

**IN THE COURT OF
APPEAL AT MOMBASA**

(CORAM: NGENYE, JA.)

CIVIL APPLICATION NO. E064 OF

2025 BETWEEN

AZIZA KHAMIS JUMA (*Administrator of the
estate of the late KHAMIS JUMA.....*)**APPLICANT**

AND

ABDULRAHAMAN MOHAMED OMAR.....RESPONDENT

*(Being an application for extension of time to file Notice of Appeal and
Memorandum of Appeal out of time against the Judgment of the Environment
and Land Court of Kenya at Mombasa (L. L. Naikuni, J.) dated 30th May, 2025*

in

ELC No. E060 of 2022)

RULING

1. The Notice of Motion for determination is dated 23rd July 2025 and is brought under **rules 4** and **49** of the **Court of Appeal Rules, 2022**. The applicant seeks: *that he be granted leave to file a Notice of Appeal out of time and that the Notice of Appeal annexed to the application be deemed as duly filed upon payment of the requisite fee; that leave be granted to file a memorandum of appeal out of time, and that the Draft Memorandum of Appeal be deemed as duly served upon payment of the requisite court fees; and that costs of the application be provided for.*

2. The application is supported by the grounds on its face and the affidavit of the applicant sworn on even date. The applicant deposes that he intends to appeal against the Judgment of **Naikuni J.** delivered on 30th May 2025 in **Mombasa ELC Case No. E060 of 2022**; that the 14 days within which he was required to file a Notice of Appeal lapsed on 30th June 2025; that, initially, he was considering a review against the Judgment as advised by his previous counsel; that he was not amenable to a review of the Judgment, consequent to which he had to seek representation by another counsel; that it was not until 23rd July 2025 that he was able to secure instructions of the current advocate; that, therefore, it was not deliberate on his part not to appeal within time; that the intended appeal has high chances of success; and that no party will suffer prejudice if the orders sought are granted.
3. Opposing the application, the respondent filed a replying affidavit sworn on 8th August 2025. He states there is no good explanation that has been proffered by the applicant for the delay of 40 days after judgment was delivered, for not preferring the appeal; that the fact as to whether to seek review of, or appeal against, the impugned judgment is not a valid reason for not filing a Notice or Memorandum of Appeal; that, in any event, the applicant had moved the **Kadhi Court** in **Succession Cause No. 83 of 2020** in a Notice of Motion dated 30th April 2025 seeking to review

and/or set aside the Judgment delivered

therein on 20th June 2020; that it is the respondent's application dated 20th June 2025 in **High Court Succession Cause No. 296 of 2012** which prompted the applicant to appeal against the decision of Naikuni, J; that the applicant had sufficient time to file a Notice of Appeal notwithstanding the fact as to whether or not he intended to seek review against the impugned judgment; that, in any, case the current advocate has as at date not filed a Notice of Appointment, yet he was instructed as early as 21st of July 2025; and that there are no exceptional circumstances warranting the application to be granted.

4. In the further affidavit dated 29th August 2025 also sworn by the applicant, he deposes that the delay in filing the appeal was not inordinate because, after the impugned judgment was delivered on 30th May 2025, a copy thereof was uploaded on the Judiciary CTS portal on 9th June 2025; that for this reason, he was not able to consider whether or not to appeal against the Judgment soberly; and that, it is in the interest of justice that the application be granted.
5. I heard the application virtually on 17th November 2025. In attendance was learned counsel Mr. Mummin for the applicant while learned counsel Mr. Tindi appeared for the respondent. Both counsel relied on respective parties' submissions. Those of the applicant are dated 29th August 2025 while of the respondent are dated 24th October 2025. Counsel also

highlighted the respective submissions. In my view, both the written and oral submissions are a regurgitation of the parties' averments contained in the affidavits in support of, and in opposition to, the application for which reason I shall not restate them.

