

**IN THE COURT OF
APPEAL AT MOMBASA**

(CORAM: NGENYE, JA.)

CIVIL APPEAL (APPLICATION) NO. E142 OF

2025 BETWEEN

JONATHAN DANIEL MTURI.....1ST APPLICANT

PATIENCE SIKUKUU MTURI 2ND

APPLICANT AND

DIAMOND TRUST BANK KENYA LIMITED...1ST RESPONDENT

STEPHEN KARANJA KANGETHE T/A

DALALI TRADERS AUCTIONEERS 2ND RESPONDENT

*(Being an application under Articles 40, 159 and 164 (3) of
the Constitution of Kenya, Sections 3A and 3B of the
Appellate Jurisdiction Act, Cap 9, Laws of Kenya and Rule 4 of
the Court of Appeal Rules, 2022 and all other enabling
provisions of the Law)*

RULING

1. ***Jonathan Daniel Mturi* and *Patience Sikukuu Mturi (the applicants)***, filed a Notice of Motion dated 30th July 2025 seeking:
 - i. Spent;***
 - ii. That time be enlarged for the filing of Notice of Appeal dated 1st July 2025 duly filed on 1st July 2025 and executed by the Deputy Registrar on 18th July 2025;***
 - iii. That time be enlarged for lodging the Record of Appeal dated 30th July 2025; and***
 - iv. That costs of this application be provided for.***

2. A brief background to the dispute as deposed by the 1st applicant in the affidavit supporting that application is that they (the applicants) were the registered owners of

property

known as **CR 18746 Subdivision No. 4112, Section I, Mainland North Mombasa (the suit property)**, measuring approximately 0.4133 Ha. **Diamond Trust Bank Limited (the 1st respondent)**, advanced a loan facility of Kshs.70,000,000 to Quantum Petroleum Limited which the applicants were the guarantors and the suit property was the first legal charge to secure the term loan facility. An impasse over the payment of the loan facility precipitated the institution of **High Court Civil Case No. 97 of 2015** which was dismissed for want of prosecution.

3. Following the dismissal of the suit, the 1st respondent through **Stephen Karanja Kangethe T/A Dalali Traders Auctioneers (the 2nd respondent)** placed an advertisement in the Daily Nation on 4th December 2023 for the sale of the suit property through an auction. The impending sale was challenged by the applicants in **Malindi ELC Case No. E54 of 2023**, but the court downed its tools for want of jurisdiction. The suit property was eventually sold to the highest bidder through an auction conducted on 23rd January 2025, and an amount of Kshs.72,000,000 was realized.
4. Unrelenting, the applicants filed **Mombasa HCCOM No. E003 of 2025** challenging the sanctity of the public auction process. The applicants contended that the valuation of the suit property indicated that the fair market value was Kshs.130,000,000 while the forced market value was Kshs.97,500,000; and that, therefore, the suit property was sold at more than Kshs.20,000,000 less than the forced

market value in breach of **Section 97(2)** of the **Land Act, Cap 280**.

5. In a ruling dated 13th March 2025, the learned Judge (**F. Wangari, J.**) dismissed the applicants' application with a rider that a fresh valuation be carried out within 21 days by either a valuer agreed by both parties and/or in default, a Government valuer do prepare a report.
6. The applicants then filed **Civil Application No. E030 of 2025** under **Rule 5(2) (b)** of the **Court's Rules, 2022** seeking temporary stay and injunctive relief against the ruling of 13th March 2025. The respondents on the other hand, filed an application dated 30th April 2025 seeking to have the applicants' Notice of Appeal dated 24th March 2025 be struck out for failure to serve within 7 days after 24th March 2025. When the two applications came up for hearing before this Court on 1st July 2025, it was directed that the application seeking stay be withdrawn and the application seeking to strike out the Notice of Appeal proceed for hearing. The application was determined, and by a ruling dated 1st July 2025, it was allowed and the applicants were granted time to file an application seeking extension of time under **Rule 4** of this **Court's Rules, 2022**.
7. The 1st applicant contended that without delay, they filed a fresh Notice of Appeal dated 1st July 2025 which was endorsed by the Deputy Registrar on 18th July 2025, and that they served it upon the respondents on 22nd July 2025; that the intended appeal is arguable as articulated

in their

Memorandum of Appeal; that they risk losing their property to a process fraught with irregularities and/or illegalities contrary to **Article 40** of the **Constitution**; and that no prejudice would be suffered by the respondents if the prayers sought are granted.

