



**Mbai v Maua & another (Civil Application E504 of 2025)  
[2026] KECA 394 (KLR) (27 February 2026) (Ruling)**

Neutral citation: [2026] KECA 394 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E504 OF 2025  
K M'INOTI, JA  
FEBRUARY 27, 2026**

**BETWEEN**

**SALOME MUENI MBAI ..... APPLICANT**

**AND**

**JAMES ONDIEKI MAUA ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

*(Application for extension of time to appeal from the judgment and decree of the Environment  
& Land Court at Nairobi (Washe, J.) dated 21st November 2024 in ELCC No. E154 of 2017)*

**RULING**

1. On 13<sup>th</sup> October 2019, the applicant, Salome Mueni Mbai filed a suit in the Environment and Land Court at Nairobi (ELC) against the 1<sup>st</sup> respondent, James Ondieki Maua and the 2<sup>nd</sup> Respondent, the Nairobi City County, for a raft of reliefs, among them a declaration that she was the lawful owner of Plot No. B-78 Umoja Innercore section II (the suit property); a declaration that the registration of the 1st respondent as the owner thereof was null and void; an order for cancellation of his registration; an order for registration of the suit property in her name; and an order for eviction of the 1<sup>st</sup> respondent from the suit property.
2. By a judgment dated 21<sup>st</sup> November 2024, the ELC (Washe, J.) dismissed the suit with costs to the 1<sup>st</sup> respondent. On 22<sup>nd</sup> November 2024, the applicant lodged a notice of appeal evincing intention to appeal against the said judgment.
3. I cannot find on record any letter bespeaking proceedings as required by rule 84 of the Court of Appeal Rules. In that event, the applicant was required to file her appeal within sixty (60) days from the date of lodging the notice of appeal. No appeal was filed within that period or at all.



4. On 15<sup>th</sup> August 2025, about nine months from the date of lodging the notice of appeal, the applicant filed the application now before the Court, seeking extension of time to file the appeal.
5. The reason given for the delay in filing the appeal is that counsel for the applicant sustained injuries on 8<sup>th</sup> August 2024 at the height of what are commonly known as ‘the Gen Z demonstrations’, which led to temporary incapacity forcing him, on the advice of doctors, to be out of office for a cumulative period of six months. Counsel explained that at the material time, he was driving when he was caught up in a crowd of unruly demonstrators, and as he attempted to flee from the chaos, he hit a speed bump at high speed, hit his head on the roof of the car, and sustained injuries from which he suffered temporary incapacity.
6. There is on record two reports from Kenyatta University Teaching, Referral and Research Hospital dated 25<sup>th</sup> November 2024 and 25<sup>th</sup> February 2025. The reports show that in addition to the injuries sustained in the motor vehicle, counsel had a fall in the bathroom in early 2025 and suffered vertebrae fracture, for which he was admitted in hospital for a week. In all, he suffered a lower back injury for which he intended to undergo surgery in India. He was managed with a lumber corset, immobilisation, analgesia and bed rest. In each of the two medical reports counsel was advised to take three months bed rest.
7. In addition, counsel averred that the intended appeal is not frivolous and that it raises bona fide issues set out in the attached draft memorandum of appeal, in which it is contended, among others, that the ELC erred by: misapprehending the evidence; failing to appreciate that the 1st respondent did not establish a valid root of his title; and ignoring that the 1st respondent did not tender evidence of payments for the suit property.
8. The above points were reiterated in the applicant’s submissions dated 16<sup>th</sup> September 2025 in which the applicant added that the notice of appeal was filed promptly within the prescribed time and that the respondents stand to suffer no prejudice if the application is granted. In support of the application, the applicant relied on *Nicholas Kiptoo arap Korir Salat v. IEBC & 7 Others* [2014] eKLR and *Kenya Hotel Properties Ltd v. Attorney General & 5 Others* [2021] eKLR on the factors that guide the Court in an application for extension of time.
9. The 1<sup>st</sup> respondent opposed the application vide submission dated 15<sup>th</sup> January 2026. He contended that the applicant had not tendered any evidence to show that the notice of appeal was filed and served within the prescribed time and, in any case, the application for extension of time was made after inordinate delay of about nine months.
10. As regards the reason for delay attributed to the health of the applicant’s counsel, it was contended that there was no medical report between the alleged date of the accident on 8<sup>th</sup> August 2024 and the date of the judgment on 21<sup>st</sup> November 2024 and that the two medical reports were contradictory and did not show exactly when the applicant’s counsel sustained the injuries. It was also contended that the six months bedrest prescribed by the doctors would have ended in May 2025 and therefore there was no explanation why the applicant waited till August 2025 to make the present application. In support the 1st respondent relied on *Waruhiu v. Munene & Another* [2021] KESC 42 (KLR).
11. The 1<sup>st</sup> respondent further submitted that the applicant had not indicated what efforts she made to follow up on her intended appeal and also did not indicate when she learnt of her counsel’s illness. In support of the submission that the applicant was indolent, the 1st respondent relied on *Karinga Gaciani & 11 Others v. Kimanga & Another* [2023] KESC 23 (KLR). In the 1<sup>st</sup> respondent’s view,



in light of the advocate's illness, the applicant ought to have filed the appeal herself or instructed a different advocate.

