



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gachihi & 2 others v Gathii & another (Civil Application  
E177 of 2025) [2026] KECA 28 (KLR) (23 January 2026) (Ruling)**

Neutral citation: [2026] KECA 28 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E177 OF 2025  
A ALI-ARONI, JA  
JANUARY 23, 2026**

**BETWEEN**

**PATRICK WANJOHI GACIHI ..... 1<sup>ST</sup> APPLICANT**

**GERALD GACIHI IRUNGU ..... 2<sup>ND</sup> APPLICANT**

**MATHEW KINGORI GACIHI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**GERALD WAKAHU GATHII ..... 1<sup>ST</sup> RESPONDENT**

**ALICE MUTHONI WAITHUKI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for an extension of time to file and serve the record of appeal out of time against the Judgment of the Environment and Land Court at Nyeri (O. Olola, J.) delivered on 23rd March 2023 in ELC Case No. 86 of 2015)*

**RULING**

1. Before the Court is an application by way of a notice of motion dated 26<sup>th</sup> November 2025 brought under Article 159 of *the Constitution*, section 3A and 3B of the *Appellate Jurisdiction Act*, rule 4 & 41 of the Court of Appeal Rules 2022 ('the Rules'), seeking an extension of time to file and serve the memorandum of appeal and the record of appeal out of time; and for the memorandum of appeal already filed to be deemed to have been duly filed.
2. The application is predicated on the grounds of the face of the application that has been rehashed in the supporting affidavit sworn by the 1st applicant with the 2<sup>nd</sup> and 3<sup>rd</sup> applicants' authority, wherein he states that the applicants pursued a declaration of customary trust over L.R. No. Othaya/Ihuririo/452 in Nyeri ELC Case No. 86 of 2015 (OS), which case was dismissed with costs. Dissatisfied, with the judgment they instructed their former counsel to appeal; the notice of appeal was filed on 3<sup>rd</sup> April 2023; the applicants repeatedly visited their previous counsel to inquire about the appeal's progress,



but received vague response; thereafter the said counsel became uncooperative at which point the applicants sought a new counsel, who discovered that the only document filed by the previous counsel was the notice of appeal; the intended appeal has high prospects of success; the delay is not inordinate and the respondents are not likely to suffer any prejudice.

3. In opposing the application, the respondents, through the 1<sup>st</sup> respondent's affidavit, sworn on 4<sup>th</sup> December 2025, state that judgment was delivered on 23<sup>rd</sup> March 2023 and that the applicants were aware they needed to file the record of appeal within sixty days after lodging their notice of appeal on 3<sup>rd</sup> April 2023, which meant the deadline was in June 2023; the application filed in November 2025 is grossly inordinate having been filed over two years and five months late; the applicants attempt to blame their former counsel is not sufficient; there is no evidence that the applicants made any inquiries about status of their case from when the notice of appeal was lodged in April 2023, until they filed the current application in November 2025; reopening a matter settled over two years ago would cause the respondents prejudice, as they have already faced prolonged anxiety and inconvenience due to the applicants; the application is an afterthought stemming from the applicants' own inaction and should be dismissed as meritless and significantly delayed, with costs to the respondents.
4. Learned counsel for the applicants has filed submissions dated 12<sup>th</sup> January 2026, and argues that the delay (from March 2023 to November 2025) was not due to the applicants' fault but was caused by the inadvertence and negligence of their former counsel. Counsel further contends that the applicants were diligent, frequently visiting their former counsel, who assured them that the appeal was on track. They only discovered the appeal had not been filed in November 2025 after perusing the court records themselves. Counsel submits further that mistakes of counsel should not be visited upon an innocent litigant. In support, he relies on *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR, where the Court held that the law does not set out any minimum or maximum period of delay and that a plausible and satisfactory explanation suffices.
5. Counsel submits further that the applicants have a very high chance of success and have provided a draft memorandum of appeal highlighting plausible grounds. In support of this contention, Athuman Nusura Juma vs. Afwa Mohamed Ramdhan [2016] eKLR, where the Court held that all that is necessary at this stage is that the appeal has a possible chance of success.
6. Further, counsel asserts that the respondents have not demonstrated any specific prejudice they would suffer if the extension is granted and argues that it is the applicants who will face eviction from the suit property and will suffer irreparable damage if the application is denied.
7. The respondents did not file any submissions.
8. I have considered the application, the supporting affidavit, the replying affidavit and the applicant's submissions. The issue for determination is whether to grant an extension of time to file and serve the memorandum of appeal and the record of appeal out of time, and whether the memorandum of appeal and the record of appeal on record may be deemed to have been duly filed.
9. Rule 4 of the Court of Appeal Rules states that; -

The Court may, on such terms as may be 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.



10. In Abdul Azizi Ngoma vs. Mungai Mathayo [1976] KLR 61, 62, this Court held:

“We would like to state once again that this court’s discretion to extend time under rule 4 only comes into existence after ‘sufficient reason’ for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”

11. The applicants’ main assertion is that they were let down by a counsel they had given instructions to appeal, and who indeed filed a notice of appeal on time and assured them that the appeal was on course. After which, their counsel’s attitude towards them changed, prompting them to visit the registry when they discovered that counsel had not taken further steps on the appeal. As a result, they instructed the counsel now on record.

12. The respondents, in opposing the application, contend that there is no proof of the applicants’ assertion. Thinking aloud, I wonder what proof a litigant can provide to show that counsel did not act on instructions! The applicants have stated their case on oath, and nothing has been placed before me to negate it. They indeed have a notice of appeal on record and have instructed a new counsel to pursue the matter as a demonstration of their desire to have the case heard on appeal. In the annexed draft memorandum of appeal, they blame the trial judge for ignoring evidence; failing to find that a customary trust existed, and, in the alternative, that the applicants had acquired the suit property by way of adverse possession. I do not find the grounds of appeal to be idle. Neither do I find the time lapse inordinate, given the explanation, which I find plausible. As regards the prejudice to be suffered, I am not convinced that there is any prejudice likely to be suffered by the respondents if the matter proceeds to be heard on appeal.

13. In the end, I allow the application. I order that the record of appeal be filed and served within the next 30 days of this ruling.

14. The costs of the application to abide by the outcome of the appeal.

**DATED AND DELIVERED AT NYERI THIS 23<sup>RD</sup> DAY OF JANUARY, 2026.**

**ALI-ARONI**

.....

**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

