

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: M'INOTI, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. E511 OF

2025 BETWEEN

SHERIA NA WATU.....APPLICANT

AND

JOHN KIUMI WAMBUGU 1ST

RESPONDENT CHIEF LAND REGISTRAR, NAIROBI

2ND RESPONDENT NATIONAL LAND

COMMISSION..... 3RD RESPONDENT NAIROBI CITY

COUNTY 4TH RESPONDENT

*(Application for extension of time to appeal from the ruling and order of the
Environment & Land Court at Nairobi (Mbogo, J.) dated 22nd May 2025*

in

ELC Pet. No. E018 of 2024)

RULING

1. The notice of motion before me is dated 18th August 2025 and is taken out by **the applicant, Sheria na Watu**. In the motion, the applicant seeks extension of time to appeal against the ruling and order of the **Environment and Land Court at Nairobi (ELC)** (Mbogo, J.) dated 22nd May 2025.
2. The brief background to the application is as follows. In or about October 2024, the applicant, claiming to be acting on its own

behalf and on behalf of the residents of **Clayworks** filed a

constitutional petition against the respondents for a declaration that the property known as **LR No. 57/1343 Kasarani (the suit property)** was public property that was unlawfully acquired by and registered in the name of the **1st respondent, John Kirumi Wambugu**. On 4th October 2024, the applicant applied for an injunction to stop the 1st respondent from constructing on the suit property, selling, charging or transferring it, pending the hearing and determination of the petition.

3. In opposition to the application, the 1st respondent pleaded that he was the lawfully registered owner of the suit property, having purchased it from **Peter Wambugu Mureithi, Francis Kingori Wanyeki** and Irene **Jacinta Wambui**. He further pleaded that the petition was *res judicata* because the issues raised therein were raised and determined in a previous suit, namely, **ELC No. E095 of 2021**, in a judgment dated 8th February 2024. Further, that **Civil Appeal No. E479 of 2024** arising from that judgment, was pending in this Court.
4. After considering the matter the ELC, by the impugned ruling, found that in the previous suit the ELC declared the 1st respondent to be the lawful owner of the suit property; that although the applicant was not a party to that suit, *res judicata*

cannot be

avoided by the introduction of new or different parties; and that the petition was indeed *res judicata*.

5. The applicant was aggrieved and in a bid to appeal, its advocates prepared a notice of appeal dated 4th June 2025, but which was not lodged in court until 13th June 2025. By the time the notice of appeal was lodged, it was out of the time prescribed by **rule 77(2)** of the **Court of Appeal Rules**.
6. In the present application, the applicant seeks extension of time to regularise the notice of appeal that I have referred to.
7. Only one reason is presented for failure to comply with the rules, namely that the applicant's previous advocate failed to lodge the notice on time and kept misleading the applicant that he had done so. In the affidavit in support of the application sworn on 18th August 2025 by **Augustine Omondi**, it is deposed as follows:

“8. The delay in filing the Notice of Appeal was caused by the Applicant’s erstwhile advocates, who, despite clear instructions to lodge an appeal immediately after the Ruling was delivered, kept assuring the Applicant that the appeal had been filed, when in fact it had not.

9. When I became very inquisitive through mobile calls, I would be informed by the said counsel that they had lodged an appeal and were

awaiting for court's directions.

10. Moreover, when I demanded for the case number for the lodged appeal, the said advocates could not provide this information.

8. There is no affidavit on record from the said advocates explaining the circumstances under which they failed to file the notice of appeal.
9. The applicant adds that the intended appeal is not frivolous and that among other, it raises the issues whether the ELC erred by holding that the petition was *res judicata* while the applicant was not a party to the first suit; by failing to find that the question whether the suit property was public land was not raised in the first suit; and by failing to holding that the issues and the parties in the suit and the petition were different.
10. It is further contended that the delay is not inordinate and is excusable.
11. The 1st respondent opposed the application vide a replying affidavit sworn by himself on 12th January 2026 and submissions dated 19th January 2026. The bulk of the 1st respondent's response is a detail argument and submissions on the merits of the intended appeal, which is not the proper remit of a single judge. At this stage, a single judge is only required to engage with the question whether the intended

appeal is frivolous on a *prima*

facie basis, not definitively. (See **Athuman Nusura Juma v. Afa**

Mohamed Ramadhan, CA No. 227 of 2015).

