



REPUBLIC OF KENYA



**Mutie & 2 others v Registrar & 2 others (Civil Application
E289 of 2025) [2025] KECA 2308 (KLR) (19 December 2025) (Ruling)**

Neutral citation: [2025] KECA 2308 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E289 OF 2025
F SICHALE, JA
DECEMBER 19, 2025**

BETWEEN

**JULIUS MUTIE MUTUA 1ST APPLICANT
ALEX KYALO MUTEMI 2ND APPLICANT
PASCALI KISELI BASILIO MUNGUI (SUING AS THE OFFICIALS OF AIMI MA
LUKENYA SOCIETY) 3RD APPLICANT**

AND

**THE CHIEF LAND REGISTRAR 1ST RESPONDENT
EAST AFRICA PORTLAND CEMENT COMPANY LIMITED 2ND
RESPONDENT
THE HONORABLE ATTORNEY GENERAL 3RD RESPONDENT**

*(Being an Application for Extension of Time to file and serve Memorandum
and Record of Appeal from the judgment of the Environment and
Land Court (A. Nyukuri J), dated 9th October 2023 in (Machakos
ELC Case No. 74 of 2014 as Consolidated with Petition No. 10 of 2018)*

RULING

1. Julius Mutie Mutua, Alex Kyalo Mutemi and Pascali Kiseli Basilio Mungui (suing as the officials of Aimi Ma Lukenya Society) (“the applicants” herein), have vide a motion on notice dated 9th May 2025, brought pursuant to Rules 4, 42, and 47 of the Court of Appeal Rules 2010, 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 applicants to file and serve the Memorandum and Record of Appeal out of time against the decision rendered on 9th October 2023 by Hon Lady Justice A. Nyukuri (as she then was) in ELC Case No. 74 of 2014 Consolidated with Petition No. 10 of 2018, of the Environment and Land Court at Machakos.
 - iii. That upon grant of leave, the annexed draft Memorandum of Appeal (marked as JMMM-7) be deemed as duly filed and served.
 - iv. That this Honourable Court be pleased to issue any other orders as may be necessary in the interest of justice.
 - v. That the costs of this application abide the determination of the intended appeal.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Julius Mutie Mutua, the current Chairman of Aimi Ma Lukenya Society who deposed inter alia that on 9th October 2023, A. Nyukuri J, dismissed a suit they had instituted in Machakos and Environment Land Court for alleged failure to serve the amended plaint within the timeframes earlier directed by the court.
 3. That, shortly after delivery of the ruling, they resolved to change legal representation and shortly thereafter filed an application seeking stay of the ruling delivered on 9th October 2023, pending appeal, but the court did not grant the stay orders as sought.
 4. That, subsequent to the said ruling, he was arrested alongside his co-officials and charged in Milimani Criminal Case No. 312 of 2024, and in response to the said criminal prosecution, they filed Constitutional Petition No. E171 of 2024, seeking inter alia conservatory orders staying the criminal trial.
 5. He further deposed that the multiplicity of these proceedings diverted their attention and constrained their ability to promptly compile and file Memorandum and Record of Appeal, within the prescribed timeline and that thus, the delay in filing the Record of Appeal was not deliberate nor inordinate, but was occasioned by genuine and justifiable circumstances beyond his control, including the ongoing legal battles and administrative hurdles in accessing court documents.
 6. The motion was opposed vide a replying affidavit sworn on 29th October 2025, by Roseline Ominde the Company Secretary and Legal Manager of the 1st respondent who deposed inter alia that the allegation that the applicants were diverted by multiplicity of suits was unfounded and that there was a further delay in filing the instant motion which was filed on 9th May 2025, yet the typed proceedings were allegedly obtained on 24th September 2024.
 7. She further deposed that taking into consideration that the orders issued on 9th October 2023, struck out the previous suit and did not dismiss it as the applicants wish to mislead the Court, they subsequently filed a fresh suit namely; Machakos ELC Case No. 7 of 2023, challenging the same proprietary rights over the same property that was the subject as the previous suit.
 8. She thus deposed that in view of the foregoing and the applicants having filed the said fresh suit, which was currently pending before the ELC Court for determination and at the same time seeking to appeal against the Court’s decision to strike out the previous suit; clearly demonstrates an abuse of court process and forum shopping which would occasion an absurdity if this Honourable Court makes contradictory orders or directions.



9. There was no response on part of the 2nd and 3rd respondents despite having been served with a copy of the application and the hearing notice on 24th June and 14th October 2025, respectively.
10. It was submitted for the 1st respondent that it is trite law that delay should be satisfactorily explained and that courts have stated that a plausible and satisfactory explanation for the delay is the key that unlocks the court's flow of discretionary favour and that there has to be valid and clear reasons upon which discretion can be favourably exercised.
11. It was further submitted that in the instant case, the applicants contended that they obtained the typed proceedings on 24th September 2024 and that as such, they ought to have filed the Memorandum and Record of Appeal within 60 days as required by Rule 84 of the Court of Appeal Rules, which delay was further evidenced by the date of filing this application which was 9th May 2025, yet the proceedings were allegedly obtained on 24th September 2024, which delay had not been explained.
12. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the 1st respondent's replying affidavit and submissions, the cited authorities, and the law.
13. The principles upon which this Court exercises its discretion pursuant to Rule 4 to extend time or not are now old hat. 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.
14. See *Patel v Waweru & 2 Others* [2003] KLR 361 at pp. 362-3 where this Court had the following to say in respect to Rule 4 of the Court of Appeal Rules;

“This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single Judge explaining the reason for what was clearly an inordinate delay. How does a single Judge exercise his discretion” In *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi – Civil Application no. NAI. 251 of 1997* this Court stated:-

“It is now settled that the decision whether or not to extend the 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.”

15. In the instant case and as regards the length of the delay, the impugned ruling was delivered on 9th October 2023, whereas the instant motion was filed on or about 9th May 2025. There has therefore been a delay of about 1 year and 7 months, which delay is no doubt inordinate.
16. Turning to reasons proffered for failing to file the appeal on time, it was contended that the same was not intentional but was rather occasioned by justifiable challenges, including the applicants involvement in multiple parallel proceedings arising from the same subject matter and administrative delays in procuring certified typed proceedings, which were only availed on 24th September 2024.
17. I do not consider the reasons advanced for the delay to be reasonable/plausible for the following reasons; firstly the 1st respondent in their replying affidavit in opposition to the motion have deposed that pursuant to the impugned ruling of 9th October 2023, which struck out the applicants previous suit, the applicants subsequently filed a fresh suit namely *Machakos ELC Case No. 7 of 2023* in



respect of the same subject matter, a fact that has not been disclosed to this Honourable Court, which allegation has not been controverted by the applicants.

18. Secondly, despite the applicants contending that the typed proceedings in this matter were availed on 24th September 2024, no explanation has been forthcoming as to why it took them another 8 months to file the instant motion, which is dated 9th May 2025.
19. Ultimately, therefore, I am not satisfied that the delay herein has been sufficiently explained to the satisfaction of this Court.
20. As to the arguability or otherwise of the intended appeal, I cannot make a determination of this issue sitting as a Single Judge, and I will therefore not delve into the issue.
21. Finally, on prejudice, I am not satisfied that the applicants will stand to suffer any prejudice if the instant motion is not allowed, given the fact that there is already a similar matter pending before the ELC Court in Machakos.
22. Taking into totality all the circumstances of this case, I am of the considered opinion that the applicants have 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.
23. Accordingly, the applicants' motion dated 9th May 2025, is without merit and the same is hereby dismissed in its entirety with costs to the 1st respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2025.

F. SICHALE

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

