



**Kenya National Highways Authority v Alba Petroleum Limited & 4 others (Civil Application E059 of 2024) [2026] KECA 52 (KLR) (30 January 2026) (Ruling)**

Neutral citation: [2026] KECA 52 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E059 OF 2024  
AK MURGOR, JA  
JANUARY 30, 2026**

**BETWEEN**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... APPLICANT**

**AND**

**ALBA PETROLEUM LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL MUSEUMS OF KENYA ..... 3<sup>RD</sup> RESPONDENT**

**THE LAND REGISTRAR MOMBASA ..... 4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

*(An application for extension of time to file Notice of Appeal out of time in an Appeal from the Judgement of the Environment and Land Court of Kenya at Mombasa (L.L. Naikuni, J.) delivered on 26<sup>th</sup> day of February, 2024, in Mombasa Constitutional Petition No. 36 of 2022)*

**RULING**

1. By a Notice of Motion dated 24<sup>th</sup> May 2024, brought pursuant to Sections 34 and 3B of the [Appellate Jurisdiction Act](#), and Rule 4 of the Court of Appeal Rules, 2022 the Applicant, Kenya National Highways Authority, seeks that this Court be pleased to grant leave to file Notice of Appeal dated 30<sup>th</sup> April, 2024 and to deem the Notice of Appeal dated 30<sup>th</sup> April, 2024 already lodged in the Environment and Land Court as duly filed and served; that this Court be pleased to grant the Applicant leave to file its Memorandum and Record of Appeal out of time and they be deemed as duly filed and served and for the costs of this Application be in the intended appeal.



2. The Notice is brought pursuant to the grounds on its face and the supporting affidavit sworn by Lawrance Maruti , Senior Legal Officer for the Applicant, in which he contended that the 1<sup>st</sup> Respondent, Alba Petroleum Limited instituted a Constitutional Petition No. 36 of 2022 dated 9<sup>th</sup> November 2022 in the Environment and Land Court at Mombasa against the Applicant and other Respondents, seeking a declaration that the decision by the 2<sup>nd</sup> Respondent to grant the Applicant access to its properties known as MSA/MS/Block 1/107 and MSA/MS/Block 1/108 (the suit properties) situated in Likoni, Mombasa County prior to payment of just compensation was unconstitutional, unlawful, null and void; a declaration that the actions of the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents violated or threatened to violate the 1<sup>st</sup> Respondent's constitutional rights; an order of mandatory injunction or mandamus compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to pay full, adequate, fair, reasonable and just compensation to the 1<sup>st</sup> Respondent for the compulsory acquisition of the suit properties; an order of permanent injunction restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents from accessing, entering, developing, undertaking construction works on, taking possession of or otherwise interfering with the suit properties pending full compensation; an order restraining the Land Registrar, Mombasa from registering any restriction, entry or transaction in respect of the compulsory acquisition of the suit properties prior to payment of compensation; an order directing that valuation of the suit properties be undertaken and payment made within a specified period; an award of general and exemplary damages arising from delay in payment of compensation; and costs of the Petition.
3. He deposed that Judgment was delivered on 26<sup>th</sup> February 2024 in favour of the 1<sup>st</sup> Respondent as the court found that it had jurisdiction to hear and determine the Petition, notwithstanding the provisions of Sections 133C and 134 of the Land Act as amended, Section 67 of the Kenya Roads Act, and the Preliminary Objection dated 28<sup>th</sup> November 2022, and had entered Judgment in favour of the 1<sup>st</sup> Respondent in terms of the Petition in its entirety with costs; that following delivery of the Judgment, the 1<sup>st</sup> Respondent commenced execution proceedings and extracted a decree dated 13<sup>th</sup> March 2024.
4. He deposed that the Applicant is aggrieved by the Judgment and decree and is desirous of appealing against the decision in its entirety; that the Applicant was unable to file and serve a Notice of Appeal within the prescribed timelines due to an inadvertent and excusable delay occasioned by its former advocates, M/s Rachier & Amollo LLP, who failed to promptly notify the Applicant of the delivery of the Judgment and to provide a copy thereof within the statutory appeal timelines despite their having followed up; that the Applicant only received the Judgment and decree vide a letter dated 3<sup>rd</sup> April 2024 after the appeal period had lapsed. He deposed that upon receipt of the Judgment, the Applicant promptly instructed M/s Dulo & Company Advocates to take over conduct of the matter, and that a Notice of Appeal dated 30<sup>th</sup> April 2024 was lodged in the Environment and Land Court, together with a request for certified copies of the Judgment and typed proceedings in preparation for filing the Record of Appeal. He deposed that the delay was not deliberate, or inordinate, and was attributable to circumstances beyond the Applicant's control.
5. Further, he deposed that the intended appeal is arguable and raises serious issues of law and fact, including whether the learned Judge was in error in assuming constitutional jurisdiction where no constitutional threshold had been met, in holding that access to the suit properties amounted to unconstitutional conduct without proof of possession under Section 120 of the Land Act, in issuing permanent injunctions notwithstanding that the road project had not commenced and no possession of the site had been taken, and in compelling the Applicant to pay compensation despite its limited statutory role in the compulsory acquisition process, which vests valuation, assessment and award in the National Land Commission, among other grounds.



7. He averred that execution has commenced and that unless the orders sought are granted, the Applicant faces imminent risk of attachment and loss of public funds, which would occasion substantial loss, irreparable harm and render the intended appeal nugatory. He deposed that no prejudice will be suffered by the 1<sup>st</sup> Respondent if the application is allowed and that in any event the Attorney General, the 5<sup>th</sup> Respondent, has already filed a Notice of appeal within the prescribed timelines; that the application was made in good faith, and is founded on considerations of justice, fairness, public interest and the balance of convenience, and urged this Court to exercise its discretion under Rule 4 of the Court of Appeal Rules, 2022 and grant the orders sought.
8. In response, the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by Alnoor Habib Jiwan, a Director of the 1<sup>st</sup> Respondent company in which he deposed that the orders sought by the Applicant cannot be granted on the primary ground that the Notice of Appeal dated 30<sup>th</sup> April 2024 had already been struck out by an order of this Court of 18<sup>th</sup> March 2025 in Civil Application No. E053 of 2024, Alba Petroleum Limited versus Kenya National Highways Authority & 4 Others, pursuant to an application filed by the 1<sup>st</sup> Respondent dated 9<sup>th</sup> May 2024. He deposed that annexed to his affidavit were copies of the Ruling, the application that led to the striking out of the Notice of Appeal, and the filing receipts evidencing that the Notice of Appeal was lodged on 3<sup>rd</sup> May 2024, outside the prescribed time; that in light of the Notice of Appeal which the Applicant now seeks to regularize having been struck out, the prayer seeking leave to file and deem the Notice of Appeal as duly filed is untenable; that further without a valid Notice of Appeal, the jurisdiction of this Court cannot be invoked, and therefore the prayer seeking leave to file a Memorandum of Appeal and Record of Appeal out of time is equally incompetent; that unless and until the order striking out the Notice is set aside, the present application is incurably defective and incapable of being granted.
9. The deponent went further to add that, even if the application were to be considered on its merits, the Applicant had not satisfied the legal threshold for extension of time to file a Notice of Appeal. He deposed that the 1<sup>st</sup> Respondent would suffer immense prejudice if the application were allowed, as it would defeat the finality of the order striking out the Notice of Appeal, delay and prolong payment of compensation awarded by the Environment and Land Court, and undermine the execution of a judgment lawfully obtained.
10. In their written submissions, counsel for the Applicant submitted that the Notice of Motion dated 24<sup>th</sup> May 2024 was properly brought under Rule 4 of the Rules, Sections 3A and 3B of the [Appellate Jurisdiction Act](#) and all other enabling provisions of the law, and urged the Court to exercise its wide and unfettered discretion to extend time for filing the Notice of Appeal, the Memorandum and Record of Appeal out of time.
11. Counsel submitted that applications for extension of time under Rule 4 have been the subject of extensive judicial consideration and that the guiding principles are now well settled. On the length of delay, counsel submitted that though the Judgment of the Environment and Land Court was delivered on 26<sup>th</sup> February 2024, its former advocates, M/s Rachier & Amollo LLP, sent them a copy on 3<sup>rd</sup> April 2024, approximately 37 days after delivery of the Judgment. Counsel submitted that the Applicant thereafter promptly filed its Notice of Appeal dated 30<sup>th</sup> April 2024 and moved the Court for extension of time, and that therefore, the delay was neither inordinate nor deliberate.
12. On the reason for delay, counsel submitted that the delay was occasioned by the Applicant's former advocates who failed to notify the Applicant of the delivery of the Judgment within time, and that such mistake was excusable and should not be visited upon an innocent litigant. In support of this proposition, counsel relied on the decision in the case of Philip Chemwolo & Another v Augustine Kubende [1986] eKLR, for the proposition that errors of counsel should not necessarily be visited



on a client where no prejudice is occasioned. Counsel further submitted that upon learning of the Judgment, the Applicant acted diligently by changing advocates, instructing M/s Dulo & Company Advocates, requesting for certified copies of the Judgment and typed proceedings, and taking steps to regularize the appeal process.

13. On the chances of the appeal succeeding, counsel submitted that the intended appeal raises numerous arguable and triable issues of law and fact as set out in the Notice of Motion, the supporting affidavit and the draft Memorandum of Appeal. Counsel submitted that an arguable appeal is not one that must necessarily succeed but one that raises at least one bona fide issue deserving judicial consideration, and relied on the decision in the case of *Winfred Nkuene Kirimi v Jacinta Gakii* [2020] eKLR.
14. On prejudice, counsel submitted that no prejudice would be suffered by the 1<sup>st</sup> Respondent if the application were allowed, whereas the Applicant stood to suffer substantial prejudice as execution proceedings had already been initiated and denial of leave would render the intended appeal nugatory.
15. In conclusion, counsel submitted that the Court should be guided by substantive justice rather than procedural technicalities, and relied on the decision in *Hunker Trading Company Limited v Elf Oil Kenya Limited* [2010] eKLR, where the Court emphasized that technicalities should not impede the determination of substantive issues. Counsel urged the Court to find that the Applicant had met the threshold for extension of time.
16. In their written submissions, counsel for the 1<sup>st</sup> Respondent submitted that under the rules of this Court, the Notice of Appeal ought to have been filed on or before 11<sup>th</sup> March 2024, being fourteen (14) days from the date of Judgment; that the Applicant's Notice of Appeal dated 30<sup>th</sup> April 2024 was in fact filed on 4<sup>th</sup> May 2024, fifty-four (54) days out of time and without leave of the Court.
17. Counsel submitted that due to this late filing, the 1<sup>st</sup> Respondent filed an application dated 9<sup>th</sup> May 2024 seeking to strike out the Notice of Appeal, which application was registered as Civil Application No. E053 of 2024. Counsel submitted that despite service, the Applicant neither filed a response nor attended court, whereupon, this Court (*Tuiyott, Achode & Muchelule, JJ.A.*) allowed the application on 18<sup>th</sup> March 2025 and struck out the Applicant's Notice of Appeal.
18. On the issues for determination, counsel submitted that the orders sought cannot be granted because the Notice of Appeal no longer exists in law, having been struck out by a subsisting order of this Court on 18<sup>th</sup> March 2025. Counsel submitted that it is therefore untenable to seek to deem as duly filed a Notice of Appeal that has already been struck out, and that without a valid Notice of Appeal, the jurisdiction of the Court cannot be invoked to file a Memorandum of Appeal or Record of Appeal. Counsel further submitted that granting the orders sought would amount to overturning the Court's own order striking out the Notice of Appeal through the back door, without a formal application to set aside the order.
19. On whether a sufficient explanation had been offered for the delay, counsel submitted that even on the merits, the Applicant had failed to meet the threshold for extension of time; that although the Applicant alleged that it became aware of the Judgment on 3<sup>rd</sup> April 2024, the Notice of Appeal was only filed on 4<sup>th</sup> May 2024, a delay of over one month which had not been explained at all. Counsel further submitted that the Applicant's assertion that the Notice of Appeal was filed on 30<sup>th</sup> April 2024 was misleading, as the court filing receipt annexed to the Replying Affidavit showed that the Notice was filed on 4<sup>th</sup> May 2024. Counsel argued that the unexplained delay disentitled the Applicant to the discretion of the Court; that the case belongs to the client and not the advocate, and the Applicant cannot shift blame to its former advocates for failure to follow up on delivery of the Judgment.



20. Counsel further submitted that the present application was filed on 18<sup>th</sup> July 2025, more than one year after the Notice of appeal was filed, and that the supporting affidavit did not explain why an application dated 24<sup>th</sup> May 2024 was filed over a year later, which delay was inordinate and unexplained.
21. On prejudice, counsel submitted that the 1<sup>st</sup> Respondent would suffer immense prejudice if the application were allowed, as it would defeat a subsisting order of this Court striking out the Notice of Appeal, and delay payment of compensation for the suit properties that were compulsorily acquired as far back as 2022, and prolong resolution of a matter relating to a public interest infrastructure project.
22. The Court's authority to entertain and determine such an application flow from Rule 4 of the Court of Appeal Rules, which empowers the Court, upon being satisfied that sufficient reason has been shown, to enlarge the time prescribed by the Rules or by any decision of the Court. Rule 4 of the Court of Appeal Rules allows for this Court to extend time to lodge an appeal in the following terms:
23. 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 v. 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.”

24. From these authorities, it is clear that the discretion under Rule 4 is wide and unfettered, and the factors relevant to its exercise are not closed. 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.
25. Against the above precincts, the central issue for determination is whether there is a valid application to extend time to file the Notice of Appeal, and the Memorandum and Record of Appeal before this Court, and if so whether the Applicant has demonstrated sufficient cause to warrant the grant of leave to extend time. It is common ground that the Judgment intended to be appealed against was delivered on 26<sup>th</sup> February 2024, and that the Applicant did not file a Notice of Appeal within the prescribed 14 days. The Applicant attributes the delay to its former advocates and urges the Court to exercise discretion in its favour.
26. It is not disputed that the Applicant's Notice of Appeal dated 30<sup>th</sup> April 2024 was the subject of Civil Application No. E053 of 2024, where the 1<sup>st</sup> Respondent sought to strike it out for having been filed out of time. The 1<sup>st</sup> Respondent's application was allowed by this Court on 18<sup>th</sup> March 2025, with the result that the Applicant's Notice of Appeal dated 30<sup>th</sup> April 2024 was struck out. In effect, indubitably, the application now before me has since been overtaken by events.



- 27. It is trite that with the Notice of Appeal having been struck out, any intended appeal before this Court ceases to exist in law. As such, there is nothing upon which this Court can exercise its discretion to extend time or deem as duly filed. Granting the orders sought would be tantamount to overturning a valid and subsisting order of this Court through the back door, which this Court cannot do.
- 28. Further, without a valid Notice of Appeal, the jurisdiction of this Court to entertain the filing of a Memorandum and Record of Appeal cannot be invoked. See *Khaemba v Teachers Service Commission & 2 others* [2025] KECA 203 (KLR)
- 29. In the absence of a valid and subsisting Notice of Appeal, in view of the Notice underpinning this application having been struck out, this Court lacks jurisdiction to entertain the application.
- 30. In sum, the Notice of Motion dated 24<sup>th</sup> May 2024, be and is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

It is so ordered.

**DATED AND DELIVERED IN MOMBASA THIS 30<sup>TH</sup> DAY OF JANUARY, 2026**

I certify that this is a

True copy of the original Signed

**DEPUTY REGISTRAR**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

