

**IN THE COURT OF
APPEAL AT NAIROBI**

(CORAM: ONGAYA, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI E669 OF

2025 BETWEEN

ERDEMANN PROPERTY LIMITED.....APPLICANT

AND

SAFARICOM STAFF PENSION

SCHEME

REGISTERED TRUSTEES.....RESPONDENT

(Being an application for extension of time to file an Appeal against the ruling of the Environment and Land Court of Kenya at Machakos (C. Ochieng, J.) dated and delivered on 24th June, 2025

in

ELC Case No. 9 of 2019)

R U L I N G

1. The applicant filed the notice of motion dated 14th November 2025. The application was under **Article 50(1)** of the Constitution, Sections **3, 3A** and **3B** of the Appellate Jurisdiction Act Cap.9 and **Rule 4** of the Court of Appeal Rules. The applicant prayed for the following orders:

(1)....(Spent).

(2)That the Honourable Court be and is

*hereby pleased to issue an Order granting
the intended*

appellant an extension of time to file an appeal against the Ruling and Orders of Honourable Lady Justice Christine Ochieng dated and delivered on 24th June, 2025 in Machakos Environment and Land Court Civil Suit No. 9 of 2019 out of time.

(3) That the Honourable Court do make any such other or further Orders as it may deem just and expedient in the circumstances to give effect to the preceding Orders.

(4) That costs for this application be provided for.

2. The application is premised on grounds set out in the application and supported by the affidavit of Zeyun Yang, sworn on 14th November 2025. It is averred as follows:

a) On 15.10.2024, the Superior Court marked the applicant's (the plaintiff's) case as closed, thereby precluding the testimony of a key witness, namely

S.S Jabbal of Jabbal Limited, a chartered quantity surveyor whose evidence is central to the applicant's claim for special damages in the sum of Kshs. 324,886,296.00, the quantum of the applicant's property destroyed by the respondent.

b) The applicant subsequently filed in the superior court an application dated 19.03.2025 seeking to review and set aside the said orders, and leave to reopen the matter for the said witness to testify. The applicant states that the witness had been absent on the said 15.10.2024 because of bereavement - a fact the applicant states to have been communicated to the Court and defendant's counsel beforehand. Through its Ruling delivered on 24.06.2025, the superior

court dismissed the applicant's application, holding that counsel for the plaintiff had voluntarily closed its case. Further, the

application had been filed after inordinate delay and allowing the same would prejudice the defendant, the respondent in the instant application.

- c) Aggrieved by the decision of the superior court, the applicant filed Nairobi COACAPPL E462 of 2025 - Erdemann Property Limited vs. Safaricom Staff Pension Scheme Registered Trustees dated 24.07.2025 urging that the said trial Court's Ruling violated the applicant's rights to a fair and just determination of its claim on merits, contrary to the principles of natural justice and Articles 50(1) and 159 of the Constitution of Kenya.*
- d) The intended applicant's intended appeal has considerable chances of success.*
- e) There has been a change of circumstances in that, following the filing of the application in COACAPPL E462 of 2025, which the Court certified as urgent, the advocate (James Githui) handling the application and intended appeal resigned from employment with the law firm of CM Advocates LLP on 30.09.2025. This threw the progress of the intended appeal into disarray, leaving critical steps untaken.*
- f) The counsel currently handling this matter, namely Dennis K. Wambua, reported to work at CM Advocates LLP on 06.10.2025, and upon acquainting and familiarizing himself with the matter, has taken the necessary steps to fast-track the conduct of the intended appeal, and the reason for the delay has therefore ceased.*
- g) The administrative lapses and transitional challenges from the erstwhile counsel to counsel presently handling the matter have been*

sufficiently addressed to avert any unnecessary delays going forward, and the matter is on track. The said challenges are reasonable and excusable under the prevailing circumstances.

h) The applicant is ready and willing to comply with any directions issued by the Court to obtain the expeditious hearing and determination of the intended appeal.

i) The applicant stands to suffer substantial loss and bears the greater risk of injustice comparable to the respondent unless the instant application is allowed.

3. The respondent filed a replying affidavit sworn by Richard Gitahi on 13th February 2026. The application was opposed upon the following grounds:

a) The history of the matter, as clearly set out in the affidavit, has been long drawn out, and litigation, as a matter of public policy, must come to an end. The original suit at the superior court was filed in January 2019, which is over six years ago.

b) As a preliminary issue, the application seeking extension of time “to file an appeal” presupposes that there is a valid notice of appeal with respect to the impugned Ruling. However, in the present case, the applicant’s Notice of Appeal was struck out by this Court on 27.01.2026 upon application by the respondent in Nairobi COACAPPL No. E526 of 2025 (Safaricom Staff Pension Scheme Trustees Registered vs. Erdemann Property Limited). Therefore, there being no notice of appeal, this Court cannot act in vacuo and grant an extension of time to file the main appeal. The application is therefore incompetent and ought to be

struck out with costs in limine.

- c) *The respondent contends that the instant application is mainly aimed at further delaying the cause before the superior court, and otherwise an abuse of the court's process.*
- d) *In support of its case, the respondent cited the holding of the Supreme Court in **Civil Application No. 3 of 2016 - The County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR**, whose test for extension of time the applicant has failed to pass. The test include the applicant repeatedly failing to comply with orders before the Superior Court; lacking a lawful basis to the satisfaction of the court; the respondent suffering extreme prejudice if the extension is granted; the instant application having been filed on 14.11.2025 (143 days after the impugned Ruling); the letter requesting for certified proceedings having been filed on 07.11.2025 (four months after the impugned Ruling), and there being no public interest consideration for extending time.*
- e) *The alleged mistake by counsel has not been demonstrated through an affidavit by the counsel. No evidence has been exhibited to show that counsel resigned on 30.09.2025 as alleged. Further, even if counsel resigned on the alleged date, the notice of appeal had been filed on 04.07.2025 and the applicant had not filed the letter requesting for proceedings within the 30 days prescribed in law so that the record of appeal had to be filed within 60 days from 04.07.2025 per Rule 84(1) of the Court of Appeal Rules. The respondent therefore urges that the applicant has failed to explain the delay because the alleged resignation of counsel has not been shown to have a bearing on the delay as was purported for the applicant.*

- f) The respondent further states that the instant application was filed after unexplained delay of 143 days, the ruling subject of the intended appeal having been delivered on 24.06.2025 and the application filed on 14.11.2025. Further the letter requesting for the proceedings was belatedly filed on 07.11.2023 being over four months after the ruling was delivered by the superior court.*
- g) The applicant has as well demonstrated no public interest to justify the extension of time.*
- h) The applicant ought to have taken all necessary steps to file the appeal and comply with all necessary provisions of the Court of Appeal Rules in relation to the appeal. However, the focus was to delay the primary suit, hence their filing of the stay of proceedings application in Nairobi COACAPPL No. E462 of 2025 before filing the application for extension of time. Nairobi COACAPPL No. E462 of 2025 application was ultimately withdrawn when it came up for hearing on 17.11.2025.*

4. The application was listed as a chamber matter before me and considered in absence of the parties on 26.02.2026. By the hearing notice dated 12.02.2020 the parties were notified about the directions as to service and filing of submissions before the 26.02.2026. The applicant filed no submissions. The respondent filed the submissions dated 23.02.2026.

5. I have considered the parties' respective positions and the material on record. It is not disputed that the applicant's notice of appeal filed on 04.07.2025 was struck out by the

Order of

the Court given on 27.01.2026 in Civil Application No. E526 of 2025. In that regards, the proposed belated appeal subject of the extension of time to file appeal as per the instant application stands upon no foundation.

6. The respondent has as well established that the alleged resignation of counsel is remote in time and therefore not a valid reason to explain the delay in issue. The application has as well been filed belatedly with unexplained undue delay of 143 days as urged for the respondent. The delay is found not reasonably explained by the applicant. The application is not merited because the applicant has shown no plausible and satisfactory explanation for the delay. It is liable to dismissal with costs for the respondent. In conclusion, the application dated 14.11. 2025 is hereby dismissed with costs for the respondent.

Dated and delivered at Nairobi this 6th day of March, 2026.

B. ONGAYA

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed

DEPUTY REGISTRAR