



**Karisa (Suing as the personal representative of the Late Julius Fondo) v Nzaro & another
(Civil Application E058 of 2025) [2026] KECA 77 (KLR) (30 January 2026) (Ruling)**

Neutral citation: [2026] KECA 77 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E058 OF 2025
AK MURGOR, JA
JANUARY 30, 2026**

BETWEEN

**KENNETH SAMMY KARISA (SUING AS THE PERSONAL REPRESENTATIVE
OF THE LATE JULIUS FONDO) APPLICANT**

AND

JACKSON NGUA NZARO 1ST RESPONDENT

THE LAND REGISTRAR - KILIFI 2ND RESPONDENT

(An application for extension of time to file the Notice of Appeal, Memorandum of Appeal and Record of Appeal out of time against the Judgment and Decree of the Environment and Land Court Mombasa (N. A. Matheka, J.) delivered on 24th January 2023) in ELC No. 149 of 2012)

RULING

1. By a Notice of Motion dated 17th July 2025, brought pursuant to Sections 3A and 3B of the *Appellate Jurisdiction Act*, Rule 4 of the Court of Appeal Rules 2022 and Article 159 of *the Constitution*, the Applicant, seeks for time to be extended to file the Memorandum of Appeal and Record of Appeal out of time and for provision to be made for costs.
2. The Notice is brought pursuant to the grounds on its face and is supported by the affidavit of Kenneth Sammy Karisa the Applicant, in which he contended that the Judgment was delivered virtually on 24th January 2023 in the absence of the Applicant and the Applicant's former legal counsel; that a Notice of Appeal was subsequently filed on 10th February 2023, and a request for typed proceedings was made on 16th February 2023 by the Applicant's former legal counsel, without the knowledge or instructions of the Applicant.
3. It was contended that prior to delivery, his former counsel Messrs. Sherman, Nyongesa & Mutubia Associates assured him that Judgment had not yet been delivered and would be delivered on notice;



that on or about 18th February 2023, the Applicant received information from one of the tenants on the suit premises that the Respondent had visited them with a copy of a judgment issued in his favour. It was at that point that the Applicant became aware that Judgment had been delivered.

4. He contended that, he immediately contacted his former legal counsel, who assured him that he would take appropriate action; that owing to the prevailing circumstances and lack of confidence in his former advocate, he was compelled to change advocates; that his new advocate was not privy to the fact that a Notice of Appeal had already been filed within time. Consequently, the Applicant filed Civil Application No. E021 of 2023, Kenneth Sammy Karisa vs Jackson Ngua Nzaro & the Lands Registrar, Kilifi, seeking extension of time to file a Notice of Appeal, Memorandum of Appeal, and Record of Appeal out of time; that thereafter, he became aware that the Notice of Appeal had in fact been filed within time and that, but there was a delay in filing the Record of Appeal.
5. The Applicant deponed that pursuant to filing the application to extend time, the 1st Respondent filed Civil Application No. E098 of 2023, Jackson Ngua Nzaro vs Kenneth Sammy Karisa & the Lands Registrar, Kilifi, seeking to strike out the Record of Appeal. The application was heard, and on 7th March 2025, this Court rendered a ruling striking out the Record of Appeal.
6. Subsequently, on 24th March 2025, the Applicant filed Civil Application No. E023 of 2025, Kenneth Sammy Karisa vs Jackson Ngua Nzaro & the Lands Registrar, Kilifi, again seeking leave to extend time to file the Memorandum and Record of Appeal out of time. The application came up for hearing on 17th July 2025, but was withdrawn as the orders sought, were interim in nature.
7. The Applicant averred that by this time, it was now clear that the timelines for filing of the Record of Appeal had since lapsed, hence the present application seeking extension of time to file both the Memorandum and Record of Appeal. It was contended that the delay which is excusable arose from a chain of procedural missteps and misinformation in filing that were neither deliberate nor intended to obstruct justice. It was contended that the Appeal has never been heard or determined on its merits and that the subject matter of the Appeal concerns land, which is an emotive and sensitive matter that ought to be heard and determined; that further, the intended Appeal raises triable issues, comprised substantive grounds of appeal and that it is therefore in the interest of justice that the present application be considered and allowed.
8. In response to the application, the 1st Respondent filed a Replying Affidavit sworn on 20th August 2025 where it was deponed that although the application was served upon his advocates on 18th July 2025, he was unable to respond immediately as he had travelled to India with his ailing father, who had been undergoing medical treatment.
9. Nonetheless, the 1st Respondent opposed the application for the reason that since Judgment was delivered on 24th January 2023, the Applicant had engaged in a series of procedural missteps that demonstrated a lack of diligence in prosecuting the intended appeal. It was deponed that the Applicant had served his advocates with a Notice of Appeal dated 7th February 2023, and lodged on 8th February 2023; that a letter dated 13th February 2023 requesting certified copies of the proceedings and Judgment, was filed on 16th February 2023; that soon thereafter, on 24th February 2023, the Applicant acting in person had served a further Notice of Appeal together with a Notice to Act in Person; that on 14th March 2023, the Applicant had filed Civil Application No. E021 of 2023 seeking extension of time to file a Notice of Appeal, Memorandum of Appeal, and Record of Appeal out of time. According to the 1st Respondent, it was evident from that application that as at 14th March 2023, the Applicant had already obtained the proceedings and Judgment and was still well within the prescribed time for filing the Record of Appeal, particularly because, a request for proceedings had been made and served within



- time, thereby entitling the Applicant to a Certificate of Delay. He averred that the proceedings had been certified ready on 24th February 2023 and that the decree had been sealed as early as 8th February 2023.
10. The 1st Respondent further deponed that, acting in good faith, his counsel had written to the Applicant's counsel on 4th April 2023 proposing a practical way forward even as the application for extension of time was pending; that thereafter the Applicant had withdrawn his application on 3rd May 2023 when it came up before Odunga, JA, at a time when the Applicant was still within the appeal timelines.
 11. It was the 1st Respondent's deposition that despite having all the requisite documents, the Applicant did not file the Memorandum and Record of Appeal until 11th July 2023, which prompted the 1st Respondent to file Civil Appeal No. E098 of 2023, seeking to strike out the Record; that this culminated in the ruling delivered on 7th March 2025 striking out the Record of Appeal. He further averred that the Applicant thereafter filed Civil Application No. E023 of 2025 on 24th March 2025 seeking extension of time, which application was withdrawn on 17th July 2025 before Nyamweya, JA.
 12. The 1st Respondent averred that in the instant motion before the Court, the Applicant seeks leave once again to file a Memorandum and Record of Appeal out of time, yet there is no valid Notice of Appeal underpinning the intended Record, rendering the orders sought void and in vain. He contended that litigation ought to come to an end and that, given the history of oversights and missteps by the Applicant, it would be fair and just for the application to be dismissed.
 13. Both parties filed written submissions, and when the application came up for hearing, learned counsel Mr. Nyange appeared for the Applicant, while learned counsel Mr. Mwakisha appeared for the 1st Respondent. Learned Counsel Mr. Kemei appeared for the 2nd Respondent. In the written submissions, counsel for the Applicant submitted that the delay in lodging the Memorandum and Record of Appeal was neither deliberate nor inordinate but was occasioned by a combination of factors beyond their control; that although a Notice of Appeal and a request for proceedings were filed timeously by his former advocates shortly after delivery of Judgment on 24th January 2023, this was done without the knowledge of the Applicant or his current advocates. Upon change of legal representation, the Applicant remained unaware of the existence of the Notice of Appeal, which led to procedural confusion that resulted in the previous Record of appeal being struck out, and an earlier application for extension of time being withdrawn due to an inadvertent error by counsel in seeking interim rather than substantive orders.
 14. The Applicant contends that the delay has been sufficiently explained, since the mistakes complained of were attributable to counsel rather than the litigant, and that no prejudice will be suffered by the Respondents if time is extended. He argued that the dispute concerns land, and urged the Court to exercise its discretion in the interests of justice to allow the appeal to be heard on its merits.
 15. For their part, counsel for the 1st Respondent reiterated the contents of the 1st Respondent's Replying affidavit and further submitted that the Applicant continues to embark on filing endless applications for extension of time to file the Record. It was submitted that when the Record was struck out on 7th March 2025 the Notice of appeal was also struck out; that pursuant to this, the Applicant was required to file a fresh Notice of appeal, before seeking time to be extended to file the Record. Counsel argued that granting of the prayers as filed would be in vain as there was no valid Notice of appeal.
 16. Counsel for the 2nd Respondent informed the Court that he would not be participating in the proceedings and would leave the decision to the discretion of the Court.



