



**Mbulo & another v Nyamwaya (Civil Application E158 of 2025)
[2026] KECA 763 (KLR) (24 April 2026) (Ruling)**

Neutral citation: [2026] KECA 763 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E158 OF 2025
HA OMONDI, JA
APRIL 24, 2026**

BETWEEN

GEORGE OTIENO MBULO 1ST APPLICANT

MICHAEL ODHIAMBO MBULO 2ND APPLICANT

AND

BENEDICT OWUOR NYAMWAYA RESPONDENT

(Being an application for extension of time to file and serve Notice of Appeal and Record of Appeal out of time against the decision of the Environment and Land Court at Migori (Dr. Nyagaka, J.) dated 30th September, 2025 in Case No. E003 of 2023)

RULING

1. The applicants had filed an appeal being Migori ELC No. E003 of 2023, arising from a ruling of the magistrate's court in Migori CMCC 326 of 2014, where their application for review of the trial court's earlier judgment on grounds that the trial court had no jurisdiction had been dismissed. Their appeal seeking striking out of the primary suit and orders for review of the judgment was dismissed on 30th September 2025 (Nyagaka, J).
2. According to the applicant, the effect of the dismissal means that judgment in, ordering vacant possession of land parcel No Suna East/Area B Kwa/326 within three (3) months; and the caution that had been lodged against the title to the suit property, to be removed. George Otieno Mbulo and Michael Odhiambo Mbulo, the applicants herein are aggrieved by this outcome and intend to appeal against it. However, the statutory time for giving the Notice of Appeal, as well as lodging the appeal has expired. They have thus moved this Court by a Notice of Motion dated 24th November, 2025 and supported by an affidavit of even date, sworn by the 1st applicant seeking extension of time within which to file the appeal.



3. It is stated that the cause of the delay is that the advocate who was handling the file, left the law firm before ensuring that a proper Notice of Appeal, and that a substantive appeal had been filed and served within the prescribed timelines.
4. The applicant explains that the nature of the dispute is highly sensitive as it revolves around a protracted claim of possession and ownership; especially because the applicants have lived there with their families and made their livelihoods on the said parcel, and they have nowhere else to go to. Further, in anticipation of the intended appeal, the applicants have also applied for orders of stay of execution before the trial court.
5. The respondent has not filed any reply to the application, either by way of a replying affidavit or written submissions.
6. As pointed out by the applicant, this application for extension of time was filed on 24th November, 2025, from a judgment that was delivered on 30th September, 2025. A delay of 41 days from the required 14 days of filing after judgment as provided in Rule 77 (2) of the Court of Appeal Rules 2022. That the delay was not intentional nor deliberate, but was as a result of the advocate who had primary conduct of the file leaving the firm before he could ensure compliance in the matter in filing the Notice of Appeal as well as the substantive appeal within the prescribed timelines.
7. It is also drawn to the attention of this Court, that various authorities have reiterated that extension of time is not a right to a party, but an equitable remedy that is only available to a deserving party at the discretion of the court; that a party who seeks extension of time has the burden of laying basis to the satisfaction of the court.
8. Rule 4 of the Court of Appeal Rules provides as follows:

The Court may, on such terms as may be just, by order, 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.
9. Clearly, under Rule 4, this Court has unfettered discretion to extend time for any step intended to be done within the period stipulated by the Rules. This was aptly set out in Paul Wanjohi Mathane vs. Duncan Gichare Mathenge [2013] eKLR where this Court held thus:

“The discretion under Rule 4 is unfettered, but it has to be exercised judiciously, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”
10. In considering the prayer, a court must also take into account whether there will be any prejudice suffered by the respondent if extension is granted; and whether the application has been brought without undue delay. I acknowledge that indeed, the Supreme Court of Kenya in the case of Nicholas Kiptoo Korir Arap Salat vs. IEBC [2014] eKLR set down the guiding principles to consider in the exercise of discretion. One other consideration included by the learned Judge in the case of Julius Kamau Kithaka vs. Waruguru Kithaki & 2 Others (2013) eKLR is whether prima facie the intended Appeal has chances of success or is a mere frivolity.



11. The applicants in their submissions have attempted to explain the delay as an omission and/or mistake on the part of their previous advocate and not their own fault; and that they acted without undue delay the moment they realised the state their matter was at. I recognise that the alleged mistake of counsel does not of itself cure a litigant's own inaction, basically because it is a litigant's case and not that of his counsel. The primary responsibility to act within the prescribed timelines under this Court's Rules rests heavily on the litigant's shoulders. Indeed, with regard to the responsibility of the litigant to follow up their case, Waki, J.A. had this to say in *Habo Agencies Limited vs. Wilfred Odhiambo Musingo* [2015] eKLR:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

12. In this instance there appears to have been total trust in the advocate who was handling the matter, in terms of taking up the next step, after the applicants had made known to him, their dissatisfaction with the decision. The applicants are not to blame.

13. On the issue as to whether or not the intended appeal has no chance of success, the applicant cites the case of *Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge* [2013] KECA 199 (KLR) where the Learned Judge, in determining whether to allow the application to extend time cited the case of *Richard Nchapi Leiyagu vs. IEBC & 2 others Civil Appeal No. 18 of 2013*, where the Court expressed itself as follows:

“The right to a hearing this Court is conscious of the fact that it is not the role of a single judge to determine the merits or otherwise of the appeal.”

14. This Court has held in the case of *Athuman Nasura Juma vs. Afwa Mohammed Ramadhan* [2016] eKLR:

“...this court has to be careful to ensure that the intended Appeal has merit or not is not an issue to be determined with finality by a single Judge”.

15. I bear in mind the afore-going principles whilst determining this application. In this case, judgment was delivered on 30th September 2025; the Notice of Appeal ought to have been filed within 14 days of the judgment. The instant application was filed on 24th November 2025. Of course, the applicants have not presented any letter of instruction to their previous advocate, to fortify their claim that they had given instructions. However, to be fair to them, in two months after the judgment, they followed up on their appeal – this is not contested; and within two months of the date of judgment, they had moved to court to file this application.

16. Drawing from the case of *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] KECA 701 (KLR) in considering the injustice that would be occasioned to the Applicants if the application was not allowed, the Court took into account the financial loss, loss of office, loss of social status and public humiliation if the application is not allowed which will render the appeal if successful, nugatory. In this instance, the applicant contends that this is a highly sensitive matter for ownership and possession of the suit property, where the Applicants and their families stand to suffer substantial loss and great injustice if evicted since they are domiciled on the suit property, where they have lived and made their livelihood since the 1970s up to date; that the respondent on the other hand, has not been in



occupation of the said property and therefore, no prejudice will be suffered by respondents if the application is allowed and the extension of time is granted.

17. The other consideration to be borne in mind, relates to whether the respondent will suffer any prejudice. The very fact of attempting eviction is a demonstration that the applicants are on the land, and there is nothing to suggest any earth-shattering prejudice likely to be suffered by the respondent.
18. The delay has been adequately explained, and I do not consider it inordinate and the applicants herein, have made the present application without undue delay; they have met and satisfied the principles set out for this Court to exercise its discretion in her favour and grant the extension. The applicants are therefore, in my view are deserving of the orders sought, to the extent that leave is granted to the applicants to file and serve the Notice of Appeal, and the Record of Appeal, within 14 (Fourteen) days from the date of this ruling. The costs shall abide the appeal.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL, 2026.

H. A. OMONDI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

