



REPUBLIC OF KENYA



KENYA LAW
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**Kibue & 2 others v Kamithi & another (Civil Application
E149 of 2025) [2025] KECA 1112 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1112 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E149 OF 2025**

F SICHALE, JA

JUNE 20, 2025

BETWEEN

ANNUNCIATA WAITHIRA KIBUE 1ST APPLICANT

PAUL KIMARI KIBUE 2ND APPLICANT

SUSAN NJERI KIBUE 3RD APPLICANT

AND

GEORGE NJENGA KAMITHI 1ST RESPONDENT

MARGARET NDUITA KAMITHI 2ND RESPONDENT

(Being an Application for Extension of Time to file a Memorandum of Appeal and Record of Appeal against the Judgment and Orders of the Environment and Land Court at Nairobi (L. Komingoi J), dated 30th September 2020 in (Nairobi ELC Case No. 156 of 2010)

RULING

1. By the motion on notice dated 20th February 2025, brought pursuant to the provisions of Rule 4 of the Court of Appeal Rules; Section 3A and 3B of the *Appellate Jurisdiction Act*; Article 159 of *the Constitution* of Kenya 2010 and all other enabling provisions of the Law, Annunciata Waithira Kibue, Paul Kimari Kibue and Susan Njeri Kibue (“the applicants” herein) have invoked the jurisdiction of this Court sitting as a Single Judge seeking the following orders:
 - “i. Spent.
 - ii. That this Honourable Court be pleased to grant extension of time and grant leave to the applicants to file their Memorandum of Appeal and Record of Appeal out of time.



- iii. That the Court do issue any other order (s) it may deem just in the circumstances of this case.
 - iv. That costs of this application be in the cause.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Dr. Susan Njeri Kibue (the 3rd applicant herein), who deposed inter alia that they had initially filed their Record of Appeal timeously on 16th November 2020, in Civil Appeal No. E444 of 2020.
3. That, through inadvertent error by their counsel, the Record of Appeal was served on the respondents out of time and that the said Record of Appeal was not served immediately because they were still waiting for the trial court to type the remaining proceedings from 12th July up to 30th September 2020.
4. She further deposed that they filed a Supplementary Record of Appeal on 10th May 2021 and refilled the same on 14th July 2023, subsequent to a ruling by the Deputy Registrar of the Court on 7th June 2023, granting them leave to file the said Supplementary Record of Appeal and that further the Supplementary Record of Appeal was filed on the strength of a Certificate of Delay issued by the Court on 23rd April 2021.
5. That, subsequent thereafter, the respondents filed applications dated 7th May 2021 and 1st August 2023 seeking orders for striking out of the said Record of Appeal and Supplementary Record of Appeal due to a time lapse on service of the Record of Appeal which applications were allowed by the Court on 5th February 2025.
6. She further deposed that the Notice of Appeal instituting this appeal was not challenged and remains on record and that further the instant application had been brought without any unreasonable delay.
7. The motion was opposed vide grounds of opposition dated 9th May 2025 and a replying affidavit of even date sworn by Henry Omino an advocate from the firm of Walker Kontos who has the conduct of this matter on behalf of the respondents who deposed inter alia that the initial appeal filed by the applicants herein, was duly struck out by the Court of Appeal on 5th February 2025 for material non-compliance on part of the applicants for reasons inter alia; failing to file and serve the Supplementary Record of Appeal within the timelines accorded by the Deputy Registrar and that the appeal having been struck out due to the omissions of the applicants, they ought not to be allowed a second bite at the cherry.
8. In a rejoinder to the averments contained in the respondents replying affidavit, the 3rd applicant swore a further affidavit on 12th May 2025, deposing inter alia that their appeal was not dismissed as alleged by the respondents and that further the Notice of Appeal herein had not been challenged and remains on record.
9. It was submitted for the applicants that this Court has the power to allow a party to regularize a Record of Appeal that has been struck out. For this proposition, reliance was placed on the case of Catherine Karungari Karl v Guenter Otto Karl (10 of 1998) 1988 KECA281 (KLR) (8 May 1998) (1). It was thus submitted that the cited authority was very similar to the circumstances in the present case noting that the applicants Record of Appeal had been struck out earlier on and that further, this Court had the discretion to allow a party to regularize an appeal by filing a fresh Record of Appeal and that this was not a second bite on the cherry as the Notice of Appeal was never struck out.
10. On the other hand, it was submitted for the respondents that there was unreasonable and unexplained delay in bringing the instant application as it was common ground that the decree proposed to be



