

**IN THE COURT OF
APPEAL AT
NAIROBI**

**CORAM: JAMILA MOHAMMED, J.A. (IN
CHAMBERS)) CIVIL APPLICATION NO. E228 OF
2025**

BETWEEN

MARY NYAMBURA MACHARIA.....APPLICANT

AND

COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT

(Being an application for extension of time to file the Record of Appeal out of time in the intended Appeal from the Rulings and Orders of the Environment and Land Court of Kenya at Nairobi (Omogeni, J. and T. Murigi J.) on 30th October, 2024 and 20th February, 2025

in

ELC Misc. Civil Application No. E073 of 2024)

RULING

Background

- 1) Before me is a Notice of Motion dated 8th April 2025 brought pursuant to **Rule 4** of the **Court of Appeal Rules, 2022**. **Mary Nyambura Macharia** (the applicant) seeks an order extending time within which to lodge and serve the Record of Appeal arising from the decision of the Environment and Land Court (ELC).

The County Government of Nairobi is the respondent herein.

- 2) The application is supported by the affidavit sworn by learned counsel for the applicant, **Mr. Kennedy Otieno Arum**. The respondent opposes the application through a replying affidavit sworn on 10th December 2025 by **Karisa Iha**, learned counsel for the respondent.
- 3) The background giving rise to the present application is largely uncontested. The applicant had moved the ELC by way of judicial review proceedings seeking various reliefs against the respondent.
- 4) The application dated 11th April 2024 was heard by **Omogeni, J.**, who in a ruling delivered on 30th October 2024 dismissed the application. Aggrieved by that decision, the applicant lodged a Notice of Appeal within the prescribed time signalling her intention to challenge the ruling before this Court.
- 5) Subsequently, the applicant filed an application dated 3rd December 2024 seeking review of the ruling of **Omogeni, J.** That application was heard and determined by **Murigi, J.**, who dismissed it in a ruling delivered on 20th February 2025.
- 6) According to counsel for the applicant, the delay in lodging the Record of Appeal was occasioned by the difficulty in obtaining certified copies of the proceedings. Counsel avers that the proceedings were eventually supplied on 26th March 2025.

7) The respondent contests that explanation. It is contended that the applicant applied for proceedings long after the period for lodging the Record of Appeal had expired and that no certificate of delay was obtained. The respondent further argues that by electing to pursue a review application, the applicant effectively abandoned the appellate process.

Determination

8) The issue falling for determination is whether the applicant has satisfied the principles governing the exercise of this Court's discretion under Rule 4 of the Court of Appeal Rules.

9) Rule 4 donates to this Court a wide and unfettered discretion to extend time limited by the Rules. However, it is trite that such discretion must be exercised judicially and on the basis of sound reason rather than caprice or sympathy.

10) In the often cited case of **Leo Sila Mutiso v Hellen Wangari Mwangi**

[1999] 2 EA 231, this Court held that the factors to be considered in an application for extension of time include the length of the delay, the reason for the delay, possibly the chances of the intended appeal succeeding, and the degree of prejudice to the respondent if the application is granted.

11) The Court subsequently reiterated in **Thuita Mwangi v Kenya**

Airways

Ltd [2003] eKLR that the exercise of the Court's discretion under Rule
4

must be guided by the circumstances of each particular case and the explanation offered for the delay.

12) In **Fakir Mohamed v Joseph Mugambi & 2 Others [2005] eKLR**, the

Court emphasized that the list of factors to be considered is not exhaustive and that the Court is entitled to consider any relevant factor so long as the discretion is exercised judicially.

13) More recently, in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet**

[2018] eKLR, the Court observed that the law does not prescribe the length of delay that would amount to inordinate delay; what is critical is whether the delay has been satisfactorily explained.

14) The Supreme Court in **Nicholas Kiptoo Arap Korir Salat v IEBC & Z**

Others [2014] eKLR summarized the governing principles and underscored

that extension of time is not a right but an equitable remedy available only to a deserving party.

15) Applying the foregoing principles to the present application, two issues arise for consideration: whether the delay has been satisfactorily explained and whether the applicant has approached the Court with sufficient candour to warrant the exercise of discretion in her favour.

16) The applicant attributes the delay to the difficulty in obtaining typed

proceedings. While delay in the preparation of proceedings may in

appropriate cases constitute a reasonable explanation, the circumstances of this case present a different picture.

17) After lodging the Notice of Appeal, the applicant elected to pursue an application for review before the trial court. The remedies of review and appeal are, in most circumstances, mutually exclusive. A party who opts for review does so knowing that such a course may have implications for the appellate process.

18) The sequence of events in this matter suggests that the applicant consciously chose to pursue the review jurisdiction of the trial court and only reverted to the appellate process after the review application was dismissed.

19) In my view, that course of conduct undermines the explanation advanced for the delay. The applicant cannot properly attribute the delay solely to the unavailability of proceedings when the record demonstrates that she had elected to pursue a different procedural path.

20) As regards the length of the delay, the Record of Appeal ought to have been filed on or before 12th February 2025. The present application was filed on 8th April 2025.

21) While that period may not be described as excessively long, the explanation offered must nonetheless be satisfactory. As this Court

stated

in ***Mwangi v Kenya Airways Ltd [2003] eKLR***, even a short delay must

be satisfactorily explained.

22) On the question of the arguability of the intended appeal, it is well settled that a single Judge should refrain from making definitive pronouncements on the merits of the intended appeal.

23) In ***Athuman Nusura Juma v Afa Mohamed Ramadhan [2016] eKLR***,

the Court cautioned that the merits of an intended appeal are not a matter to be conclusively determined in an application of this nature.

24) Suffice it to say that the Court must guard against determining substantive issues at this interlocutory stage.

25) Ultimately, the Court must weigh all the relevant considerations in order to determine whether the applicant has established a proper basis for the exercise of discretion.

26) In the present case, the applicant's decision to pursue review proceedings after lodging a Notice of Appeal casts doubt on the explanation given for the delay and creates the impression that the applicant sought to pursue two parallel remedies sequentially.

27) Equity aids the vigilant.

28) In the circumstances, I am not persuaded that the applicant has placed before the Court a satisfactory basis upon which the discretion under

Rule 4 should be exercised in her favour.

29) The Notice of Motion dated 8th April 2025 is therefore devoid of merit and is hereby dismissed with costs to the respondent.

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

JAMILA MOHAMMED

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

