

IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. E048 OF 2025

BETWEEN

**SAID RAMADHANI GWAYA (*Suing
as the Personal Representative of
the***

Estate of MWINYI RAMA GWAYA)*.....**APPLICANT*

AND

**LENNY MAXWELL KIVUTI.....1ST
RESPONDNT**

**MOFFAT KINGI.....2ND
RESPONDENT**

***(An application for extension of time to file the Notice of
Appeal, and Record of Appeal out of time against the
Judgment and Decree of the High Court Kwale (Dena, J.)
delivered on the 7th May 2024***

in

ELC No. 27 of 2021)

RULING

By a Notice of Motion dated 9th June 2025, brought pursuant to **Sections 3A** and **3B** of the **Appellate Jurisdiction Act, Rules 4, 41, 42, 88** and **92** of the **Court of Appeal, Rules 2022** and **Articles 10, 27, 28, 48, 60, 159** of

the **Constitution**, the Applicant, seeks for time to be extended to file the Appeal out of time and for timelines to be provided for filing the Notice of Appeal alongside the Record of appeal; ii) a stay of execution of the Judgment of 7th

May 2024 pending the hearing and determination of this application and the appeal; and iii) that costs be provided for.

The Notice is brought pursuant to the grounds on its face and is supported by the affidavit of **Saidi Ramadhani Gwaya** sworn on the same day, where it was deponed that, the Applicant was only recently informed of the delivery of the Judgment against him; that though he had retained counsel for the pendency of the suit, his counsel failed to inform him of the delivery of the Judgment and that since he is illiterate or semi-illiterate he was not in a position to ascertain it's delivery. It was deponed that he has now retained new counsel who has agreed to offer him pro bono services, and that his counsel has since obtained copies of the Judgment on 30th April 2025.

It was further deponed that the appeal has high chances of success given that the subject property is their ancestral land and the learned Judge misdirected himself by declaring that the Applicant is not the bona fide owner of the property; that this was despite all the government ministries having produced documentary evidence in court that demonstrated that the Applicant is the real and legitimate owner of the subject property; that the Applicant has been in possession of the subject property since adjudication in the area, and he is

unable to understand the basis on which the 1st Respondent claims to own the subject property; that the appeal raises triable issues with high chances of success. It was further deponed that unless an order of stay of execution is granted in this application, the intended appeal will be

rendered nugatory and the Applicant will suffer substantial loss and untold prejudice and grave injustice.

In a Replying affidavit sworn by the 1st Respondent on 30th June 2025, the application was opposed. It was deponent that the application for extension of time and stay of execution of the Judgment is frivolous and vexatious and an abuse of the court process; that the Notice of motion is an omnibus application seeking extension of time to file a Notice of appeal out of time and at the same time seeking stay of execution of the Judgment of the Environment and Land Court before this Court is seized of jurisdiction considering that there is no valid Notice of appeal; that the delay in filing the Notice of appeal is not excusable as no reason for delay has been provided to explain the delay; that further, the length of delay is inordinate given that the Judgment was delivered on 7th May 2024.

It was contended that the Applicant seeks to blame his advocate for the delay, yet it is the Applicant who has been indolent in the circumstances, since it is trite that the case belongs to the litigant and not to their advocate; that the Applicant never made any effort to check on his advocate or the court registry to know the progress of his case and whether the Judgment was delivered. It was further contended that the

Respondents are entitled to enjoy the fruits of their Judgment and have a right to ownership of the subject property; that further, the defence of being illiterate and a man of straw does

not assist a litigant who has been indolent in advancing his claim, especially in light of the strict timelines of the Court's rules.

When the application came up for hearing on a virtual platform, learned counsel **Mr. Njama Maina** holding brief for Mr. Njuguna appeared for the Applicant while learned counsel **Ms. Musundi** holding brief for Mr. Nyaundi appeared for the Respondents, both parties filed written submissions. Learned counsel **Mr. Gikandi** appeared on the platform briefly for the 2nd Respondent.

Prior to commencing his submissions, counsel for the Applicant informed the Court that the Applicant would abandon the prayer for stay of execution, as it is not properly before the Court.

