

**IN THE COURT OF APPEAL
AT MALINDI
(CORAM: DR. K. I. LAIBUTA, JA. - IN
CHAMBERS) CIVIL APPLICATION NO. E039 OF
2025**

BETWEEN

**OMAR MOHAMED SHALLO 1ST
APPLICANT FAISAL MOHAMED SALIM
2ND APPLICANT**

AND

**ABDALLA MOHAMED SALIM 1ST
RESPONDENT ALI MOHAMED SALIM
2ND RESPONDENT COUNTY LAND REGISTRAR, KILIFI
3RD RESPONDENT COUNTY LAND REGISTRAR, MOMBASA
..... 4TH RESPONDENT ATTORNEY GENERAL
..... 5TH RESPONDENT**

*(Being an application for extension of time to lodge the Record
of Appeal out of time from the Judgment and Decree of the
Environment and Land Court at Malindi (M. A. Odeny, J)
delivered on 24th April 2023*

in

ELC Case No. 17 of 2014)

***** RULING *****

1. Before me is a Notice of Motion dated 28th October 2025 in which the applicants (Omar Mohamed Shallo and Faisal Mohamed Salim) seek leave to lodge their Record of Appeal out of time pursuant to rule 4 of the Court of Appeal Rules. The

intended appeal is from the judgment and decree of the

Environment and Land Court (the ELC) at Malindi (M. A. Odeny, J.) dated *24th April 2023* in ELC Case No. 17 of 2014.

2. The applicant's Motion is supported by the annexed affidavit sworn by the 1st applicant on 28th October 2025 essentially deposing to a whopping 28 grounds set out on the face of the Motion, but to which I need not address myself in extenso, save to take note of the salient grounds on which the application is anchored, namely: that the impugned judgment was delivered on 24th April 2023 in favour of the 1st and 2nd respondents, Abdalla Mohamed Salim and Ali Mohamed Salim; that the applicants instructed the firm of Gicharu Kimani & Associates to appeal the impugned Judgment; that the said firm requested for certified copies of proceedings on 25th April 2023 and lodged a Notice of Appeal on 27th April 2023; that copies of the proceedings were ready for collection on 3rd July 2023, but were collected by the firm aforesaid on 23rd July 2023; that the said firm closed office without filing the record of appeal or informing the applicants; that the applicants have since instructed another firm who are ready to lodge the appeal; and that the appeal is arguable with high chances of success.

3. Learned counsel for the applicants, M/s. K. Luganje & Company file written submissions dated 10th March 2026 in support of the Motion citing one judicial authority relating to extension of time in criminal appeals, but which does not add value to the applicants' Motion under rule 4.

4. In reply to the applicants' Motion, the 1st and 2nd respondents filed an affidavit sworn by the 1st respondent (Omar Mohamed Shallo) on 30th January 2026 on his own behalf and on behalf of the 2nd respondent deposing that the appeal has no chances of success; that the applicants' Motion was brought almost 30 months late (between the date of the impugned decision and the date of the instant Motion); that the intended appeal belongs to the applicants and not to their counsel; that they only instructed their new advocates in October 2024; and that the intended appeal is doomed to fail.

5. On their part, learned counsel for the 1st and 2nd respondents filed written submissions dated 28th February 2026 citing no authorities.

6. The 3rd to 5th respondents did not file any affidavit in reply.

Neither did they file any submissions or appear before me to make oral submissions when the Motion came for hearing on the Court's virtual platform on 12th March 2026 despite having been duly served with the hearing notice on 18th February 2026.

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. The four basic factors to be considered in exercise of the Court's discretion in determination of applications under **rule 4** were enunciated in **Leo Sila Mutiso vs. Helen Wangari**

Mwangi

[1999] 2 EA p231. In determining whether to extend time, the Court takes into account: (i) the length of the delay; (ii) the reason for the delay; (iii) the chances of the appeal succeeding

if the application is granted; and (iv) the degree of prejudice to the respondent if the application is granted. In principle, the

discretion is unfettered, and there is no limit to the number of factors the court would consider so long as they are relevant.

9. In the same vein, the Court of Appeal in **Fakir Mohammed vs. Joseph Mugambi and two others** [2005]

eKLR considered

additional factors that may be considered in appropriate cases, namely: the effect of delay on public administration; the importance of compliance with time limits; the resources of the parties; and whether the matter raises issues of public importance, all of which the Court viewed as relevant, but not exhaustive.

10. The Applicants' Motion for extension of time to file an appeal turns on the four basic factors enunciated in **Leo Sila Mutiso vs. Helen Wangari Mwangi** (supra)

11. With regard to the merit of the appeal, it is sufficient for the Applicants to demonstrate that they have an arguable appeal with the likelihood of success. Having considered the 6 grounds of appeal set out on the face of their memorandum of appeal dated 28th October 2025, I form the view that the applicants have demonstrated that the intended appeal is

arguable, and that the

intended appeal is not frivolous in that it seeks to challenge the learned Judge's decision on the grounds that she was at fault by holding that the suit property belonged to the 1st and 2nd respondents; granting injunctive relief against the applicants; holding that the applicants were trespassers on the suit property; failing to consider the evidential documents produced by the applicants; and in ordering the 3rd, 4th and 5th respondents to restore the registry map in respect of the suit property.

12. With regard to the period of delay, the Court of Appeal in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet** [2018] eKLR observed that ***“... 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 favourably exercisable.”***

13. I take to mind the fact that, even though the Notice of Appeal dated 25th April 2023 was filed on time on 27th April 2023, the letter dated 25th April 2023 requesting for

proceedings was

not copied to the respondents, a procedural infraction that offends the mandatory provision of rule 84(2) of this Court's Rules. Notably, neither the applicants' Notice of Appeal nor the letter requesting for proceedings bear any sign of endorsement as having been served on the respondents' counsel within the respective periods stipulated in rules 79(1) and the proviso to rule 84(1) of this Court's Rules. In **Mae Properties Ltd v Joseph Kibe & Another** [2017] eKLR, this Court held that service of the letter bespeaking proceedings is mandatory for invoking Rule 84(2).

14. It is also noteworthy that the proceedings were ready for collection on 3rd July 2023 as shown on the certificate of delay issued on 10th July 2023. I find nothing on record to suggest that the record of appeal has been lodged. In effect, the applicants appear to be sitting pretty awaiting this Court's sanction to do so while the proper thing to have done was to lodge and serve the record, and then approach the Court to extend time and deem the record as duly filed.

15. Instead, the applicants lament that that their previous advocates closed business without filing the record of appeal or informing the applicants of the closure of their office; that they retained a new firm of advocates on 9th October 2024; and that the decree was issued on 12th May 2025. However, no reason has been furnished as to why the record of appeal is yet to be lodged.

16. Having considered the applicants' Motion, the grounds on which it is anchored, the affidavits in support and in reply, the rival submissions of learned counsel, the cited authorities and the law, I can only conclude that the Notice of Motion dated 28th October 2025 does not merit the orders sought pursuant to rule 4 of the Court of Appeal Rules and is hereby dismissed with costs to the 1st and 2nd respondents. Orders Accordingly.

Dated and delivered at Mombasa this 15th day of May, 2026.

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR