

**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MURGOR, J.A - IN CHAMBERS)**

**CIVIL APPLICATION NO. E030 OF 2025**

**BETWEEN**

**JULIUS YAA BAYA.....1<sup>ST</sup>**

**APPLICANT LINUS CHARO JEFWA.....2<sup>ND</sup>**

**APPLICANT**

**AND**

**KAINGU KALAMA KITHUKU.....RESPONDENT**

***(An application for extension of time to lodge a Memorandum of Appeal and Record of Appeal against the Judgment and Decree of the Environment and Land Court delivered at Malindi (Mwangi Njoroge, J.)***

***delivered on 3<sup>rd</sup> April 2025 in***

***E.L.C.L.A No. E009 of 2024)***

**\*\*\*\*\***

**RULING**

By a Notice of Motion dated 5<sup>th</sup> August 2025, brought pursuant to **Rule 4** of the **Court of Appeal Rules**, the **Applicants Julius Yaa Baya** and **Linus Charo Jefwa** seek for leave to extend time to lodge the Memorandum and Record of

Appeal against the Judgment and Decree of the Environment and  
Land Court delivered

at Malindi on 3<sup>rd</sup> April 2025 in *E.L.C.L.A No.E009 of 2024 Julius Yaa Baya & Linus Charo Jefwa-Versus-Kaingu Kalama Kithuku* and that the costs of and incidental to this application be provided for.

The Notice is brought pursuant to the grounds on its face and the supporting affidavit sworn by **Patrick Shujaa Wara**, counsel for the Applicant, in which he contended that the Applicants, who are aggrieved by the trial Judge's decision intend to lodge an appeal, but delayed in filing the Memorandum of Appeal and Record of Appeal on time; that the Notice of Appeal was lodged on 8<sup>th</sup> April 2025 and the certified typed copies of the proceedings and Judgment were certified on 15<sup>th</sup> July 2025; that the office court file with the pleadings and copies of proceedings were inadvertently misplaced in counsel's office and were only traced on 4<sup>th</sup> August 2025 by which time the 60 days period for filing the Record of appeal had expired; that the Record of Appeal is now complete, and can only be lodged with leave of this Court; that for this reason, it was deponed that time should be extended to file the Memorandum and Record of appeal.

It was contended that the delay was not deliberate or inordinate; that the Applicants' appeal comprises sound prima

facie grounds of appeal with prospects of success and that no prejudice shall be suffered by the Respondent who in any event is in possession of the suit land and that the wider interest of justice would be served if the application is allowed.

In response, the Respondent filed a Replying Affidavit sworn by **Richard Otara** counsel for the Respondent who deposed that the Judgment was delivered on 3<sup>rd</sup> April 2025, following which, the Applicants had 14 days within which to file and serve a Notice of Appeal in accordance with this Court's rules, and thereafter, the Applicants were then required to file the Record of Appeal within 60 days. It was deposed that from the Applicants' own application and the supporting affidavit, it was evident that certified proceedings were collected well within time.

The deponent challenged the explanation advanced by the Applicants' counsel that the delay was occasioned by the advocate's office file or proceedings having been misplaced, as untenable, unconvincing, and incapable of sustaining the exercise of the Court's discretion. It was averred that no reason had been given why counsel could not have obtained or made copies of the relevant documents and proceedings directly from the court registry, which was at all material times accessible. It was further deposed that the period between 3<sup>rd</sup> April 2025 and 5<sup>th</sup> August 2025, when the present application was filed, amounted to an inordinate delay of approximately four months, which had not

been sufficiently explained and was therefore inexcusable, and therefore, the Applicants had failed to demonstrate any excusable cause to warrant the extension of time sought.

Both parties filed written submissions. When the application came up for hearing, learned counsel **Mr. Shujaa** appeared for the Applicants, while learned counsel **Mr. Otara** appeared for the Respondent.

In their written submissions counsel for the Applicants submitted that, they had demonstrated that the application was meritorious and that they deserved the Court's discretion to extend time. They contended that the delay in lodging the Memorandum and Record of Appeal within the prescribed time was occasioned by circumstances beyond their control; that upon receipt of the certified proceedings on 15<sup>th</sup> July 2025, the Applicants' advocates' office court file containing the pleadings and copies of the proceedings intended for preparation of the Record of Appeal was inadvertently misplaced during an office relocation. The misplaced file was later recovered on 4<sup>th</sup> August 2025, by which time the 60 days period for filing the Record of Appeal had lapsed.

The Applicants further submitted that copies of the Notice of Appeal, the advocates' letter requesting proceedings, and the certified proceedings were annexed to the supporting affidavit,

thereby demonstrating diligence on their part. They maintained that the delay was not deliberate, was not inordinate, and was sufficiently explained.