6. That said, learned counsel for the applicant relied on this Court's decisions of **Anti-Counterfeit Authority vs. Francis John Wanyange & 4 others (2021) eKLR**, in submitting that extension of time to appeal is essentially a matter of the discretion of the court; and **Leo Sila Mutiso vs. Hellen Wangari Mwangi (1999) 2 EA 23** and **Fakir Mohammed vs. Joseph Mugambi & 2 Others (2005) eKLR** in emphasizing the factors that the Court should consider in exercising its discretionary powers to extend time.
7. On the respondent's part, no case law was cited.
8. I have considered the application, the affidavit in support thereof, the respondent's replying affidavit, the applicant's further affidavit, the respective oral and written submissions and the law.
9. It is settled law that extension of time to do anything that a party is required to do under **rule 4** of this **Court's Rules, 2022** is discretionary. However, the discretionary powers must be exercised judiciously and in the interest of justice. Further, each case should be considered under its own

circumstances. In the

case of **Fakir Mohammed vs. Joseph Mugambi (supra)**, this Court stated:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it 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 the 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 v Mwangi, Civil Application No. NAI. 255 of 1997 (UR), Mwangi vs Kenya Airways Limited [2003] KLR 496, Major Joseph Mwereri Igweta vs Murika Methare & Attorney General Civil Application No. NAI 8 of 2000 (UR) and Murai vs Wainaina (No. 4) 1982 KLR 38.”

10. The Supreme Court in the case of **Nicholas Kiptoo arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others (2014) eKLR** stated that:

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts

which litigants have to lay a basis where they seek courts to grant it.”

11. The Court went on to lay down the factors that a court should consider in extending time to file an appeal as follows:

- “i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;**
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- vi. Whether the application has been brought without undue delay; and**
- vii. Whether in certain cases like election petition public interest should be a consideration for extending time.”**

12. In this instance, the applicant urges that he got late to file a Notice of Appeal because, initially, his former advocate had

advised him to prefer a review against the impugned judgment as opposed to an appeal. The Judgment having been delivered

30th May 2025, he had until 13th June 2025 to file a Notice of appeal and, thereafter, 7 days to serve the same. On the part of the respondent, it is submitted that the applicant did not require 40 days to decide whether or not to appeal, or seek review against the judgment; and that, in any case, instead of approaching this Court, the applicant preferred to go to the Kadhi's Court to seek that the judgment in the succession cause in that court be set aside.

13. The instant application was filed on 23rd July 2025, which means that since the delivery of the Judgment on 30th of May 2025, it has taken the applicant a cool 53 days to approach this Court by this application. It is also notable that the applicant failed to instruct the current advocate timeously so that he could also approach the Court within a reasonable time. It is also factual and is not contested that the impugned judgment was uploaded on the Judiciary CTS portal on 9th June 2025 which was 10 days after delivery of the Judgment. Again, it means that the applicant had another 4 days within which he could have filed a Notice of Appeal, but he did not.
14. As underpinned in the case of **Fakir Mohammed vs. Joseph Mugambi (supra)**, a party seeking an equitable relief must approach the court with clean hands. In this instance, the length of the delay in filing the Notice of Appeal is not only unreasonable, but also unjustified in the circumstances of the afore-stated chronology of events. In

the same vein, the reason

given for the delay is not plausible at all. Equity does not aid the indolence. The applicant sat on his right to file a notice of appeal. He squandered time that was readily available to him to do the needful and, instead, went to another court. Upon realizing that things were not going his way, he has now turned around and filed the instant application.

15. My take is that non-compliance with timelines prescribed under this Court's Rules ought to be taken seriously because it derails the cause of justice for a party who wishes to enjoy the fruits of a judgment, ruling or order made by the court below. As was stated in the case on **John Mutai Mwangi & 26 others vs. Mwenja Ngure & 4 others 2016 eKLR** that the Court's strict timelines should be adhered to, is for the reason:

".....meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner.

16. It is for this reason that am unable to exercise my discretion in favour of the applicant. I find that the applicant has not advanced plausible justification for the inordinate delay in filing the Notice and Memorandum of Appeal. Conversely, the respondent would be highly prejudiced if the application is allowed for the reason that there is nothing he failed to do that he was required to do after the judgment was delivered. He certainly is eagerly waiting to reap the fruits of the

judgment.

17. Accordingly, I find that the application is unmeritorious and is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 19th day of December, 2025.

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY

REGISTRAR

