



**Mwakuzimu & another v Germano Chincerini Foundation (The Registered Trustee)
(Civil Application E055 of 2023) [2025] KECA 1335 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1335 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E055 OF 2023**

KI LAIBUTA, JA

JULY 18, 2025

[IN CHAMBERS]

BETWEEN

HASSAN JUMA MWAKUZIMU 1ST APPLICANT

ATHMAN ALI MWAKUZIMU 2ND APPLICANT

AND

**GERMANO CHINCHERINI FOUNDATION (THE REGISTERED
TRUSTEE) RESPONDENT**

(Being an application for extension of time to file and serve the Record of Appeal out of time from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (L. L. Naikuni, J.) delivered on 9th May 2023 in E.L.C Case No. 59 of 2016)

RULING

1. Before me is a Notice of Motion dated 22nd June 2023 by which the applicants, Hassan Juma Mwakuzimu and Athman Ali Mwakuzimu, seek, *inter alia*, extension of time pursuant to rule 4 of the [Court of Appeal Rules](#) to file an appeal out of time from the judgment and decree of the ELC (L.L. Naikuni, J.) dated 9th May 2023 in [Mombasa ELCC No. 59 of 2016](#).
2. The applicants' Motion is supported by the annexed affidavit of Hassan Juma Mwakuzimu, the 1st applicant, sworn on 22nd June 2023 essentially deposing to 8 grounds on which the Motion is anchored, namely: that the impugned judgment was delivered on 9th May 2023 in the applicants' absence, who were acting in person; that, on 12th June 2023, they learnt from their former advocates that judgment had been delivered; that, by that time, the timelines set for appeal had lapsed; that they were aggrieved by the trial court's decision and wish to appeal; that failure to file the appeal within the prescribed period was occasioned by failure on the trial court to notify them of the date of delivery of the



impugned judgment; that the respondent is unlikely to suffer any prejudice should the application be allowed; and that the intended appeal has high chances of success.

3. In support of the Motion, learned counsel for the applicant, M/s. Akanga Matende & Company, filed written submissions dated 6th July 2023 citing the cases of *Paul Wanjohi Mathenge v Dancun Gichane Mathenge* [2013] eKLR; and *Leo Sila Mutiso v Rose Helen Wangari Mwangi* [1977] eKLR, submitting on the factors to be determined in an application for extension of time pursuant to rule 4 of this *Court's Rules*; and *Mary Nchekei Paul v Francis Mundia Ruga* [2019] eKLR where Musinga, JA. Considered the degree of prejudice to be suffered if the application for extension of time was not granted. Counsel urged me to allow the Motion.
4. In response, the respondent filed a replying affidavit of John Muoki, the respondent's Manager, sworn on 13th July 2023 stating, inter alia, that the superior court had given notice of the date for delivery of judgment by an email dated 28th April 2023 to counsel for the parties.
5. On their part, counsel for the respondent, M/s. Kamoti Omollo & Company, filed written submissions dated 18th July 2023 citing the cases of *Paul Wanjohi Mathenge v Dancun Gichane Mathenge* (*supra*); and *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014] eKLR, highlighting the principles that govern the exercise of discretion in applications for extension of time; and *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR where this Court observed that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.
6. 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.
7. 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 (see also *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR).
8. 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* (*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 applicants' draft memorandum of appeal dated 22nd June 2023 contains 11 grounds intended to be advanced on appeal and which demonstrate that the intended appeal is arguable. To my mind, the intended appeal is not frivolous and deserves this Court's scrutiny, but whether or not the appeal will succeed is not for me to judge.



10. On the period of delay, the Court of Appeal in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR observed that

“... the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable.”

11. The impugned judgment having been delivered on 9th May 2023, but there being no proof that a notice of appeal was lodged with the Registrar of the superior court in accordance with rule 7(1) of the *Court of Appeal Rules*, there is no basis upon which I can exercise my discretion under rule 4 of this *Court’s Rules*. I also hasten to observe that the record as put to me does not contain any material to suggest that the appellants made a written request for the proceedings and that the letter (if any) bespeaking their application was filed and served on the respondent within the mandatory timelines stipulated in rule 84(2) of the *Court’s Rules*. In the circumstances, and for good reason, no useful purpose would be served in pronouncing myself on the other factors to be considered in determination of applications under rule 4.

12. 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.”

13. 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.”

14. 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.

15. In view of the foregoing, I reach the inescapable conclusion that the applicants’ Notice of Motion dated 22nd June 2023 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