8. Ms. Faith Ndonga, the 1st respondent's Legal Manager filed a replying affidavit dated 7th October 2025 opposing the application. She regurgitated the facts which led to the present proceedings and further deposed that, once the Notice of Appeal was struck out, the applicants filed the present application after a period of one (1) month sixteen (16) days and without leave of the Court; that the applicants failed to satisfactorily explain the delay in filing the application; that the application has been overtaken by events as the suit property was sold in an auction and the amounts realized were used to offset the outstanding debt in Account No. 0203384002; that the applicants have failed to demonstrate that they have an arguable appeal for the reasons that equity of redemption was extinguished at the fall of the hammer on 23rd January 2025; that the sale by public auction was undertaken after issuance of statutory notices required under **Sections 90** and **96** of the **Land Act, Cap 280**; that the issue of service of the statutory notices had been determined in HCCC No. 97 of 2025; that the respondents procured a valuation report dated 22nd January 2025; and that the valuation report procured by the applicants was so procured after the sale of the charged property. It was urged that the application is not meritorious and it ought

to be dismissed with costs.

9. At the virtual hearing of the application on 4th November 2025, learned counsel **Mrs. Ikegu** appeared for the applicants while learned counsel **Mr. Kisinga** appeared for the respondents. Both counsel relied on respective parties' written submissions which they orally highlighted, and which I have accordingly considered. Those of the applicants are dated 1st September 2025 while of the respondents are dated 7th October 2025.
10. It suffices to state that the applicants relied on the decisions of **Wasike vs. Swala (1985) KECA 66 (KLR)** and **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet (2018) KECA (2018) KECA 701 (KLR)** where this Court outlined the principles to be considered in an application for extension of time; the Supreme Court decision of **Salat vs. IEBC & 7 others (2014) KECS 12 (KLR)** also for the principles to be considered in an application of this nature; **MSA vs. KMKA [2024] KECA 1222 (KLR)** where the Court stated that the "*litmus test for inordinate delay is that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable*"; and **Sections 3A and 3B** of the **Appellate Jurisdiction Act** in emphasizing the considerable latitude in the exercise of the Court's discretion and interpretation of the law.
11. On behalf of the respondents, while regurgitating the background giving rise to the appeal and the instant application, the Supreme Court decision of **Nicholas Kiptoo Arap Salat vs. Independent Electoral and**

Boundaries

Commission (supra) was also cited for the principles for consideration in extending time. It was submitted that the applicants had not proffered good grounds upon which the application should be allowed, and I was accordingly urged to dismiss it with costs.

12. I have considered the Motion, the affidavits in support of, and in opposition to, the Motion, the 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 and Record of Appeal.

13. **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.”

14. In as much 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.”

15. 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. Afa 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”.

16. After the applicants were aggrieved by the ruling and orders of the superior court in Mombasa HCCOM Case No. E003 of 2025 delivered on 13th March 2025, they first filed a Notice of Appeal dated 24th March 2025, but it was struck vide a ruling dated 1st July 2025 upon the respondents’ application dated 30th April 2025 being allowed, the grounds advanced therein being that the Notice was not served within 7 days as provided under **Rule 79(1)** of this **Court’s Rules, 2022**.
17. The applicants’ impugned Notice of Appeal having been struck out, they had an opportunity to approach the Court afresh, and on even date, they filed the Notice of Appeal dated 1st July 2025 and a Record of Appeal on 18th July 2022. Pursuant thereto, they filed the instant application seeking extension of time to file and serve the Notice and Record of Appeal out of time.
18. I respectfully disagree with the respondent’s counsel submission that the present application was brought inordinately too late in the day. Time could only be computed from when the fresh Notice of Appeal and Record of Appeal were filed. In the case of **Andrew**

Kiplagat Chemaringo (supra), this Court held that there is no maximum or

minimum period of delay, but that the reason and/or reasons for the delay must be plausible and explained to the satisfaction of the Court as follows:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

19. In my considered view, the present application was wholly dependent on the outcome of the application dated 30th April 2025 filed by the respondent to strike out the earlier Notice of Appeal dated 24th March 2025. I am satisfied that the delay was not deliberate and the reasons for the delay were satisfactorily explained. In view therefore, justice tilts towards hearing the appeal on merit as opposed to focussing on technicalities.
20. As to the prejudice which the respondent would suffer, I do not suppose any exists since the 1st respondent already perfected the judgement by selling the disputed property to recover the loan. And, as to the propriety of the auction in which the property was sold, is a matter for determination by the full bench that will ultimately hear the main appeal. Depending on the outcome of the intended appeal, the successful party will be compensated by way of costs, which ordinarily follow the event, or through any other order that the Court may fit and just to grant.

21. For the foregoing reasons, I am inclined to grant the application. Accordingly, I grant the Notice of Motion in the terms that:

- a) The applicants be and are hereby granted leave to file and serve a Notice and Record of Appeal out time.***
- b) The Notice and Record of Appeal shall be filed within seven (7) days from the date of this Ruling.***
- c) Orders (a) and (b) above shall automatically stand vacated if the applicants do not comply as directed.***
- d) Costs shall abide the outcome of the appeal.***

Dated and delivered at Mombasa this 30th day of January, 2026.

G. W. NGENYE-MACHARIA

.....
**.... JUDGE OF
APPEAL**