



**Masumbuko & 2 others v Ministry of Lands Appeal Tribunal & 3 others (Civil Application E032 of 2024) [2025] KECA 914 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 914 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E032 OF 2024**

**KI LAIBUTA, JA**

**MAY 23, 2025**

**BETWEEN**

**ONESMUS MASUMBUKO ..... 1<sup>ST</sup> APPLICANT**

**REBECCA MVERA MASUMBUKO ..... 2<sup>ND</sup> APPLICANT**

**EMILY FIKIRINI KAWIHI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**MINISTRY OF LANDS APPEAL TRIBUNAL ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY FOR LANDS ..... 2<sup>ND</sup> RESPONDENT**

**MINISTRY OF LANDS ..... 3<sup>RD</sup> RESPONDENT**

**AUGUSTINO BAYA THOTHO ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for extension of time to file and serve the Notice and Record of Appeal out of time from the Judgment and Decree of the Environment and Land Court of Kenya at Malindi (Mwangi Njoroge, J.) dated 22nd October 2024 in Misc. App. No. 8 of 2019)*

**RULING**

1. Before me is a Notice of Motion dated 10<sup>th</sup> December 2024 in which the applicants (Onesmus Masumbuko, Rebecca Mvera Masumbuko and Emily Fikirini Kawahi) seek extension of time pursuant to rule 4 of the Court of Appeal Rules, 2022 to file and serve a notice of appeal dated 10<sup>th</sup> December 2024; an order that the record of appeal be filed within such extended time; and that the costs of their application be provided for.
2. The applicants' Motion is supported by the 1<sup>st</sup> applicant's annexed affidavit sworn on 10<sup>th</sup> December 2024 deposing to 7 grounds on which the Motion is anchored, namely: that the impugned judgment was delivered on 22<sup>nd</sup> October 2024 in the absence of the parties; that the applicants instructed their



counsel to lodge an appeal, which they failed to do; that they retrieved their file from their counsel for the purpose of pursuing the appeal on their own; that they instructed M/s. Kenga & Company, who applied for and received certified copies of proceedings on 3<sup>rd</sup> December 2024; that they filed the notice of appeal on 10<sup>th</sup> December 2024; that the delay in filing the instant application and the intended appeal was occasioned by their previous advocates; that the intended appeal raises triable issues with overwhelming chances of success; and that no prejudice will be suffered by any party if the application herein is allowed.

3. In support of the Motion, learned counsel for the applicants, M/s. Kenga & Company, filed written submissions dated 9<sup>th</sup> May 2025 citing the cases of *Kariuki v Wangeci & 7 Others* [2024] KECA 1692 (KLR), submitting that mistakes committed by advocates should not be visited upon their clients; *Veronica Gathoni Mwangi v Samuel Kagwi Ngure & Another* [2020] KEHC 5118 (KLR); and *Gogo & Another v Mwasina & 6 Others* [2021] KECA 130 (KLR) where the two courts held that a delay of 3 and 5 months respectively was not inordinate. Counsel urged me to allow the Motion.
4. Despite having been duly served with the applicants' Motion and the hearing notice, the respondents did not file any affidavit in reply. Neither did they file submissions or appear at the hearing when the applicants' Motion came before me on the Court's virtual platform on 13<sup>th</sup> May 2025.
5. 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.
6. 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 v 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.
7. The Applicants' Motion for extension of time to file an appeal turns on the four basic factors enunciated in *Leo Sila Mutiso v Helen Wangari Mwangi* (ibid)
8. 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. It is noteworthy that the applicants have not annexed a Memorandum of Appeal to demonstrate that the intended appeal is arguable. I find no material on the record as put to me, or in the submissions by counsel, to suggest the grounds on which the intended appeal is founded. Consequently, no useful purpose would be served by pronouncing myself on the remaining three factors, namely the period of delay, the reasons for such delay and whether the respondents stood to suffer any prejudice.
9. I form this view on the authority of the Supreme Court's decision in *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR) where it held that: "This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:
  1. 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;



2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
10. In the same vein, the High Court in *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Odunga J, (as he then was) observed that:

“In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence.” (See also *Ratman v Cumarasamy* [1964] 3 All ER 933; *Savill v Southend Health Authority* [1995] 1 WLR 1254 at 1259.)

11. In the absence of the basis on which the intended appeal is preferred, it matters not that the period of delay was not glaringly inordinate. Neither does it matter that the respondents took no steps to oppose the applicants’ Motion. Moreover, the Court’s discretion under rule 4 is not absolute. It is an equitable relief dependent on the circumstances of each case. Having said that, I hasten to add that the appellants’ afore-mentioned omission is further compounded by the fact that the letter bespeaking their application for proceedings was not copied to the respondents; that that the letter was filed on the 33<sup>rd</sup> day following delivery of the impugned judgment (3 days out of time); and that, since they picked their proceedings on 3<sup>rd</sup> December 2024, the applicants have taken no demonstrable steps to file the record of appeal for more than one year.
12. The multitude of procedural infractions aforesaid militate against exercise of my discretion under rule 4 in the appellants’ favour. In any event, attributing such fatal mistakes on counsel does not of itself save the situation. This Court in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR stated that:

“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.”

13. Similarly, in *Bi-Mach Engineers Limited v James Kahoro Mwangi* [2011] eKLR, this court reiterated the duty of an applicant to follow up on instructions given to an advocate and expressed itself as follows:

“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up on the matter with his



erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy.”

(See: The decision of the High Court of Kenya at Thika in Mwangangi v Mugi [2024] KEHC 6321 (KLR)).

14. Having carefully considered the applicants’ Motion, the grounds on which it was founded, the affidavit in support, the submissions by learned counsel, the cited authorities and the law, I form the view that the application has no merit and is hereby dismissed with no orders as to costs.

**DATED AND DELIVERED AT MALINDI THIS 23<sup>RD</sup> DAY OF MAY 2025.**

**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**