12. Lastly, as regards prejudice, the first respondent submitted that the applicant had first to establish sufficient reason for extending time before the Court could consider the question of prejudice. In support counsel cited *County Government of Mombasa v. Kooba Kenya Ltd* [2019] KECA 221 (KLR). For the foregoing reasons, counsel urged the court to dismiss the application with costs.
13. The 2<sup>nd</sup> respondent neither responded to the application nor filed submissions.
14. I have carefully considered this application and the submissions by learned counsel as well as the authorities they cited. The discretion conferred on the Court to extend time by rule 4 of the Court of Appeal is wide and unfettered. The rationale behind rule 4 is an appreciation of the unpredictability of life. The vicissitudes of daily life sometimes make it impossible for parties to abide by the time set by the Court or prescribed by the rules. A party will not be shut out of appellate justice merely because they have not complied with the prescribed timelines.
15. The law gives such parties a second chance if they can demonstrate that they were prevented by genuine reasons from complying with the prescribed time. What that means is that the wide and unfettered discretion vested in the Court is exercised judiciously and upon reason, rather than arbitrarily or as a matter of course. Over time the Court has developed considerations which guide it in determining whether or not to extend time. For example, in *Nicholas Kiptoo Korir Arap Salat v. IEBC & 7 Others* (supra), the Supreme Court held that:
  - i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
  - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis..."
16. And in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* [1999] 2 EA 231, this Court identified some of the relevant considerations in an application for extension of time as follows:

"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly, (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted".

(See also *Fakir Mohamed v. Joseph Mugambi & 2 \*Others* [2005] KECA 340 (KLR) and *Imperial Bank Ltd (In Receivership) & Another v. Alnashir Popat & 18 Others* [2018] eKLR).
17. The judgment in question was delivered on 21<sup>st</sup> November 2024. There is a notice of appeal on record dated 22<sup>nd</sup> November 2024. Looking at the two medical reports on record, I do not think they are contradictory as alleged by the 1<sup>st</sup> respondent. They speak to different occasions when counsel sustained injuries and was recommended to take a 3 month bedrest in each occasion. The first was the car mishap and the second was the fall in the bathroom. That counsel is an elderly person of 75 years



and the fact that he was planning to travel to India for surgery suggests that he sustained serious rather than feigned injuries.

18. The delay of nine months would under normal circumstances be deemed inordinate. But at the end of the day, what really counts is whether the delay is genuinely explained or whether it was occasioned by pure indolence. In this instance, I find that although the delay would otherwise be inordinate, it is candidly and genuinely explained. In such circumstances, the Court will not visit the predicaments of counsel on the appellant. I would also think its a bit insensitive in the circumstances of this application where counsel has suffered substantial injuries, to fault the applicant for failure to file the appeal herself or to immediately instruct another counsel.
19. In *Tononoka Steels Ltd v. The PTA Bank* [1998] KECA 226 (KLR), Lakha, JA reasoned as follows, which I agree with:

“It is, of course, undesirable and indeed dangerous to enumerate all the cases in which the Court will exercise its discretion under rule 4 of the Rules. Broadly speaking, my view of the matter is that unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court’s discretion, the Court should, in so far as it may be reasonable, prefer, in the wider interests of justice, to have a case determined on its merits.”
20. It is also apt to bear in mind the legislative history of rule 4 of the Court of Appeal Rules as regards the discretion of the Court. That history was explained as follows, in *Imperial Bank Ltd (In Receivership) & Another v. Alnashir Popat & 18 Others* [2018] eKLR:

“A look at the legislative history of rule 4 will readily show that before 1985, the rule required an applicant to show “sufficient reason” why discretion to extend time should be exercised in his or her favour. After an amendment of the rule in 1985, that “sufficient reason” stricture was removed and the Court was henceforth allowed to extend time on such terms as it thought just.”
21. I do not think the applicant’s intended appeal is frivolous. At this stage, a single judge cannot make definite findings about the merits of the appeal. He or she can only engage with the issue on a prima facie, basis as explained in *Athuman Nusura Juma v. Afwa Mohamed Ramadhan* [2016] eKLR:

“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”.
22. Lastly, as regards the prejudice to be suffered by each party, I note that on the one hand the 1<sup>st</sup> respondent has a judgment in his favour which he is entitled to enjoy. On the other, the applicant has a constitutionally underpinned right of appeal which has not been timeously pursued due to the reasons set out above. While the 1<sup>st</sup> respondent prejudice is a delay in enjoyment of the fruits of the judgment, that of the applicant entails total shut out from the Court. In the circumstances I am persuaded that it is the applicant that stands to suffer the greater prejudice.
23. In the circumstances, I allow the notice of motion dated 15<sup>th</sup> August 2025 and direct the applicant to file her appeal within thirty (30) days from the date of this ruling. Costs of the ruling will abide the outcome of the appeal. It is so ordered.



**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY 2026.**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