17. Rule 4 of the Court of Appeal Rules vests in this Court an unfettered discretion to extend time where the circumstances of the case so demand. It is trite that the discretion, must be exercised judiciously and not arbitrarily, and each case must be determined on its own facts.
18. This Court in the case of *Leo Sila Mutiso vs Hellen Wangari* [1989] 2 EA 231 set out the relevant factors to be considered in an application for extension of time that:

“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.”
19. These principles were reaffirmed by this Court in *Fakir Mohamed vs Joseph Mugambi & 2 Others*, Civil Application No. Nai. 332 of 2004 [2005] eKLR, and more recently in *Imperial Bank Limited (In Receivership) & Another vs Alnashir Popat & 18 Others* [2018] eKLR.
20. In effect what is of crucial importance is that, an applicant seeking extension of time bears the obligation of satisfying the Court that there existed sufficient reasons for the failure to comply with the timelines prescribed under the Rules.
21. At the outset, it is observed that contrary to counsel for the Respondent’s assertions that the Notice of Appeal was struck, it is clear from the Ruling of 7th March 2025 that only the Memorandum and Record of Appeal were struck out.
22. With this in mind, in the instant application, the Applicant attributes the delay in filing the Record to, mistakes by former counsel, confusion occasioned by change of advocates, and procedural missteps. The 1st Respondent has drawn the Court’s attention to the fact that a Record of Appeal was already filed out of time, challenged, and subsequently struck out by this Court on 7th March 2025, and that thereafter the Applicant filed and withdrew a second application for extension of time before eventually bringing the present motion.
23. The foregoing notwithstanding, when the Applicant’s instant application is considered, the Applicant seeks to rely on the Notice of Appeal dated 7th February 2025 and lodged on 8th February 2025, a request for proceedings, and the proceedings certified on 24th February 2023, to lodge the Record of Appeal, which ought to have been filed on or about 11th April 2023. The present application was not filed until 17th July 2025. The delay in seeking leave to lodge the Memorandum and Record of Appeal is therefore in the region of two years and three months, which period of delay the Applicant is required to explain.
24. As stated earlier the Applicant has attributed the reasons for delay as mistakes of counsel, confusion occasioned by change of counsel, and procedural missteps. As concerns the mistakes of counsel, I have considered the motion and the annexures and can find nothing that points to his counsel, either past or present, as having committed any error leading to the delay. What the record discloses is that his previous counsel filed the Notice of Appeal, and the request for proceedings, and even obtained the typed proceedings well within the time frame specified. Thereafter, it is the Applicant himself, who caused the subsequent missteps by filing another Notice of appeal, when acting in person. Therefore, it has not been demonstrated that counsel’s mistakes led to the delay, and neither has counsel admitted to have been the cause of such delay.



25. On the procedural missteps, the Record is replete with the filing of application after application for extension by the Applicant, where upon the Record of appeal filed on 11th July 2024 being struck out 7th March 2025. Undeterred, the Applicant has since brought this motion filed on 7th July 2025. A computation of the time since the last motion was struck out to the date of this motion, would mean that there was a further 4 months delay in filing the Record. An interrogation of the pleadings does not disclose any reasons for that delay. If indeed the Record was ready, it ought not to have taken 4 months for the Applicant to have brought this motion for extension of time.
26. 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.”
27. Clearly, though the Applicant seeks to blame his counsel for the delay, where no perceivable blame lies, and then has failed to explain the further 4 months delay in bringing this application, the only conclusion that can be reached is that the delay in seeking to lodge the Memorandum and Record of Appeal, which I find to be inordinate, has not been explained.
28. With respect to whether the appeal has chances of success, from the record, the Applicant’s suit was initiated in the trial Magistrates court. This would mean that any appeal to this Court would be strictly on matters of law only. I have considered the attached Memorandum of appeal, and it would seem that the grounds of appeal dwell on matters of fact arising from the trial Magistrate’s court decision. This would beg the question of whether indeed, the intended appeal has good chances of success.
29. Regarding whether the Respondents will suffer prejudice, it is not lost on me that, since the Judgment was rendered on 24th February 2023, the Applicant has subjected the Respondents to application after application, to which the 1st Respondent has diligently responded each time. It cannot therefore be disregarded that the 1st Respondent has been subjected to significant prejudice, by the unrelenting motions.
30. In the totality of the circumstances, I am not persuaded that the Applicant has laid a sufficient basis to warrant the exercise of this Court’s discretion in his favour.
1. In sum, I decline to exercise my discretion to extend time for filing of a Memorandum and Record out of time, and accordingly dismiss the Notice of motion dated 17th July 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

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JUDGE OF APPEAL

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



DEPUTY REGISTRAR