It was submitted on behalf of the Applicant that this was an application for extension of time to file the Notice of Appeal and Record of Appeal out of time; that the Applicant had lost touch with his counsel and was not aware that the Judgment was delivered; that after he contacted his counsel, he came to learn of its delivery; that the Applicant has resided on the suit property all his life, and no prejudice would be occasioned to

the Respondents if time was extended to file the Notice and Record of appeal out of time; that the Applicant should be provided an opportunity to defend his property. It was further submitted that the appeal has good chances of success.

Submitting on behalf of the 1st Respondent, counsel stated that the period of delay was unreasonable, that the Judgment was rendered on the 7th May 2024 and this application was filed 13 months later; that the reasons for delay in lodging the appeal are unfounded as after the Applicant was substituted as the personal representative, he did not take his responsibility seriously; that he was indolent and should have followed up on delivery of the Judgment. It was finally submitted that the Applicant had not proffered any reasons for the delay, and that as a consequence, this Court has no basis on which to exercise its discretion to extend time for filing of the Notice and Record of appeal.

Rule 4 of the **Court of Appeal Rules 2022** donates broad discretion to this Court to extend time for the doing of any act required under the Rules. The Rule expressly empowers the Court to enlarge time “...on such terms as it thinks just,” whether before or after the expiration of the prescribed period. It is to be borne in mind that the wide latitude given to the Court should be exercised judiciously.

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 distinct. 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.

In the instant case, the Judgment was rendered on the 7th May 2024 and this application has been brought 13 months

later. The question that arises is whether the Applicant has explained the delay in bringing this motion. The Applicant claims to have lost contact with his counsel, and was not aware of the date when the Judgment was delivered, and that he only came to learn of its delivery when he engaged a new counsel who had

subsequently made available to him copies on 30th April 2025.

He further claimed to be semi -illiterate.

In *Trade Bank Ltd (In liquidation) vs L.Z. Engineering Construction Ltd*

& Another Civil Appl. No. NAI. 282/98, this Court stated thus;

“The inaction” which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”

In considering whether the Applicant has explained the delay, when the reason that he lost contact with his counsel and was not aware of the date of delivery of the Judgment is interrogated, it becomes clear that the Applicant had no interest in pursuing the outcome of the suit, hence the delay in obtaining the Judgment. This is evident because, having lost contact with his counsel would infer that, from the close of the hearing upto the time of delivery of the Judgment and when he came to learn of its delivery, the Applicant never visited his counsel to inquire whether the Judgment was delivered. Without having made any such enquiry in the intervening

period, the Applicant would not have known when the Judgment was delivered. It is trite that a suit belongs to the litigant and not to counsel. Further, there is nothing that showed that he ever visited the court Registry to establish the status of his case. It was not enough to aver that he was illiterate. Had he been

vigilant and interested to know of the outcome of his case, he would have made constant enquires with the Registry, to ascertain whether or not the Judgment was delivered. Given the foregoing, it is patently clear that the Applicant has failed to provide a sufficient explanation as to the reason for delay in lodging the Notice and Record of appeal.

Turning to whether the Applicant's intended appeal has any chances of success, I have examined the motion and the annexures, and it is apparent that the Applicant did not file a draft memorandum of appeal setting out the reasons for which he considers that the learned Judge was in error. Though he has averred that the court did not consider his evidence and by so doing, arrived at the wrong conclusion, without the reasons for his appeal against the Judgment having been holistically set out, I am unable to ascertain the likelihood of success of the intended appeal.

On whether the Respondents will be prejudiced, it cannot be gain said that the application to lodge a Notice of appeal has come rather late in the day, and it would seem as an afterthought. And if the Applicant's lethargy as displayed in the failure to assiduously pursue his judgment is anything to go by, it would mean that were time to be extended, the Respondents

will have to wait an indeterminable period before they can be in any position to enjoy the fruits of their judgment.

In sum, I decline to exercise my discretion to extend time for filing of the Notice of appeal out of time, and accordingly dismiss the Notice of motion dated 9th June 2025 with costs to the 1st Respondent.

It is so ordered.

Dated and delivered in Mombasa this 30th day of January, 2026.

A.K. MURGOR

.....
JUDGE OF APPEAL

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

**DEPUTY
REGISTRAR**