12. As far as is relevant to the application for extension of time, the 1st respondent averred that the intended appeal was frivolous because the two suits involved the same property but only change of parties; the delay was unreasonable; the applicant had not put before the court any justification for extension of time and that he stood to suffer great prejudice having spent over **Kshs. 100,000,000.00** on the suit property and having to defend two suits on the same issue.
13. The 1st respondent relied on **Thomas Ogembo v. Samuel Bosire**
Angwenyi, Keroka Riverside Self Help Group & Magaret
Nyangau [2021] KECA 892 (KLR) on the factors that guide the Court in an application for extension of time; **Bank of Africa**
Kenya Ltd and another v. TSS Investment Ltd and 2
thers (2024) KECA 410 (KLR) in support of the proposition that mere change of parties cannot avoid *res judicata* and **Kimondo v. Igoki**
& Another [2025] KECA 1492 (KLR) in support of the

proposition that delay, however short must be satisfactorily explained.

14. For the foregoing reasons, the 1st respondent urged the Court to dismiss the application with costs.

15. I have duly considered this application, the submissions by learned counsel and the authorities they relied on. As has been stated time and again, the discretion conferred on the Court to extend time by **rule 4** of the **Court of Appeal** is wide and unfettered, but it must be exercised judiciously and upon reason, rather than arbitrarily or as a matter of course. 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. Further, in **Leo Sila Mutiso v. Rose Hellen Wangari Mwangi** [1999] 2 EA 231, this Court set out some of the factors to be considered 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 in 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 in this application was delivered on 22nd May 2025 and the notice of appeal was not filed until 13th June 2025 way out of the 14 days prescribed by **rule 77(2)** of the ***Court of Appeal Rules***. While of and by itself the period may not be inordinately long, the critical question is the reason for the delay, however short.
18. As I have pointed out, the only reason preferred is inaction by the applicant’s counsel. There is no affidavit on record from the said advocate, for example, explaining why the notice of appeal was not filed on time or the challenges, if any, the advocate had in complying with the rules.
- 19.** Decisions abound from this Court that mere inaction by

counsel is not a good reason to extend time. In **Rajesh Rughani v. Fifty**

Investment Ltd & Another [2005] eKLR, the Court held as follows:

"If the advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy."

(See also **Bi-Mach Engineers Ltd v. James Kahoro Mwangi** [2011] eKLR where the court added that in a scenario like the above, the client had a remedy against a recalcitrant advocate).

20. Subsequently in **Bains Construction Co. Ltd v. John Mzare**

Ogowe [2011] eKLR, the Court reiterated:

"It is to some extent true to say mistakes of counsel as is the present case should not be visited upon a party but it equally true when counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences."

(See also the decisions of the Supreme Court in **George Waruhiu**

v. Munene & Another [2021] KESC 42 (KLR) and **Gaciani & 11**

others v. Kimanga & Another [2023] KESC 23 (KLR) where

it was held that in an application for extension of time, it is not enough for the applicant to blame his or her advocates).

21. The applicant has therefore failed to offer any justifiable reason for failure to abide by the time prescribed by the rules. Having so failed, it is not necessary to consider the other factors in an application for extension of time. The reasoning in **Abdul Azizi**

Ngoma v. Mungai Mathayo [1976] KLR 61, is still valid, although the Court was considering **rule 4** before the 1985 amendments. The Court held that it was only after an applicant had explained the delay that the other factors such as prejudice and the prospects or otherwise of the intended appeal would be considered.

22. Taking all the foregoing into account, I find no merit in this application and dismiss it with costs to the 1st respondent. It is so ordered.

Dated and delivered at Nairobi this 27th day of February 2026.

K. M'INOTI

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

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

Signed

**DEPUTY
REGISTRAR.**