



**Elbi Homes Limited v Lauri & 2 others (Civil Application
E031 of 2024) [2025] KECA 1391 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1391 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E031 OF 2024
AK MURGOR, JA
JULY 31, 2025**

BETWEEN

ELBI HOMES LIMITED APPLICANT

AND

LENZI LAURI 1ST RESPONDENT

CEASER KIHUMBA 2ND RESPONDENT

CRYSTAL BAY WATAMU 3RD RESPONDENT

(An application for extension of time within which to file a Memorandum of appeal, Grounds of appeal and Record of appeal and a stay of further proceedings in the Environment and Land Court pending the determination of the intended appeal arising out of the dismissal of the Applicants application for the amendment of the Plaint by (Makori, J.) delivered on 12th July 2023 in Malindi High Court Civil Suit Number No. 143 of 2012)

RULING

1. By Notice of Motion dated 16th February 2024 brought pursuant to Rules 4, and 42, of the Court of Appeal Rules, Article 159 of *the Constitution* Order 50 rule 4 of the Civil Procedure Rules inter alia, the Applicant Elbi Homes Limited seeks orders for: (i) enlarging the time for filing of the Memorandum of appeal, Grounds of appeal and Record of appeal; ii) an order for stay of the proceedings until determination of the intended of the appeal and costs.
2. The application supported by an affidavit of Allan George Njogu Kamau the Applicant's director, was brought on grounds that the Applicant filed a Plaint in Malindi High Court Civil Suit Number 143 of 2012 which was amended on 23rd October 2017; that in the Plaint, the Applicant sought a declaration for orders that it be entitled to exclusive possession and occupation of Plot Number 683 Grant Number CR 24169 (the suit plot) situated in Watamu; that further orders were sought seeking enforcement of orders by the Officer Commanding Watamu police station to demolish and remove



illegal structures on the suit plot, aggravated damages, mesne profits, compensatory damages which amendment was by consent of the parties.

3. It was further deponed that by an application dated 26th January 2023, the Applicant sought to further amend the Plaintiff by deleting the names of the 1st, 2nd and 3rd Respondent and to substitute them with the name of Seven Islands Watamu Limited, which application was dismissed by the trial court.
4. The Applicant was aggrieved and sought an appeal to this Court against the decision of the trial Judge; that it filed a Notice of appeal on 24th July 2023 and on the same day, the Deputy Registrar of the Environment and Land Court was requested for a copy of the decree and typed proceedings; that when the typed proceedings were received, more than 60 days had lapsed which caused the Applicant to request for a Certificate of delay. It was deponed that the Deputy Registrar not only declined to issue the Certificate of delay, but also failed to provide any reasons; that this prompted the Applicant to file a Notice of motion dated 26th March 2024 seeking orders for issuance of the Certificate of delay; that by a ruling dated 30th September 2024, the Applicant's application was dismissed for the reasons that the physical file disclosed that the Certificate of delay was signed on 1st December 2023. The Applicant deponed that it was not informed that the Certificate of delay had been signed way back on 1st December 2023, and despite their having diligently followed up issuance of the Certificate of delay with several letters to the Registry, including a letter dated 20th February 2024, no response was received.
5. As a consequence, it was deponed, a plausible and satisfactory explanation had been provided for the delay in filing the Memorandum of appeal, Grounds of appeal and Record of appeal, and therefore, it is imperative that this Court enlarge time for the lodging of the Applicant's appeal and for an order of stay of proceedings to be granted failing which the appeal would be rendered nugatory.
6. By a Replying affidavit sworn on 30th April 2025 Roberto Lenzi, the 1st Respondent and director of the 3rd Respondent, Crystal Bay Watamu Limited opposed the application for stay of proceedings and extension of time. It was deponed that the Applicant has not demonstrated that it had an arguable appeal; that the suit was instituted almost 13 years ago against the Respondents for a declaration that the Applicant is entitled to exclusive possession and occupation of the suit plot; that the Respondents filed a defence challenging the Applicant's claim for the reason that the order sought were incapable of being issued against the 1st Respondent as he was not in possession of the suit plot and that the allegations of trespass and unlawful possession were unsupported by the evidence.
7. It was thereafter deponed that in an application dated 29th September 2017, the Applicant again sought to amend the Plaintiff to introduce Crystal Bay Watamu Limited as the 3rd Defendant, which application was allowed by consent of the parties; that thereafter a further amendment of the Plaintiff was sought in an application dated 26th January 2023; that this time, the amendment sought to delete the 3 respondents and replace them with Seven Islands Watamu Limited as the sole defendant; that the 1st Respondent opposed the further amendment and upon consideration, the learned Judge dismissed the application; that it is this decision that led to the filing of the Applicant's Notice of appeal, and this application seeks to extend time for filing of the Memorandum of appeal, Grounds of appeal and Record of appeal.
8. On 26th March 2024, the Applicant filed an application seeking to compel the Deputy Registrar of the High Court at Malindi to issue a Certificate of delay, and in a ruling of 30th September 2024, the Deputy Registrar dismissed the application for the reason that the Certificate of delay signed on 1st December 2023 was ready for collection and was in the court file. It was deponed that the Applicant had neglected to collect the Certificate of delay and therefore, this application was based on misrepresentation and



non-disclosure of material facts and violated the cardinal principles of equity; that the Applicant is guilty of laches and the delay in filing the Memorandum and Record of appeal has been inordinate, and the Applicant has failed to meet the legal threshold for grant of the order of stay of proceedings as well as to enlarge time.

9. Both the Applicant and the Respondent filed written submissions, and when the motion came up for hearing on a virtual platform, learned counsel Mr. Kiarie Kariuki appeared for the Applicant, while learned counsel Mr. Asman holding brief for Ms. Asili was for the Respondents.
10. Mr. Kariuki relied entirely on the Applicant's written submissions, but withdrew the prayer for an order of stay of proceedings, since it was not properly before this Court. In the submissions, the Applicant reiterated to a large extent the contents of the motion, save to add that the Certificate of delay was not issued despite sustained efforts to obtain it from the Registry, but to no avail. Counsel reiterated that it was the failure on the part of the Deputy Registrar to supply the Certificate of delay that led to the delay in filing the Memorandum and the Record of appeal.
11. Mr. Asman also relied on the Respondent's written submissions which also reiterated the averments of the affidavit in reply.
12. Under rule 4 of the Court of Appeal Rules, this Court has jurisdiction to extend time in a matter such as this in the following terms:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or 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.”
13. This Court in the case of *Leo Sila Mutiso vs Hellen Wangari Mwangi* [1999] 2 EA 231 set out the principles to be applied in the exercise of its discretion in the determination of any application under rule 4 thus:

“...the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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.”
14. Having regard to the foregoing, the ruling appealed against was delivered on 12th July 2023, and this application was filed on 16th February 2024, which would mean that there was a delay of about 7 months in the filing of the Memorandum and Record of appeal, and hence this application seeking for time to be extended.
15. The question for consideration is whether the delay has been adequately explained. The Applicant's complaint is that the failure by the Registry to issue the Certificate of delay timeously or at all is what led to the delay in filing the Memorandum and Record of appeal.
16. The Notice of appeal was filed on 24th July 2023 and served on the Respondent on 31st July 2023. The letter bespeaking the request for typed proceedings was filed on the same date, and served on the Respondent, albeit that the date of service is not indicated. Having served the Respondent, it goes without saying that the Applicant was entitled to benefit from the proviso to Rule 84 of this Court's rules, which provides that the time for preparation of the proceedings would be excluded from computation of the period of delay.