Regarding the chances of success of the intended appeal, the Applicants submitted that the draft Memorandum of Appeal disclosed arguable grounds, in particular, whether the learned Judge erred in law and fact by shifting the burden of proof to the Applicants to establish that the suit land was initially allocated to their predecessor in title, despite the Respondent's case being that the land had initially been allocated and documented in his favour before it was allegedly fraudulently registered in the name of the Applicants' predecessor. The Applicants further submitted that it was arguable whether the learned Judge failed to appreciate that the Applicants' title to the suit land was valid and indefeasible, and that the burden lay upon the Respondent to prove that their title was acquired through fraud or misrepresentation to which the Applicants' predecessor in title was a party. They contended that these issues raised bona fide and prima facie grounds of appeal with reasonable prospects of success.

On the question of prejudice, the Applicants submitted that no prejudice would be suffered by the Respondent if the application was allowed, given that the Respondent remained in

physical possession of the suit land. They further contended that the wider interests of justice would be served by allowing the application and granting the Applicants an opportunity to ventilate their appeal on the merits.

On their part, counsel for the Respondent submitted that on the issue of prejudice, the Applicants had lost the suit in the trial court and had been condemned to pay costs to the Respondent. An appeal to the Environment and Land Court had similarly been unsuccessful. Despite this, the Applicants had failed to settle the accrued costs, thereby subjecting the Respondent to substantial financial hardship.

It was further submitted that the Applicants were employing the present application as a delaying tactic, aimed at exhausting the Respondent financially and frustrating his ability to enjoy the fruits of judgment. The Respondent deponed that the Applicants had continued to deny him access to his land, using the pending appellate process as a shield and to perpetuate the dispute and deny him justice.

In conclusion, Counsel submitted that the Applicants' application was devoid of merit, that the delay complained of was inordinate and unexplained, and that granting the orders sought would continue to occasion him grave prejudice.

**Rule 4** of the **Court of Appeal Rules** allows for this Court to extend time to lodge an appeal in the following terms:

***The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.***

This Court in the case of **Leo Sila Mutiso vs. Hellen Wangari Mwangi [1999]**

**2 EA 231** which is the locus classicus, laid down the parameters for a party seeking to extend time for filing to demonstrate:

***“It is now well 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.”***

From the above, it is clear that the discretion under **Rule 4** is wide and unfettered, and the factors relevant to its exercise are wide. They include, but are not limited to, the length of the delay, the reason for the delay, the possible chances of the intended appeal succeeding, the degree of prejudice to the respondent, the

conduct of the parties, the need to balance the right of appeal against the principle of finality in litigation, and whether the matter raises issues of public interest. The discretion must, however, be exercised judicially and on a case-by-case basis.

The Judgment sought to be appealed from was delivered on 3<sup>rd</sup> April 2025, while the present application was filed on 5<sup>th</sup> August 2025, a delay of approximately four months. The Applicants attributes the delay to inadvertently misplacing the advocates' office file, which was later recovered. While the delay is not insignificant, the Applicants' counsel has taken responsibility for occasioning the delay which occurred whilst counsel was relocating their offices. Having lodged the Notice of Appeal and requested for the proceedings within the stipulated time frame, it is apparent that the Applicants had every intention of filing an appeal, and would have done so in good time had the advocate's file not been misplaced. It is also evident that the Applicant lodge this application soon after retrieving their office file. Given the explanation for the delay, I am satisfied that it has been satisfactorily explained.

As regards the intended appeal, the Applicants contend that the learned trial Judge was in error in shifting the burden of proof on the ownership of land to the Applicants and erroneously concluding that their title was fraudulently acquired. Without expressing any concluded view on the merits, the intended

appeal is not frivolous and raises arguable issues deserving of consideration by this Court.

On the question of prejudice, I am unable to discern what prejudice would be occasioned to either party, save that this being a land dispute, it would be

mutually beneficial to the parties were the matter to be determined with finality by this Court.

In sum, the Applicant having satisfied the requirements of **Rule 4**, I exercise my discretion to extend time for lodging of the Applicant's Memorandum and Record of appeal.

In so finding, I make the following orders:

- i) that time be and is hereby extended for lodging the Memorandum and Record of appeal;*
- ii) that the Memorandum and Record of appeal to be lodged and served within 14 days of this Court's order: and*
- iii) Costs in the appeal.*

***It is so ordered.***

***Dated and delivered in Mombasa this 30<sup>th</sup> day of January, 2026***

**A.K. MURGOR**

.....  
..... **JUDGE OF APPEAL**

***I certify that this is a True copy of the original***

***Signed***

**DEPUTY REGISTRAR**