appealed against, was issued by the court on 30th September 2020, after a period 4½ years which period was inordinate.

11. It was further submitted that the applicants had acknowledged that their earlier appeal that they had filed was duly struck out by the Court of Appeal on 5th February 2025, arising from serious lapses on their part and that this fact notwithstanding, there was still an unexplained delay of 1 and half months in filing the instant application, from the date the appeal was struck out which delay had not been explained.
12. Turning to prejudice, it was submitted that the judgment in favour of the respondents was issued in the year 2020, which was more than 4 and a half years and that they were entitled to the fruits of their judgment and that the present application only served to prolong unnecessarily the enjoyment of this right.
13. Consequently, I was urged to dismiss the application with costs.
14. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the grounds of opposition, the replying affidavit, the further affidavit, the respective parties' submissions, the cited authorities and the law.
15. The principles upon which this Court exercises its discretion pursuant to Rule 4 to extend time or not are now old hat. The Court has wide and unfettered discretion in deciding whether to extend time or not. However, in exercising its discretion the Court should do so judiciously.
16. See *Mwangi vs. Kenya Airways Limited* (2003) KLR 486 where this Court stated thus:

“Over the years, the Court has set out guidelines on what a single Judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance, in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi* (Civil Application No. Nai 255 of 1997 (unreported), the Court expressed itself thus;

“It is now well settled that the decision whether or not to extend 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.”

17. In the instant case and as regards the length of the delay, the impugned judgment was delivered on 30th September 2020, whereas the instant motion is dated 20th February 2025. There has therefore been a delay of almost 5 years which delay is certainly inordinate.
18. Turning to reasons proffered for the delay, it was the applicants' contention that they had initially filed their Record of Appeal timeously on 16th November 2020 in Civil Appeal No. E444 of 2020, but through inadvertent error by their counsel the Record of Appeal was served upon the respondents out of time and that the reason for this was due to the fact they were still waiting for the trial court to type the remaining proceedings of the trial court from 12th July 2018 up to 30th September 2020.
19. It is not lost on this Court that on 5th February 2025, a 3 Judge Bench of the Court of Appeal comprising Ochieng, Muchelule and J. Ngugi JJ.A struck out the applicants Memorandum and Supplementary Record of appeal following “concessions from the applicants”, whereas the instant



motion was filed on or about 20th February 2025, a period of about 15 days, which delay I do not consider to be inordinate.

20. Given the circumstances, I consider the reasons given for the delay to be reasonable/plausible and more so given the fact that the matter was in Court and ultimately therefore, I am of the considered opinion that the delay herein has been sufficiently explained to the satisfaction of this Court.
21. 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 make no further comment on this issue.
22. Finally on prejudice, I am satisfied that the applicants would be greatly prejudiced if the instant motion is not allowed as they will have been shut out from the seat of justice and on the contrary if the instant motion is allowed, the parties will have their day in Court and they will be accorded an opportunity to canvass their respective positions.
23. The totality of my findings therefore is that 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 and the instant motion is accordingly allowed.
24. Accordingly, the applicants' motion dated 20th February 2025, is merited and the same is hereby allowed as prayed. The applicants shall file their Memorandum and Record of Appeal within a period of 30 days from the date of this ruling failure to which these orders shall stand vacated.
25. The costs of this motion shall abide the outcome of the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2025.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