17. According to the Applicant, it obtained the proceedings on the 6th November 2023, but since the Certificate of delay was not supplied simultaneously with the proceedings, counsel on record requested the Deputy Registrar to supply the Certificate. When it was not forthcoming, counsel wrote to the Registry on 20th February 2024 requesting for the Certificate, and when no response was received, he was compelled to file an application seeking for supply of the Certificate of delay. On 30th September 2024 the application was dismissed for the reason that a Certificate of delay was issued on 1st December 2023. The ruling further stated that, the signed Certificate of delay of 1st December 2023 indicated the actual period taken to prepare and supply the proceedings and the ruling was from 25th July, 2023 to 6th November, 2023. The ruling went on to state that by the time of delivery of the Applicant's letter dated 20th February 2024, the Certificate of delay, had already been signed and was awaiting collection.
18. Going by the material before the Court, it is not in dispute and both the Deputy Registrar's ruling of 30th September 2024 and the Applicant's motion are in agreement that the period taken to prepare and supply the proceedings and the ruling was from 25th July 2023 to 6th November 2023. As a consequence, it can be discerned that it took 3 months for the proceedings to be prepared, which period should be excluded from the period of delay. Additionally, when 60 days for filing the record is computed, the total period of delay that can be explained is 5 months out of the 7-month period of delay. This would leave 2 months that are yet to be explained.
19. The Applicant has strenuously maintained that had it not been for the delay in provision of the Certificate of delay, and which it is yet to receive, it would have filed the Record of appeal on time.
20. In the case of *Mistry Premji Ganji (Investments) Limited vs Kenya National Highways Authority* [2019] eKLR it was observed that:

“...the computation of the 60-day window within which he should lodge the record of appeal is suspended during the typing of proceedings provided the appellant serves the letter bespeaking proceedings upon the court and the respondent. A certificate of delay is usually issued in such cases, specifying the time taken for the proceedings to be typed, for purposes of exclusion of the same during computation”.
21. In the case of *Abdulrehman (Sued as the Attorney of the Wakf of the Late Harith Al-Amin Bin Mazrui) vs Canarian Holdings Limited* [2025] KECA 911 (KLR) this Court stated:

“The origins of a Certificate of Delay stems from the proviso to rule 84(1) of this Court's Rules, 2022 which provides for issuance of a Certificate of Delay to account for the time taken in obtaining the proceedings from the trial court if the appeal is not instituted within 60 days of lodging a notice of appeal... A Certificate of Delay is therefore prima facie evidence of the period it took to prepare and deliver the proceedings.”
22. The above-cited authorities elaborate on the necessity of the supply of the Certificate of delay, as this enables a Court to compute the time taken for preparation of the typed proceedings and the ruling. In the absence of a Certificate of delay, a court is hamstrung in its ability to ascertain the period of preparation, as demonstrated herein, where this Court has had to rely on other extraneous information to determine the period of preparation of the proceedings.
23. A perusal of the record does not disclose that the signed Certificate of delay was made available to the Applicant, meaning that, as at the time of filing of this application, it had yet to be supplied. In view of the unusual circumstances surrounding the Certificate, including the motion seeking to compel the Registry to issue the Applicant with a Certificate of delay, I am constrained to construe the benefit



of doubt in favour of the Applicant that, it was the failure to provide the Applicant with the signed Certificate of delay that led to the delay in filing of the memorandum, grounds, and record of appeal in the remaining 2 months. In view of the conclusion reached, I am satisfied that the delay has been satisfactorily explained.

24. Turning to the question of whether the appeal has any measure of success and whether there will be prejudice to the parties, upon consideration of the material before the Court, it is observed that the Applicant did not file a draft Memorandum of appeal and has yet to file the Memorandum of appeal. As a consequence, there are no Grounds of appeal upon which this Court can discern whether or not the appeal is likely to succeed. Be that as it may, this being an emotive land matter, my considered view is that it would be mutually beneficial to all parties for the Applicant's intended appeal to be heard and determined with finality.
25. In sum, the applicant having satisfied the requirements of rule 4, I exercise my discretion to extend time for lodging of the Applicant's Memorandum, Grounds and Record of appeal.
26. In so finding, I make the following orders:
 - i. that time be and is hereby extended for lodging the Memorandum and Record of appeal; and
 - ii. that the Memorandum and Record of appeal be lodged and served within 30 days of this Court's order.
 - iii. Costs in the appeal.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JULY, 2025

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

