

**IN THE COURT OF**  
**APPEAL AT**  
**NAIROBI**

**CORAM: JAMILA MOHAMMED, J.A. (IN**  
**CHAMBERS)) CIVIL APPLICATION NO. E319 OF**  
**2023**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION.....APPLICANT**  
**AND**

**ZABLON MABEA AGWATA.....1<sup>ST</sup>**  
**RESPONDENT**  
**WILSON GACANJA.....2<sup>ND</sup>**  
**RESPONDENT**  
**IKM PLACE LIMITED.....3<sup>RD</sup>**  
**RESPONDENT**  
**ARROW CENTRE LIMITED.....4<sup>TH</sup>**  
**RESPONDENT INVESTMENT AND MORTGAGE BANK**  
**LIMITED.....5<sup>TH</sup> RESPONDENT MINISTRY OF LANDS, HOUSING**  
**AND**  
**URBAN DEVELOPMENT.....6<sup>TH</sup>**  
**RESPONDENT CHIEF LAND**  
**REGISTRAR.....7<sup>TH</sup> RESPONDENT**  
**NATIONAL LAND COMMISSION.....8<sup>TH</sup>**  
**RESPONDENT**  
**THE ATTORNEY GENERAL.....9<sup>TH</sup>**  
**RESPONDENT**

(Application for extension of time to serve the Notice of Appeal and Letter Bespeaking proceedings upon the firm of Messrs. Oraro & Company Advocates and to file the Memorandum of Appeal and Record of Appeal out of time against the judgment and decree of the Environment and Land Court at Nairobi (Oguttu Mboya, J.) dated 7<sup>th</sup> November 2024

in

**ELC No. 56 of 2019)**

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**RULING**

**Background**

- 1)** The application dated 12<sup>th</sup> May 2025 is brought pursuant to Rule 4 of the Court of Appeal Rules, 2022, in which **Ethics & Anti-Corruption**

**Commission** (the applicant) seeks orders in the main that: this Court extend time within which to serve the Notice of Appeal and the letter bespeaking proceedings; extend time to file and serve the Record of Appeal; and that costs be provided for. The application is supported by the affidavit sworn on the same date by learned counsel for the applicant, Ms. Faith Ng'ethe.

**Zablon Mabea Agwata., Wilson Gacanja., IKM Place Limited, Arrow Centre Limited, Investment and Mortgage Bank Limited, Ministry of Lands, Housing and Urban Development, Chief Land Registrar, National Land Commission and The Honourable Attorney General** are the 1<sup>st</sup> to 9<sup>th</sup> respondents respectively.

- 2) The background to the application is that the applicant had instituted proceedings against the respondents in Nairobi ELC Cause No. 56 of 2019, in which judgment was delivered on 7<sup>th</sup> November 2024 in favour of the respondents.
- 3) Being dissatisfied with that judgment, the applicant instructed counsel to lodge an appeal. Consequently, a Notice of Appeal dated 8<sup>th</sup> November 2024 and a letter bespeaking proceedings of even date were lodged. It is however conceded that the said Notice of Appeal and the letter bespeaking proceedings were not served upon the firm of **Messrs. Oraro & Company Advocates** for the 3<sup>rd</sup> respondent herein. According to counsel for the

applicant, **Ms. Faith Ng'ethe**, the omission was inadvertent, the 3<sup>rd</sup> respondent's advocates having been left out of the mailing list when service was effected electronically.

4) Counsel further explains that the Record of Appeal was not filed within the stipulated period owing to pressure of work, explaining that she was engaged in various commissions and was away from her chambers between 17<sup>th</sup> March 2025 and 2<sup>nd</sup> May 2025. Counsel deponed that the Record of Appeal has already been compiled and is ready for filing once the orders sought are granted. Counsel adds that certified copies of the proceedings were obtained on 24<sup>th</sup> February 2025, and that a certificate of delay was issued on 24<sup>th</sup> February 2025. The applicant contends that the intended appeal raises arguable issues and enjoys good prospects of success.

5) The application is opposed. In a replying affidavit dated 24<sup>th</sup> November 2025 sworn by **James Mburu Kamau**, a director of the 3<sup>rd</sup> respondent, and in grounds of opposition dated 12<sup>th</sup> November 2025, the 3<sup>rd</sup> respondent contends that the applicant has failed to disclose material facts, in particular the existence of pending proceedings before this Court in COACAPPL/E631/2024 in which the applicant filed a Memorandum of Appeal dated 25<sup>th</sup> November 2024 said to be identical to the draft memorandum annexed to the present application. It was further deposed

that this therefore contradicts the applicant's claim that it was unable to prepare the same within time.

6) It is further contended that the applicant has failed to explain the delay between 24<sup>th</sup> February 2025, when the certificate of delay was issued, and 25<sup>th</sup> April 2025 when the appeal ought to have been filed. The 3<sup>rd</sup> respondent also disputes the explanation regarding service, arguing that no proof has been provided that service was effected electronically upon all respondents. The 3<sup>rd</sup> respondent further deponed that the allegation that the 3<sup>rd</sup> respondent was inadvertently omitted from the mailing list is unsubstantiated.

### **Determination**

7) The issue for determination is whether the applicant has laid a proper basis for the exercise of this Court's discretion under Rule 4 of the Court of Appeal Rules, 2022.

8) Rule 4 confers upon the Court wide and unfettered discretion to extend time limited by the Rules. However, that discretion must be exercised judicially and on well-established principles.

9) The guiding principles were set out in **Leo Sila Mutiso v Hellen Wangari**

**Mwangi [1999] 2 EA 231**, where the Court held that in determining

whether to extend time the Court considers the length of delay, the reason

for the delay, the chances of the intended appeal succeeding, and the degree of prejudice to the respondent.

**10)** The Court in **Fakir Mohamed v Joseph Mugambi & 2 Others, [2005]**

**eKLR** emphasized that although the discretion under Rule 4 is unfettered, the applicant must place before the Court material upon which the Court can properly exercise that discretion.

**11)** The Supreme Court reiterated these principles in **Nicholas Kiptoo Arap**

**Korir Salat v Independent Electoral and Boundaries Commission &**

**7 Others [2014]** **eKLR**, emphasizing that extension of time is not a right

but an equitable remedy available only to a deserving party who has laid a satisfactory basis for the Court's discretion.

12) These principles have been reaffirmed in more recent decisions of this

Court. In **Waga v Bidco Oil Refineries Limited [2023]** **eKLR**, the

Court

reiterated that the principles in **Leo Sila Mutiso** continue to guide the exercise of discretion under Rule 4.

13) In **Kazungu v Rapam Limited [2023]** **eKLR** this Court reaffirmed that

applications under Rule 4 require a satisfactory explanation for delay and sufficient material upon which the Court may exercise its

discretion.

14) Similarly, in ***Bartilol & 3 others v Bartilol & Another [2024] eKLR***  
the

Court emphasized that the jurisdiction under Rule 4 is discretionary and

must be invoked upon full disclosure of all relevant facts explaining the delay.

**15) In Oloo & 19 others v Development Bank of Kenya Ltd [2024]  
eKLR**

the Court reiterated that although Rule 4 grants unfettered discretion, the exercise of that discretion must be guided by the principles articulated in **Leo Sila Mutiso**.

16) Under Rule 79(1) of the Court of Appeal Rules, 2022, a Notice of Appeal must be served within seven (7) days of its lodgment.

17) In the present case, there is no proof that service of the notice of appeal was effected on counsel for the 3<sup>rd</sup> respondent. The explanation offered by the applicant is that the 3<sup>rd</sup> respondent's advocates were inadvertently omitted from the mailing list during electronic service and that counsel was engaged in various commissions and under pressure of work.

18) Those explanations do not satisfactorily account for the delay. Courts have repeatedly held that pressure of work or inadvertence of counsel, without more, does not constitute sufficient reason for the exercise of the Court's discretion.

**19) In Habo Agencies Limited v Wilfred Odhiambo Musingo [2015]  
eKLR**

the Court of Appeal held that a litigant cannot simply blame counsel without demonstrating diligence.

20) Equally troubling is the absence of any explanation for the period following the issuance of the certificate of delay on 24<sup>th</sup> February 2025.

**21) In County Executive of Kisumu v County Government of Kisumu & 8**

**Others [2017] eKLR** the Supreme Court emphasized that every period of

delay must be explained.

22) The 3<sup>rd</sup> respondent has also raised the issue of pending proceedings in COAAPPL/E631/2024 which were not disclosed in the supporting affidavit. A party seeking discretionary relief must make full and frank disclosure of material facts.

**23) In Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Others [1998]**

**eKLR** the Court held that failure to disclose material facts may disentitle a party to discretionary relief.

**24)** It is true that a single Judge exercising jurisdiction under Rule 4 does not determine the merits of the intended appeal. As stated in

**Athuman**

**Nusura Juma v Afwa Mohamed Ramadhan, [2016] eKLR** the Court must refrain from determining the merits of the intended appeal with finality.

25) Even so, the existence of arguable grounds cannot cure an unexplained delay.

26) In the present matter, the delay in serving counsel for the 3rd respondent has not been satisfactorily explained. The reasons advanced amount to little more than oversight and pressure of work.

27) In the circumstances, I am not satisfied that the applicant has laid a proper basis upon which the Court may exercise its discretion under Rule 4 of the Court of Appeal Rules, 2022.

28) Consequently, the application dated 12<sup>th</sup> May 2025 is hereby dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of March, 2026.**

**JAMILA MOHAMMED**

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

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

*Signed*

**DEPUTY REGISTRAR**