

IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MURGOR, JA - IN CHAMBERS)

CIVIL APPLICATION NO. E029 OF

2025 BETWEEN

HASSAN MELE LUNE.....APPLICANT

AND

**ACHIENG JOHANA OKWERO.....1ST
RESPONDENT**

**WANDERA JOHANA 2ND
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
at Malindi (Mwangi Njoroge, J.)
delivered at Malindi on the 23rd day of April 2025***

in

E.L.C.No.116 of 2017)

RULING

By a Notice of Motion dated 5th August 2025, brought pursuant to **Rule 4** of the Court of Appeal Rules, **the Applicant, Hassan Mele Lune** seeks that this Court be pleased to extend the time for the Applicant to lodge the Memorandum of Appeal and Record of Appeal against the Judgment and Decree delivered on 23rd April 2025 in *ELC No. 116 of 2017-Hassan Mele Lune vs*

Achieng Johana Okwero

& *Wandera Johana* and that the costs of and incidental to this application be provided.

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 Applicant is aggrieved by the Judgment and Decree of the lower court, and that he intended to appeal against the decision, but delayed in filing the Memorandum of Appeal and Record of Appeal on time; that the Notice of Appeal was lodged on 9th May 2025 and the certified typed copies of the proceedings and Judgment were certified and supplied on 8th 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 5th 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.

For their part, the Respondent filed grounds of opposition where it was contended that the Applicant had not proffered any substantive reasons for the delay.

Both the Applicant and the Respondent filed written submissions, and when the application came up for hearing learned counsel **Mr. Shujaa** appeared for the Applicant, while learned counsel **Mr. Mouko** appeared for the Respondent. In their written submissions, counsel for the Applicant submitted that the present application for extension of time to lodge the Memorandum of Appeal and Record of Appeal is merited as the Applicant has demonstrated sufficient cause for the 26 days delay, and that the intended appeal was arguable with good chances of success. It was submitted that in the Judgment, the learned Judge was wrong to order the cancellation of the Applicant's title, despite such relief not having been sought, and in further directing that the suit land be registered in the name of a person who was not a party to the proceedings and was already deceased at the time the suit was filed. According to counsel, these were serious matters for determination by this Court. Counsel also submitted that no prejudice will be occasioned to the Respondents and that the Applicant has fully satisfied the criteria

for extension of time and urges the Court to exercise its discretion in his favour and allow the application as prayed.

On behalf of the Respondent, counsel submitted that the Applicant had not provided any sufficient reason for the inordinate and inexcusable delay. It was submitted that the Judgment was delivered on 23rd April 2025, and the Notice of appeal was lodged on 25th April 2025; that the request for certified copies was not made until 20th June 2025; that the Applicant was supplied with the proceedings on 8th July 2025. Counsel submitted that after considering the steps taken by the Applicant in filing the appeal, it becomes clear that the delay was on account of the Applicant's inaction. It was argued that, though the Applicant's counsel claimed to have misplaced the documents while moving offices, that the Applicant's counsel's physical address had not changed, so that nothing disclosed evidence of relocation. Counsel finally submitted that any further delay would be highly prejudicial to the Respondents who are awaiting to enjoy the fruits of their judgment.

In response, Mr. Shujaa informed the Court that their offices moved to another floor within the same building which meant that counsel's physical address did not change.

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.

Applying the foregoing principles to the instant application, the delay, though extending beyond the prescribed 60 days, has been plausibly and satisfactorily explained. The record shows that the Applicant acted promptly in

requesting for typed proceedings and the Judgment upon filing the Notice of Appeal on 9th May 2025. The proceedings were not certified until 8th July 2025. The subsequent misplacement of counsel's office file during office relocation, though regrettable, appears to have been inadvertent. After the file was recovered on 5th August 2025, the present application was filed promptly thereafter.

In the circumstances, and as stated in the case of **Andrew Kiplagat** **Chemaringo vs Paul Kipkorir Kibet [2018] eKLR**, what matters is not the length of the delay but whether the delay has been satisfactorily explained. It is apparent from the pleadings that, counsel took ownership for the delay inadvertently caused by the case file having been misplaced in his chamber. In these circumstances, I am prepared to find that the delay has been adequately explained.

In addressing the next issue, the Applicant has identified grounds of appeal, which he stated were arguable with a chance of success. In particular, it was indicated that the learned Judge ordered the cancellation of a title in the absence of a specific prayer, and went on to direct the Land Registrar to register the

suit land in the name of a deceased non-party. These are not idle or frivolous issues; they raise serious questions warranting consideration by this Court.

Third, the Respondent, who did not oppose the application, is in no demonstrable way prejudiced were time extended, particularly as, according to the Applicant, they are in possession of the suit property, and the mere fact of having to defend an appeal does not amount to prejudice.

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) *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 30th day of January, 2026

A. K. MURGOR

DEPUTY REGISTRAR

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

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