

**IN THE COURT OF APPEAL
AT NAKURU**

**(CORAM: HASSAN, J.A (IN
CHAMBERS)) CIVIL APPLICATION**

NO. E037 OF 2026 BETWEEN

KIPKOECH ARAP MAINA & AUGUSTINE KIMUTAI KOECH

(suing

as the personal representatives of the estate of **TABNYOBII C.
MAINA (DECEASED)**

.....
**APPLICANTS
AND**

PAUL KIPKETER KEINO.....1ST RESPONDENT
THE CHIEF LAND REGISTRAR.....2ND RESPONDENT
HON. ATTORNEY GENERAL.....3RD
RESPONDENT

*(Being an application for extension of time to file and
serve the notice of appeal and the record of appeal out
of time in the intended appeal from the judgment of the
Environment and Land Court (M.C. Oundo, J.) dated 25th
January, 2024*

in

Kericho ELC No. 50 of 2019.)

***** RULING**

1. Before me is a Notice of Motion dated **6th March 2026**, brought under Section 3(2), 3A and 3B of the Appellate Jurisdiction Act, Rule 4 of the Court of Appeal Rules and all other enabling provisions of the law substantively seeking an order granting leave to the applicants to file the notice and

record of appeal out of time in an intended appeal against
the judgment of the

Environment and Land Court (M.C. Oundo, J.) dated 25th January, 2024 in Kericho ELC No.50 of 2019.

2. The grounds in support of the application are borne on the face thereof and in the affidavit in support sworn by the applicants on 6th March 2026.
3. The application is opposed by the 1st respondent by way of a replying affidavit sworn by the 1st respondent on 13th April 2026. The application was canvassed by way of written submissions.
4. In summary, the applicants' averments and submissions are that upon the delivery of the judgment by the ELC, Kericho, the applicants' erstwhile advocates lodged an application for extension of time to file the appeal out of time. A ruling was delivered that granted leave to the applicants to file the appeal out of time. However, the ruling was not made available to the applicants' advocates in time, and the timelines for filing the appeal lapsed. Yet again, the applicants lodged another application seeking an extension of time to file the appeal out of time, and the court granted the applicants leave to file the appeal out of time. That

unknown to the applicants, their advocates on record filed
the appeal out of the timelines

provided by the court and also failed to include a copy of the notice in the record of appeal.

5. Consequently, the 1st respondent moved the court to strike out the appeal. The court allowed the application, and the applicants' appeal was struck out with costs. The applicants place the blame on their erstwhile advocates for failing to comply with the rules of the court. The applicants have now filed the instant application seeking an extension of time to allow them to file a notice of appeal and record of appeal out of time.
6. The applicants argue that they stand to suffer substantial harm if the orders sought are not granted for inactions that were not of their own making.
7. It is contended that the intended appeal has high chances of success. However, a draft memorandum of appeal has not been annexed to the affidavit in support of the application. A further averment is that it is in the best interest of justice that the application is allowed and that the respondents will not suffer prejudice.
8. The 1st respondent, on his part, argues that the applicants

have been granted multiple opportunities to comply with the court's

rules but have failed to do so, culminating in the striking out of the appeal. That on the material day when the appeal was struck out, the applicants' erstwhile advocate, one Kipkoech, was present, and therefore the applicants are deemed to have had full knowledge of the court's decision.

9. That the effect of the striking out order was to conclusively determine the applicants' right to pursue an appeal out of time, and the instant application is therefore res judicata and amounts to an abuse of the court process.
10. The 1st respondent further avers that the applicants are guilty of material non-disclosure in that the assertion that they have lost touch with their former advocates is demonstrably false, as the same advocates are representing them in another matter.
11. The 1st respondent avers that the applicants have demonstrated a pattern of indolence by failing to comply with timelines granted by this court.
12. I have considered the application, grounds in support thereof, the submissions, as well as the law. **Rule 4** of the **Court of Appeal Rules** does not provide for factors the

court ought to consider in an application for extension of time, but courts have

devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. The case of

Leo

Sila Mutiso v Rose Hellen Wangari Mwangi [1999],

which is the *locus classicus*, laid down the parameters as follows:

“It is now well 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.”[Emphasis supplied.]

13. The Supreme Court has reaffirmed the above principles in **Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others, SC Application No. 16 of 2014; [2014] eKLR** and noted as follows:-

“ 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-by-case basis.***

- iv) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**
- v) Whether there will be any prejudice suffered by the respondents if the extension is granted.**
- vi) Whether the application has been brought without undue delay; and**
- v) Whether, in certain cases, like election petitions, public interest should be a consideration for extending time.”**

14. The principles shall be my guide in making my determination herein.

15. As regards the length of delay, in **Sentrim Kenya Limited v CFC Stanbic Bank Limited [2021] KECA 648 (KLR)** this Court stated that there is no maximum or minimum period of delay set

out under the law. However, the reason or reasons for the delay must be reasonable and plausible. In **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR**, this Court

stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of

discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable."

16. In the instant case and as regards the length of the delay, it is indeed not in dispute that the impugned judgment was delivered on 25th January 2024. However, the applicants filed two previous applications seeking extension of time to appeal, and these applications were granted. However, due to non-compliance with this court's rules, the appeal was struck out on 3rd November, 2025. This instant application is dated 6th March 2026. The period is therefore about 4 months. Of more weight is the explanation offered for the delay.
17. The applicants blame their erstwhile advocates for failing to promptly inform them of the striking out of the appeal to enable them to move the court immediately. The applicants allege that they were unaware that the record of appeal had been served out of time or that the appeal had been struck out. The applicants allege that they only learnt of the striking out of the appeal just before Christmas of 2025, and by then, the said advocates had started their Christmas vacation.
18. The applicants further aver that further delay was occasioned by the committal to civil jail of the applicants from 16th January

2026 to 2nd February 2026 due to contempt of court proceedings arising from taxation proceedings in the High Court.

19. The applicants attribute the delay to their erstwhile advocates. Yet this Court has consistently held, in ***Bi-Mach Engineers Ltd v James Kahoro Mwangi and Habo Agencies Ltd v Wilfred Odhiambo Musingo***, that litigants bear a duty to actively pursue their cases. Mere inaction by counsel cannot excuse indolence. The obligation to ensure diligent prosecution of one's case ultimately rests with the litigant. In any event, the applicants do not explain why they remained passive upon learning that their appeal had been struck out just before Christmas. The period between January 2026 and 16th January 2026, when they were arrested, remains wholly unaccounted for.
20. As to the arguability or otherwise of the intended appeal, it would not be in my place to determine the same sitting as a Single Judge, and I will therefore not delve further into this issue.
21. Finally, on prejudice, it is my considered view that the 1st

respondent will suffer prejudice by any further delay in this matter. The matter at the ELC was filed back in 2019; it is now

7 years down the line. The delay is inordinate and will prejudice the 1st respondent.

22. The totality of my findings, therefore, is that the applicants have demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time within which to file the intended appeal.

23. Accordingly, the applicants' motion dated 6th March 2026 is not merited, and the same is dismissed with costs to the 1st respondent.

Dated and delivered at Nakuru this 8th day of May, 2026.

AHMED ISSACK

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR