



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Kathure & another v Land Registrar, Meru County & another (Civil Application E070 of 2025) [2025] KECA 1344 (KLR) (25 July 2025) (Ruling)

Neutral citation: [2025] KECA 1344 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E070 OF 2025
WK KORIR, JA
JULY 25, 2025**

BETWEEN

FAITH KATHURE 1ST APPLICANT

FAITH KAGWIRA MUNYUA 2ND APPLICANT

AND

LAND REGISTRAR, MERU COUNTY 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

(Being an application for leave to file and serve a record of appeal out of time against the judgment of the Environment and Land Court at Meru (C.K. Nzili, J.) dated 24th May 2023 in E&LC Petition No. E023 of 2021)

RULING

1. In the notice of motion dated 7th May 2025, the applicants are seeking enlargement of time to file and serve their record of appeal. The application, which is supported by the affidavit of the 1st applicant, Faith Kathure, is premised on the grounds that despite requesting for the decree vide letters dated 16th May 2024 and 8th July 2024, it was only on 24th September 2024 that the decree was signed and issued by the trial court registry. The applicants aver that the delay in lodging the record of appeal was occasioned by the failure to secure a signed decree which was beyond their control. Further, that the application has been brought without undue delay and both the record and memorandum of appeal are ready for filing.
2. The respondents did not file any response or submissions in this matter.
3. Through submissions dated 27th May 2025, the firm of Kiautha Arithi & Co. Advocates reiterated the grounds in support of the application and referred to the case of Abudi Ali Mahadhi vs. Ramadhan Saidi & Another [1998] KECA 153 (KLR) to urge that delay in obtaining the decree is a valid and



sound ground for enlargement of time. Counsel referred to Andrew Kiplangat Chemaringo vs. Paul Kipkorir Kibet [2018] KECA 701 (KLR) to appreciate the Court's unencumbered discretion to enlarge time, and Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] KESC 12 (KLR) to identify the principles underpinning the exercise of the discretion to enlarge time. Counsel also urged that no prejudice will be visited upon the respondents should leave be granted. In the end, counsel prayed that the application be allowed and the costs of the application be provided for.

4. As I have already mentioned, the respondents neither filed a response nor submissions in this matter despite being served with the application and directions. An affidavit of service to that effect has been placed on record. Be that as it may, the boundaries within which I must exercise my discretion under rule 4 of the Court of Appeal Rules, 2022 are well established. For instance, in Salat vs. Independent Electoral and Boundaries Commission & 7 Others (supra), the Supreme Court outlined the principles as follows:

“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.”

5. Ordinarily, not all the factors are considered in each and every application. An application is dependent on its own facts and only factors relevant to the application at hand are considered. In the instant application, I deem the only issue for my consideration to be whether the reason for the delay is satisfactory.
6. The applicants, having filed the notice of appeal on 13th June 2023, were required to file the record of appeal on or before 12th August 2023. With this application being brought on 7th May 2025, the period of delay is about 1 year and 9 months. According to the applicants, the delay was occasioned by failure to secure a certified decree.
7. It is indeed correct that under rule 89(1) of the Court of Appeal Rules, the decree is one of the essential documents in the record of appeal. This was confirmed in Premier Dairy Ltd vs. Amarjit Singh Sagoo & Another [2009] KECA 469 (KLR), where the Court held that:

“A certified copy of decree is a primary document. It is not one of those documents which under rule 85(2A) of this Court's Rules, may be brought in by filing a supplementary record



of appeal or which if defective may be amended and brought in through the filing of a supplementary record of appeal under rule 89(3) of this Court's Rules. As we stated earlier, Mr. Amoko, for the appellant concedes that the record does not contain a certified copy of decree. In view of what we have stated above, the omission is not curable and his argument that a copy of decree signed and sealed as required by O.XX, of the Civil Procedure Rules suffices, is not tenable."

8. The above view reflects the position prior to the acceptance of overriding objectives as forming the bedrock of substantive justice. In the subsequent decision of *Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 3 Others* [2010] eKLR, the Court allowed a supplementary record containing the Judge's notes to be filed thereby appreciating that indeed, primary or essential documents could be filed through a supplementary record and that an appeal ought not be struck out for failure to include them in the substantive record of appeal. In that regard, the Court held that:

"... In dealing with decisions of the Court made before the amendments, litigants and the practicing bar must now bear in mind the existence of the amendments and that the Court will consider previous decisions bearing in mind the existence of the amendments.

We think that in the circumstances of this appeal, striking it out would not facilitate the just, expeditious, proportionate and affordable resolution of the appeal. There is an alternative available and while we refuse to strike out the appeal as requested in the motion, we order, under rule 89(3) of the Court's rules, the 1st respondent to file and serve upon the applicants a supplementary record of appeal containing the notes of the two Judges left out in the record of appeal."

9. Similar views were adopted, expressed in *Dorcas Indombi Wasike vs. Benson Wamalwa Khisa* [2010] KECA 331 (KLR), where the Court pointed out that:

"We have already observed that the overriding objective principle is expressly superimposed on the existing rules. The effect of this, is that Rule 85 (2A) is deemed as amended to embrace all the documents specified in Rule 85 (1) with the result that it is now permissible for an appellant with leave of the court to include any of the documents referred to in Rule 85 (1) including primary documents in a supplementary record of appeal."

10. The views in the above authorities reflect the position that prevailed prior to enactment of the Court of Appeal Rules, 2022. In the current rules, the differentiation that existed in the repealed rule 85 is no longer there. All the documents listed under rule 89(1) of the current Rules are essential to the record and ought to be filed. Unlike the previous rules, rule 90 now expressly allows for the lodging of essential documents through a supplementary record of appeal by providing that:

"Where a document referred to in rule 89(1) and (2) is omitted from the record of appeal, the appellant may, within fifteen days after lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 94 (3) and, thereafter, with leave of the deputy registrar on application."

11. Having stated the foregoing, it is imperative to point out that in this application, it is not clear when the applicants' advocates were issued with the typed proceedings. With that ambiguity, it becomes more problematic to reconcile why the request for the signed decree was first made on 16th May 2024 and not earlier bearing in mind that the statutory timelines lapsed on 12th August 2023. I therefore



wonder whether the applicants are hiding behind the claim of waiting for a signed decree to explain the delay of 1 year and 9 months before the filing of the instant application. In the circumstances, I am not persuaded that the explanation for the delay in filing the appeal is genuine. Ordinarily, one would expect that if the record was availed within time, the appeal should have been filed and a supplementary record subsequently filed, with or without leave, depending on the time of filing. There is also no explanation tendered before me as to why the decree was being sought 9 months after the period for filing the record of appeal had lapsed.

12. As was pointed out in *Andrew Kiplagat Chemarigo vs. Paul Kipkorir Kibet* [2018] eKLR, even though there is no minimum or maximum period of delay, it is only a plausible and satisfactory explanation for the delay that unlocks the Court's discretion in the applicants' favour. In my view, this may be a disingenuous attempt by the applicants to conceal their inexcusable failure to file the appeal within the prescribed time under the disguise of missing an essential document. I therefore do not find the reason advanced by the applicants for the delay in filing the record of appeal to be genuine and satisfactory.
13. The upshot of the foregoing is that the notice of motion dated 7th May 2025 lacks merit and is hereby dismissed.
14. The respondents having not replied to the application, I make no order as to costs.

DATED AND DELIVERED AT NYERI THIS 25TH DAY OF JULY, 2025.

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

