

**IN THE COURT OF
APPEAL AT NAIROBI**

(CORAM: MUSINGA, (P). (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. E093 OF 2023

BETWEEN

MAINA NDEGWA 1ST

APPELLANT ALICE NJOKI MAINA.....2ND

APPELLANT

AND

PATRICK SIMIYU KHAEMBA.....1ST RESPONDENT/APPLICANT

ROSE KABUTIA KHAEMBA 2ND

RESPONDENT/APPLICANT ISHMAEL NYARIBO T/A

I. N. NYARIBO ADVOCATES.....3RD RESPONDENT

**THE COMMISSIONER FOR LANDS 4TH
RESPONDENT**

(Being an application for extension of time to strike out a notice and record of appeal from the Judgment of the Environment and Land Court of Kenya at Nairobi (L. Komingoi, J.) dated 24th November 2022

in

ELC No. 576 of 2012)

RULING

1. By an application dated 9th July 2025, the applicants, who are the 1st and 2nd respondents herein, seek leave to file an application out of time, to strike out the appeal, pursuant to **rule 86** of this Court's Rules which states as follows:

86. Application to strike out notice of appeal or appeal

A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—

(a) that no appeal lies; or

(b) that some essential step in the proceedings has not been taken or has not been taken within the prescribed time: Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.

2. The applicants contend in their affidavit in support of the application that the judgment appealed from was delivered on 24th November 2022; that the appellants filed the notice of appeal on 20th January 2023 and the record of appeal on 15th May 2025, which was 117 days outside the prescribed period after filing of the notice of appeal without leave of the Court; that the applicants instructed **Majan Maitethia & Associates Advocates** to represent them and in particular to file an application to strike out the appeal but the said advocates failed to do so; that the applicants, having lost contact with the said advocates, engaged **M/s Mwangi & Ngatia Advocates** sometime in May 2025, who discovered that the previous advocates had, without authority of the applicants, entered into a consent for stay of execution of the judgement on 1st

November 2023; and that the applicants reported the conduct
of

their former advocates to the Advocates Disciplinary Tribunal and to the Police and thereafter filed the instant application.

3. The applicants believe that they have advanced compelling reasons for the delay in filing their application outside the 30 days' statutory period under rule 86 and urge this Court to exercise its discretion in their favour, pursuant to the provisions of **rule 4** of this Court's Rules.
4. The applicants have also pointed out various defects in the record of appeal as filed, including non-payment of filing fees; lack of the mandatory seal of the Registrar of the Court appealed from, among other shortcomings.
5. The appellants did not file any affidavit in reply to the issues raised by the applicants. They only filed a strange document entitled "APPELLANTS' GROUNDS OF OPPOSITION." The Rules of this Court do not provide for filing of Grounds of Opposition by a respondent who intends to challenge an application. **Rule 52** provides for the filing of one or more affidavits in reply by a person who has been served with a notice of motion, not grounds of opposition.
6. In their Grounds of Opposition, the appellants state:

"TAKE NOTICE that at the hearing of this matter, the 1st and 2nd Appellants herein, will oppose the Notice of

Motion

Application dated 9th July, 2025 (hereinafter referred to as "the Application") on the following amongst other GROUNDS:

- 1. THAT there will be no prejudice occasioned to the 1st and 2nd Respondents' if the instant Appeal is heard and determined on merit.**
 - 2. THAT the 1st and 2nd Respondents have not established any fraud on the part of the Appellants or their advocates in relation to the consent recorded on 1st November, 2023.**
 - 3. THAT the Complaint annexed in the instant application arises from a dispute between the 2nd Respondent and her previous advocates on record from a land transaction for the sum of Kshs. 12,000,000 which the advocate allegedly withheld.**
 - 4. THAT there is no mention of any misconduct against the 2nd Respondent's Advocates in relation to the advocates conduct during the proceedings before this Honourable Court in the instant Appeal.**
 - 5. THAT filing of document is online and the allegation by the 1st and 2nd Respondents that the notice of Appeal lacks the stamp by the Deputy Registrar is perplexing.**
 - 6. THAT it is in the interest of justice that as the instant Appeal be allowed to be heard and determined on merit.**
 - 7. THAT based on the foregoing, the Application does not warrant the grant of the orders sought, and it is in the interest of justice that the said Application be dismissed with costs to the Appellants.**
7. In the absence of a replying affidavit or submissions by the

appellants, this application is unopposed. That notwithstanding, I am duty bound to determine it on its merit.

8. The application is premised on, *inter alia*, **rules 4** and **86 (b)** of this Court's Rules. In an application for extension of time under rule 4, the Court exercises its unfettered discretion, which must however be done judiciously. Among the factors that I have to take into consideration in this application are the length of the delay; the reason for the delay; and the degree of prejudice to the respondents if the application is granted. See **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi [1999] 2 EA 231**.
9. The judgment appealed from was delivered on 24th November 2022; the notice of appeal was filed on 20th January 2023 with leave of the trial court; and the record of appeal was filed on 25th May 2023, out of time and without leave of this Court, although the trial court had extended the time by 120 days, but the applicants argue that only this Court has jurisdiction to do so.
10. The applicants instructed their former advocates to apply for striking out of the appeal, but no action was taken by their advocates. The applicants kept on pursuing their former advocates throughout 2023 and 2024 without any success. Eventually, the applicants instructed their current advocates on 1st May 2025, who unearthed what had so far transpired, including the short comings complained of.

The current advocates filed this application on 9th July 2025.

11. The applicants should not be made to suffer because of the mistakes of their former advocates, as was held in **Belinda Muraya & 6 Others vs Amos Wainana [1978] eKLR.**
12. In my view, the delay in filing this application has been well explained. The applicants earnestly desire to pursue the striking out of an appeal, which they believe is improper, and they should not be denied an opportunity to do so.
13. I do not think that the appellants will be prejudiced by grant of such leave because they will have an opportunity to oppose it.
14. Consequently, I allow the application and hereby extend the time for filing an application to strike out the appeal by **14 days** from the date of this ruling. The costs of this application shall be borne by the appellants.

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

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.