

**IN THE COURT OF
APPEAL AT MALINDI
(CORAM: DR. K. I. LAIBUTA, JA. - IN
CHAMBERS) CIVIL APPLICATION NO. E038 OF
2025**

BETWEEN

**DOFU MUMBA DOFU.....1ST APPLICANT
ABDALLAH MKOBA GWASHE 2ND
APPLICANT HASSAN KESI MUMBA.....3RD
APPLICANT
SAFU MAJALIWA GWASHE 4TH
APPLICANT**

AND

**DAVID MBAJI NGOME 1ST
RESPONDENT SANTA KADOSHO KATANA 2ND
RESPONDENT
SHIDA KADOSHO KATANA 3RD
RESPONDENT
KHAMISI TUMU.....4TH RESPONDENT
DONNEX M. KATANA 5TH
RESPONDENT CHAIRMAN MIYUNI/MULEJI "B"
ADJUDICATION COMMITTEE 6TH
RESPONDENT DIRECTOR OF LAND & ADJUDICATION 7TH
RESPONDENT
LAND REGISTRAR, KILIFI COUNTY 8TH
RESPONDENT**

*(Being an application for extension of time to file the Notice
and Record of Appeal out of time against the Ruling and
Orders of the Environment and Land Court of Kenya at
Malindi (E. Makori, J.) dated 15th May 2025*

in

***Petition No. E025 of
2025)***

**** RULING**

1. Before me is a Notice of Motion dated 8th October 2025 in which the applicants seek extension of time pursuant to rule 4 of

the Court of Appeal Rules, 2022 to lodge their Notice of Appeal together with the record of appeal against the ruling and decision of the ELC at Malindi (Evans Makori, J.) dated 15th May 2025 in ELC Petition No. E025 of 2025.

2. The applicants' Motion is supported by the 1st applicant's annexed affidavit sworn on 8th October 2025 essentially deposing to the 14 grounds on which their application is anchored, but to which I need not address myself in extenso, save to take note of the salient grounds relevant to the application under rule 4, namely: that the trial court delivered the impugned ruling on 15th May 2025 thereby striking out the applicant's petition; that they filed an application dated 20th May 2025 seeking review of the court's decision; that, when the application came up for hearing on 4th June 2025, the court declined to entertain the applicants' Motion for review and allegedly struck it out; that, instead, the learned Judge granted them leave to appeal the ruling dated 15th May 2025; that they allegedly filed and served their Notice of Appeal on 4th June 2025; that they have a good appeal with overwhelming chances of success; and that no prejudice will be occasioned to the respondents if the orders sought are granted.

3. In support of the Motion, learned counsel for the applicants, M/s. Richard O. & Company, filed written submissions dated 3rd November 2025 citing the decisions in **Mutiso v Mwangi** [1999] 2

EA 231 where the predecessor to this Court set out the guiding principles to be considered in applications under rule 4 of this Court's Rules; and **Stanley Kang'ethe Kinyanjui v Tony Ketter**

& 5 Others [2013] eKLR, highlighting the principle that, for an

intended appeal to be considered arguable, the Court has to be satisfied that there is a single *bona fide* ground raised by the applicant, and which is arguable.

4. On his part, the 1st respondent (David Mbaji Ngome) filed a replying affidavit sworn on 3rd November 2025 stating, *inter alia*: that there has been inordinate delay in filing the Notice of Appeal; that the applicants have not exhibited any proof that the trial court granted leave to appeal; that the applicants cannot appeal against a decision which they sought to be reviewed, but that they can only appeal against the decision rendered on review.

5. Counsel for the 1st respondent filed written submissions dated 6th November 2025 citing the cases of **Salat v IEBC &**

7

Others [2014] KESC 12 (KLR); and **Fakir Mohammed v Joseph**

Mugambi & 2 Others [2005] eKLR for the principle that extension

of time is not a litigant's right, but a discretionary power of the

Court; and **Akhura v Simon Kibet Rugut** [2025] KEHC

3133

(KLR) where the High Court correctly held that, where a party is dissatisfied with the decision of a particular court, he can either apply for review of such a decision or appeal against it, but that he cannot opt for both, and neither can he apply for review and, when review is disallowed, proceed to appeal. For those reasons, counsel urged me to dismiss the application with costs.

6. Though served with today's hearing notice on 3rd November 2025, the 2nd to 8th respondents neither appeared nor filed any submissions or affidavits in reply to the applicants' Motion.

7. Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to “... *extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act*”

authorized or required by these Rules, whether before or after the doing of the act ...,” on such terms as it thinks just.

8. I hasten to observe that such discretionary powers are only exercisable where the Court is satisfied that the applicant has successfully invoked its jurisdiction by first lodging and serving a notice of appeal in obedience to rule 77(1) of the Court’s Rules. However, the appellants are yet to comply with this jurisdictional pre-requisite.

9. A cursory look at the record as put to me discloses a draft Notice of Appeal dated 4th June 2025, and which is yet to be lodged as required under rule 77(1). That draft is merely annexed to the 1st applicant’s supporting affidavit as annexure No. 3(a).

10. I need not over emphasise the fact that a notice of appeal is a jurisdictional prerequisite. Addressing itself to the mandatory requirement to file a notice of appeal, the Supreme Court in **University of Eldoret and another v Hosea Sitienei and three others** [2020] eKLR observed thus at para 36:

“The filing of a notice of appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a notice of appeal signifies the intention to appeal.”

11. On the authority of the University of Eldoret and Sitienei case (ibid), it is true to say that, in the absence of a notice of appeal properly on record, the applicants herein are yet to formally express their intention to appeal.

12. Citing the Supreme Court decision in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries**

Commission and 7 others [2014] eKLR, this Court had this to say

in **Apungu Arthur Kibira v Independent Electoral and Boundaries Commission and 2 others** [2018] eKLR:

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”

13. Having carefully examined the record before me, the

applicants' Notice of Motion dated 8th October 2025, the affidavits in support and in reply thereto, the written and oral submissions

of learned counsel for the applicants and for the 1st respondent, the cited authorities and the law, I reach the inescapable conclusion that the applicants' Motion is incompetent and is hereby struck out with costs to the 1st respondent. Orders accordingly.

Dated and delivered at Malindi this 24th day of April 2026.

DR. K. I. LAIBUTA CARb, FCIArb.

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed
DEPUTY REGISTRAR