



REPUBLIC OF KENYA



KENYA LAW
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**Mrema v Choke (Civil Application E129 of 2024)
[2025] KECA 1334 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1334 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E129 OF 2024**

KI LAIBUTA, JA

JULY 18, 2025

BETWEEN

NASSOR HUSSEIN MREMA APPLICANT

AND

RUWA CHOKE & 8 OTHERS 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 Kwale (A.E. Dena, J.) delivered on 29th March 2022 in Civil Appeal No. 6 of 2021)

RULING

1. Before me is a Notice of Motion dated 26th September 2024 filed pursuant to rule 4 of the Court of Appeal Rules, 2022 in which the applicant, Nassor Hussein Mrema, seeks:
 - (i) leave to file an appeal out of time from the judgment of A. E. Dena J. delivered on 29th March 2022 in Kwale ELC Case No. 6 of 2021;
 - (ii) an order that the notice of appeal dated and lodged on 19th May 2022 be validated and deemed as duly filed; and
 - (iii) that the costs of the application do abide the outcome of the intended appeal.
2. The applicant's Motion is supported by his annexed affidavit sworn on 26th September 2024 and is made on 8 grounds set out on the face of the Motion, the salient grounds of which are, namely: that the impugned judgment was delivered on 29th March 2022, but only managed to obtain a copy of the judgment on 12th May 2022; that the judgment was delivered in the absence of the parties and without notice to them; that he applied and paid for the proceedings on 12th May 2022, but that they were availed on 21st March 2024; that he has applied for a certificate of delay but that, despite numerous



reminders, the ELC has failed to avail it; and that the delay and failure to comply with the timelines was beyond the applicant's control.

3. Learned counsel for the applicant, M/s. Mukuha & Mukuha, did not file any submissions in support of the applicant's Motion.
4. On their part, learned counsel for the respondent, M/s.Okanga & Company filed Grounds of Opposition dated 10th June 2025, contending that the application lacks merit for want of sufficient reason why he should be allowed to file his appeal out of time; that the applicant ought to have lodged the notice of appeal within 14 days of the judgment; and that the applicant was duly served with notice of for delivery of the judgment by the court but chose not to attend. Likewise, counsel did not file any written submissions or affidavit in reply to the applicant's Motion.
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. In the same vein, the Court of Appeal in *Fakir Mohammed v 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.
8. The Applicant's Motion for extension of time to file an appeal turns on the four basic factors enunciated in *Leo Sila Mutiso v Helen Wangari Mwangi* (supra)
9. With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. It is noteworthy that the applicant has not presented a Memorandum of Appeal to demonstrate that the intended appeal is arguable. Neither are any grounds set out on the face of the Motion or in the affidavit in support.
10. Most important is that there is no evidence on record to show that the notice of appeal dated 12th May 2022 was ever lodged with the Registrar of the superior court in accordance with rule 77(1) of this Court's Rules. Likewise, the letter dated 12th May 2022 bespeaking the purported application for proceedings in the superior court does not indicate whether it was ever served upon or copied to counsel for the respondent as required by rule 84(2) of the Court's Rules. In view of the foregoing, no useful purpose would be served by consideration of the period of delay in approaching the Court this late in the day, or the reasons for such inordinate delay.



11. Addressing itself to the mandatory requirement to file and serve a notice of appeal, the Supreme Court in *University of Eldoret and another v Hosea Sitienei and three others* [2020] eKLR observed at para 36:

“The filing of a notice of appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a notice of appeal signifies the intention to appeal.”

12. On the authority of the *University of Eldoret and Sitienei* case (ibid), it is true to say that, in the absence of a notice of appeal properly on record, the applicant herein is yet to express his intention to appeal. Citing the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR, this Court had this to say in *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission and 2 others* [2018] eKLR:

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”

13. In so far as a notice of appeal is a jurisdictional pre-requisite, nothing flows from a non-existent notice to invoke this Court’s jurisdiction to grant the orders sought pursuant to Rule 4 or any other Rule. In effect, its hands are tied, so to speak. I so hold cognisant of the general principle that it is only in exceptional circumstances that this Court would raise its hand to slam shut the door to justice on the face of a litigant despite the constitutional guarantee of access to justice as enshrined in Article 48.

14. In view of the foregoing, I reach the inescapable conclusion that the applicant’s Notice of Motion dated 26th September 2024 is incompetent and is hereby struck out with costs to the respondent. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY 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

