressing pertinent issues. He added that the delay was due to the late availability of the amended judgment and certified copies of proceedings, which were necessary for a complete record of appeal. He emphasised that the original judgment required an amendment, a process that concluded only upon the issuance of the amended judgment, resulting in a delay.

7. Counsel argued further the certificate of delay was issued late, a factor outside the applicant's control. Further he submitted that the omission of the documents was inadvertent and not deliberate, the application is made in good faith to enable the court to have a complete record. Counsel referred to **Mombasa Cement Limited vs. Speaker of the National Assembly & Another [2018] eKLR** and **Mwangi vs. Kenya Airways Limited [2003] KLR 486**, where similar applications were allowed.
8. Further, counsel cited **M’Njara & Another vs. Muthoni (Civil Application No. E193 of 2024) 2025 KECA**, where the Court allowed the filing of a supplementary record of appeal. Counsel

submitted that this authority reiterated that justice should not be defeated by registry delays.

9. On whether granting extension of time and subsequent leave to file supplementary record of appeal will occasion prejudice to the respondent, counsel argued that the supplementary record merely seeks to include documents that should ordinarily be part of the record of appeal; it introduces no new evidence and does not alter the cause of action.
10. Counsel asserted further that no prejudice whatsoever will be occasioned to the respondent if the application is allowed and in support relied on **Fakir Mohamed vs. Joseph Mugambi & 2 Others [2005] eKLR (CA)** and **County Executive of Kisumu vs. County Government of Kisumu & 8 Others, [2017] eKLR**, to submit that the Court's broad discretion should be exercised to ensure justice is served and to lean towards sustaining appeals where the delay is excusable. Further there will be no prejudice caused to the respondent
11. Learned counsel for the respondent filed submissions dated 1st December 2025, and argued that the prayer seeking for a timeline to be set for lodging a supplementary record, is misplaced as **rule 94(3)** of the Rules provides that an appellant may file a supplementary record at 'any time' and that no specific timeline is stipulated for lodging the supplementary record once leave is obtained under **rule 90**

of the rules.

12. On the prayer seeking leave to file the supplementary record out of time, counsel submitted that the decree the applicant intends to introduce was issued on 11th August 2023 and appears in the original record of appeal (dated 2nd October 2023). Counsel asserted that he would not object to the late filing of the amended judgment, decree, and post-judgment proceedings though they have no direct bearing on the grounds of appeal, and their late filing would not cause any prejudice. Further counsel contended that the applicant failed to explain why he did not apply for a certified copy of the amended judgment when applying for the certified amended decree.
13. Counsel objected further objected to the prayer seeking to admit the record of appeal which was filed way out of time without leave of the Court. He asserted that since the notice of appeal was filed on 4th November 2022 and served on 9th November 2022, the record of appeal ought to have been filed by 4th January 2023, excluding days of the Christmas vacation, however the same was filed on 5th October 2023. Further, the proceedings and the original judgment were certified on 13th June 2023; hence, there is no reason why the record of appeal was filed almost 4 months later and further the applicant did not explain the delay and is mischievously relying on a certificate of delay dated 8th May 2024, which relates to the record seeking for an amendment to the judgement and the decree to validate an otherwise incompetent record.

14. Counsel contended that this application is meant to delay and circumvent the respondent's application dated 17th November

2023 to have the original record of appeal struck out for being filed out of time. He urged the Court to allow only the prayer for leave to file a supplementary record of appeal, but with strict timelines, dismiss the prayer seeking to have the record of appeal admitted out of time with costs and direct that the respondent's application dated 17th November 2023 be set down for hearing, as it was filed much earlier and seeks to dispose of the entire appeal.

15. I have considered the application, the replying affidavit and the rival submissions of the parties. The issue for determination is whether the applicant is deserving of an extension of time to file the supplementary record of appeal and whether the record of appeal filed and served on 2nd October 2023 should be deemed to be regularly on record.
16. **Rule 4** of the Rules governs extension of time. The rule allows the Court to exercise discretion to extend the time limited by the Rules for doing any act authorised or required by the Rules. Several Court rulings have set the parameters for consideration in such an application. In **County Government of Mombasa vs. Kooba Kenya Limited (Civil Appeal 130 of 2018) [2019] KECA 221 (KLR)**, the Court relied on the case of Karny Zaharya & Another vs. Shalom Levi. C. Appl. No. 80 of 2018, where **Koome, JA**, (as she then was) stated:

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the

***delay involved, the reason(s) for the delay,
the possible***

prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal".

Equally, in **Nathan Tirop Koech & 3 Others vs. Chief Lands Registrar & 5 Others [2019] KECA 279 (KLR)**, this Court held that; -

"The applicants before me have not indicated in their application and in their learned counsel's submissions before me, which timeline it is they were unable to meet. That immediately raises the question whether the application before me is competent. It is not open to a party to request extension of time unless the time in question is clearly set out in the Rules or in an order of this Court or a superior court. Absent a showing of such timeline, an applicant who moves the court to extend that which is neither expired nor indeed limited will be inviting the court to act in vacuum and in vain."

17. Either party may file a supplementary record of appeal where relevant documents that form part of the record are left out.

rule 90 of the Rules specifically directs what an appellant ought to do in the event an appellant is desirous of filing a supplementary record. The rule provides that: -

Where a document referred to in rule 89 (1) and (2) is omitted from the record of appeal, the appellant may, within fifteen days after lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 94 (3) and, thereafter, with leave of the deputy registrar on application.

The documents to be included in the record of appeal are referred to in **rule 89** of the Rules, meaning that, since the 15 days had lapsed, leave was to be obtained from the deputy registrar, not the Court. The respondent is correct to say that the application is misplaced. I also take note that the respondent despite objecting to the move by the applicant he has no objection to the same being filed. I take it that he has consented to the prayer.

18. The second prayer seeks to have the record of appeal deemed as duly filed. The reason given for the prayer is that the certificate of delay was not included in the record of appeal. The certificate of delay is required for the computation of time for filing an appeal where there has been a delay in providing certified copies of the proceedings and judgment. The certificate of delay clearly speaks to obtaining the amended judgment and decree and not the provision of the proceedings, and as stated by the appellant,

they are not relevant to the record of appeal.

19. The appellant claimed that he filed and served the record of appeal on 2nd of October 2023. Judgment of the trial Court was delivered on the 2nd of November 2022. In his affidavit, the applicant states that the letter bespeaking the proceedings and judgment was dated 3rd November 2022 and was copied to the respondent's counsel. The respondent on his part states that the proceedings and initial judgment were available since 13th July 2023. The letter bespeaking the proceedings was served on the respondent based on the proviso to **rule 84** of the Rules and therefore the 60 days for filing the record of appeal expired on 10th September 2023. The proceedings were therefore filed 25 days late and service of the same effected 12 days late. From counsel's explanation he seems to have relied on the wrong certificate of delay. It also appears that he did not properly compute the time within which to file the record of appeal.
20. Based on the above chronology of events the record of appeal was served late, and so was the service; however, in my view, 25 days and 12 days are not inordinate so as to deny a litigant his day in court, especially where the mistake is that of his counsel.
21. The respondent having consented to the filing of the supplementary record, I see no need to return the file to the deputy registrar to record the order and I allow the prayer by consent.
22. In the interest of substantive justice, I will also allow the

second prayer to enlarge the time within which to file the record of

appeal. Since the record of appeal is filed and served, it is hereby deemed to have been duly filed and served.

23. Costs of the application to abide by the outcome of the appeal.

Dated and delivered at Nyeri this 8th day of December, 2025.

ALI-ARONI

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR

