



**Mwahereria & another v Mohamed Junior (Civil Application  
E083 of 2025) [2026] KECA 57 (KLR) (30 January 2026) (Ruling)**

Neutral citation: [2026] KECA 57 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E083 OF 2025  
GW NGENYE-MACHARIA, JA  
JANUARY 30, 2026**

**BETWEEN**

**NASSORO RASHID MWAHERERIA ..... 1<sup>ST</sup> APPLICANT**

**MOHAMED RASHID MOHAMED SENIOR ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MOHAMED RASHID MOHAMED JUNIOR ..... RESPONDENT**

*(An application under Rules 4, 5 (2) (b), 49, 50, 57 of the Court of Appeal Rules 2022  
being an intended appeal from the Ruling of the High Court of Kenya at Mombasa  
(Mutai, J.) delivered on 9th May 2025 in High Court Succession Cause No. 150 of 2008)*

**RULING**

1. By a Notice of Motion dated 9<sup>th</sup> September 2025, Nassoro Rashid Mwahereria and Mohamed Rashid Mohamed (the applicants) seek that: leave be granted to file and serve a Notice of Appeal out of time against the ruling and order of the High Court of Kenya at Mombasa (Mutai, J.) delivered on 9<sup>th</sup> May in HCSC No. 150 of 1998; the draft Notice of Appeal annexed hereto be deemed as duly filed and served upon payment of the requisite court fees; costs of this application be provided for; and that pending the hearing and determination of the application and/or intended appeal, the Court grants a temporary injunction and/or order of stay suspending the effect of the ruling and orders made by the High Court on 9<sup>th</sup>

May 2025, including the revocation of the grant issued on 25<sup>th</sup> March 1999 and preserving the status quo of administration of the estate of Rashid Mohammed (deceased).

2. The application is premised on the grounds on its face and the supporting affidavit of the 1<sup>st</sup> applicant sworn on 9<sup>th</sup> September 2025. It is deposed that, on 25<sup>th</sup> March 1999, the applicants were issued with grant of letters of administration to the estate of Rashid Mohamed (the deceased); that



Mohamed Rashid Mohamed Junior (the respondent) filed an application dated 18<sup>th</sup> September 2020 for summons of revocation of the grant on the grounds that the proceedings relied upon to obtain the grant were defective in substance; and that the grant was obtained fraudulently by making of false statement and by concealment of material facts. Vide a ruling dated 9<sup>th</sup> May 2025, the learned Judge (Mutai, J.) allowed the respondent's application, and accordingly revoked the grant of representation issued to them.

3. According to the 1<sup>st</sup> applicant, they were initially represented by the firm of A. O. Hamza & Co. Advocates, but that they became aware of the ruling on or about 30<sup>th</sup> May 2025 after the lapse of the 14 days' period required for filing a Notice of Appeal under Rule 77(2) of the Court of Appeal Rules, 2022. The applicants then instructed learned counsel Mr. Hamza to appeal against the decision; that the counsel discouraged them against appealing, and instead asked them to pursue an out of court settlement; that they objected to the participation of one Mr. Ambwere in the negotiations, which party they contended was conflicted in the matter; that the High Court upheld their objection to Mr. Ambwere's participation in the matter; that this culminated in a breakdown of advocate/client relation; that, as a result, in early July 2025, they engaged the firm of Borona & Associates who filed the Notice of Appeal; that the delay in filing the Notice of Appeal was not inordinate; and that it was occasioned by the misadvised and inaction of their former counsel.
4. Opposing the application, the respondent filed a replying affidavit sworn on 3<sup>rd</sup> October 2025. He deposed that the applicants had formed a habit of blaming advocates and filing multiple applications; that the fundamental issue is not the distribution of the deceased's estate, but that it concerns Plot No. 160/11/MN (the suit property), which the applicants allegedly sold for a profit which they refused to account for, or share with him; and that if the issue surrounding the suit property is resolved, there would be no appeal to pursue since all other issues have been resolved through mediation and the aforesaid ruling of the superior court.
5. The respondent stated that the contention that one Mr. Ambwere was conflicted was a ruse intended to divert the real issue in contention; that the trial court had heard the matter and determined it by a ruling without the participation of Mr. Ambwere; and that the allegations as to conflict of interest is without basis and amounts to an abuse of the court process. I was accordingly urged to dismiss the application with costs.
6. In a supplementary affidavit sworn by the 2<sup>nd</sup> applicant on 30<sup>th</sup> October 2025, he states that the issues surrounding the suit property were not related to their quest for leave to file appeal out of time.
7. When the Motion came up for hearing on 18<sup>th</sup> November 2025, learned counsel Mr. Borona appeared for the applicants. The firm of Adede & Company Advocates for the respondent did not make an appearance despite service of a hearing notice, neither did they file written submissions. Suffice to state, Mr. Borono relied on the applicants' written submissions dated 11<sup>th</sup> November 2025. Basically, the submissions were a regurgitation of the averments deposed to in the applicants' supporting and supplementary affidavits, for which reason I shall not restate them unless where need be.
8. Counsel relied on this Court's decisions of Philip Chemwolo & Another vs. Augustine Kubende (1986) KECA 87 (KLR) and Jubilee Insurance Co. Limited vs. Grace Anyona Mbinda (2016) eKLR in submitting that the applicants acted promptly upon receiving competent advice from their counsel, and that the error and/or inaction from their previous counsel should not be visited upon them; this Court's decision of Thuita Mwangi vs. Kenya Airways Ltd [2003] eKLR and Supreme Court decision of Nicholas Kiptoo arap Korir Salat vs. IEBC & 7 others (2014) eKLR for the factors to be considered in an application for extension of time; and this Court's decision of ARM Limited vs. NWS (2023)



eKLR (Civil Application E053 of 2023) where the Court underpinned the need to take remedial action for the sake of dispensing substantive justice and have the matter in dispute heard on merit.

9. The applicants argued that they have an arguable appeal in that the learned Judge: revoked a grant which was issued over 20 years earlier; and failed to appreciate that the deceased's estate had been lawfully distributed, and the respondent having participated in the distribution could not relitigate ownership of the suit property contrary to the finality of prior proceedings.
10. Finally, the applicants rightfully abandoned the prayer seeking injunctive reliefs as the same is within the province of a full bench of the Court.
11. I have considered the applicants' Motion, the affidavits in support of, and in opposition to, the Motion, the applicants' written and oral submissions and the law. The sole issue that falls for determination is whether the applicants have satisfied the Court that they are entitled to extension and/or enlargement of time for filing a Notice of Appeal.
12. Rule 4 of the Court of Appeal Rules, 2022, confers upon this Court the jurisdiction to extend time as follows:

“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.”

13. Inasmuch as this Court's discretion is wide and unfettered in granting extension of time, the discretion must be exercised judiciously, but not whimsically to the detriment of the other parties. The guiding principles to consider in an application for extension of time are well settled. The Court should first consider the length of the delay; the applicant should at the very least explain the reasons for the delay; the need to balance the interests of a party who has a decision in his or her favour; and lastly, the degree of prejudice which the respondent would suffer if the application was to be granted. These principles were restated in the case of *Muringa Company Limited vs. Archdiocese of Nairobi Registered Trustees* (2020) KECA 761 (KLR) as follows:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity.”

14. Although as observed in *Muringa Company Limited vs. Archdiocese of Nairobi Registered Trustees* (*supra*) that one of the factors to be considered is whether, *prima facie*, the appeal or intended appeal has chances of success, it must be borne in mind that it is not within the bounds of the jurisdiction of a single Judge to delve into the merits or demerits of the intended appeal as this is a preserve of a full



bench. In *Athuman Nusura Juma vs. Afwa Mohamed Ramadhan* (2016) KECA 395 (KLR), M’inoti, JA. rendered himself thus:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.

15. The applicants were clearly aggrieved by the decision of the learned Judge (Mutai, J.) in his ruling dated 9<sup>th</sup> May 2025 to revoke the grant of representation issued to them. Throughout their averments, the applicants argued that the reasons for the delay in filing the Notice of Appeal was by dint of the legal advice given to them by their former counsel to pursue an out of court settlement which did not materialize.
16. Given the chronology of events, and taking into account that the respondent does not deny that there were attempts to pursue an out of court settlement, I would lay no fault on the part of the applicants in not filing the Notice of Appeal on time. In any event, litigants can only but take the advice of their counsel and in this instance, the applicants disagreed with their former counsel and sought alternative advice. In the broad equity approach, there is no prejudice which will be suffered by the respondent which cannot be compensated in the long run by way of costs.
17. Consequently, I am inclined to find in favour of the applicants. I find merit in the applicants’ application dated 9<sup>th</sup> September 2025 on the following terms:
  - a. The applicants be and are hereby allowed to file a Notice of Appeal within 7 days from the date of this ruling.
  - b. On failure to comply with (a) above, the order will automatically lapse.
  - c. Costs of the application shall abide the outcome of the appeal.

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

**G. W. NGENYE-MACHARIA**

.....

**JUDGE OF APPEAL**

