KENYA / JUDGMENT

Kamunya v Kinyuru [2026] KECA 1679 (KLR)

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COURT
Court of Appeal

BEFORE
JM Mativo

CASE / FILE NUMBER
Civil Appeal (Application) E096 of 2026

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Kamunya v Kinyuru (Civil Appeal (Application) E096 of 2026) [2026] KECA 1679 (KLR) (16 September 2026) (Ruling)

Neutral citation:

[2026] KECA 1679 (KLR)

Republic of Kenya

In the Court of Appeal at Nakuru

Civil Appeal (Application) E096 of 2026

JM Mativo, JA

September 16, 2026

Between

Jane Wairimu Kamunya

Applicant

and

David Macharia Kinyuru

Respondent

(Being an application for extension of time and leave to file an appeal out of time from the judgment and decree of the Environment and Land Court of Kenya at Naivasha (M. Oundo, J.) dated 21st May 2026 in ELC LA No. E010 of 2025)

Ruling

1.Jane Wairimu Kamunya, (the applicant) by her application dated 10th June 2026, prays for extension of time to file her appeal against the judgment delivered on 21st May 2026 in Naivasha Environment and Land Case Number ELC LA E010 of 2025. She also prays that her notice of appeal filed on the 9th day of June 2026 be deemed as properly filed. The applicant also prays for costs of the application to be provided for. The application is anchored on Sections 3A and 3B of the Appellate Jurisdiction Act and Rules 4, 41, 43, 47, and 75 (2) of the Court of Appeal Rules, 2022.

2.The grounds in support of the application as I distil them from the application and the annexed supporting affidavit sworn on 10th June 2026 by Cedric Magotsi, the applicant's advocate can be summed up as follows: (a) the impugned judgment was delivered on 21st May 2026; (b) aggrieved by the said decision, the applicant filed a notice of appeal dated 29th May 2026 and on the 9th June 2026 the Environment and Land Court granted him 30 days leave to file her appeal; (c) the applicant filed her notice of appeal before the lapse of the 30 days but the appeal is yet to be filed; (d) after the delivery of the judgment, the applicant’s counsel’s spouse fell ill which significantly contributed to the delay in filing the notice of appeal by a further 4 days, (f) the appeal has high chances.

3.The respondent strenuously opposed the application through his replying affidavit sworn on 29th July 2026. The salient grounds urged are: (a) the applicant has failed to satisfy the four guiding principles set out in the locus classicus decision in Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1997); (b) the explanation for the delay is unsatisfactory and lacks candour, as the medical evidence provided (parking receipts) predates the delivery of the judgment; therefore they bear no temporal connection to the delay; (c) the applicant's counsel actively engaged in post- judgment correspondence on 8th June 2026, which contradicts the claim of being overwhelmed and incapable of lodging a notice of appeal; (d) the applicant failed to annex a draft memorandum of appeal, leaving this Court with no basis to assess the arguability of the intended appeal.

4.In support of the application, the applicant’s counsel filed submissions dated 10th July 2026 basically urging that the delay was due to counsel’s spouse’s illness, that the application was filed within 30 days of the judgment and the Court should exercise its discretion in the applicant’s favour. Further, the appeal is meritorious.

5.To buttress his submissions, the applicant’s counsel cited Ngei Kibe & Another (Civil Appeal (Application) E359 of 2021 [2021] KECA 243 (KLR) in support of his submission that the applicant’s appeal has high chances of success. Counsel also cited Sokoro Savings and Credit Co-operative Society Ltd vs. Mwambu (Civil Application E032 of 2022) [2023] 381 (KLR) in support of the principle that a reasonable reason for the delay is a valid ground for the Court to exercise its discretion in granting an extension.

6.The respondent’s counsel filed submissions dated 27th July 2026. He argued that the applicant attributes the delay to counsel’s pre-occupation with a critically ill family member. However, the applicant’s documentary evidence shows parking receipts from 15th to 16th May 2026 before the judgment date, a fact which discredits the applicant’s explanation. Counsel submitted that the Court’s discretion under Rule 4 is not automatic and must be based on verifiable facts. It was also submitted that the applicant failed to annex the draft memorandum of appeal making it impossible for the Court to assess its merit. Further, discretion must be exercised judiciously based on verifiable facts. Lastly, the respondent will suffer prejudice if the application is granted.

7.The respondent’s counsel cited Omboya vs. Zum Zum Investments Ltd & 3 Others (Civil Application E024 of 2022) [2022] KECA 1120 (KLR) to argue that this Court has wide unfettered discretion to extend time under Rule 4. Counsel also cited Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (supra) in support of the holding that this Court has wide discretion, but the Court must consider four factors, namely, the length of the delay, the reasons for the delay, the chances of the success of the appeal and the degree of prejudice to the respondent if the stay is granted. Counsel argued that the above four pillars must be satisfied.

8.Counsel also cited Mombasa Island Cargo Terminal Limited vs. Asaka (Civil Application No. E082 of 2023) {2024] KECA 556 (KLR) in support of the proposition that submissions by counsel do not constitute evidence and cannot cure evidential deficiencies.

9.The only question for my determination is whether the applicant has met the threshold for the exercise of this Court’s discretion to grant the extension of time sought. The application is governed by Rule 4 of the Court of Appeal Rules, 2022 which gives this 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.”

10.The phrase "on such terms as are just" appearing in the above rule represents a statutory grant of wide, unfettered discretionary power to courts while allowing specific procedural reliefs. The discretion must be exercised on "just terms," meaning the applicant must show that the delay was not intentional or in bad faith.

11.The Supreme Court in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR summed up the applicable considerations as follows:a.Extension of time is not right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;b.A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;c.Whether the court should exercise the discretion to extend time, is a consideration to be made on a case- to-case basis;d.Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;e.Whether there will be any prejudice suffered by the respondents if the extension is granted;f.Whether the application has been brought without undue delay; and,g.Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

12.As was held in Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR the law does not set out any minimum or maximum period of delay and 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. The benchmark for what constitutes a "reasonable explanation" is governed by a strict overarching requirement: the applicant must provide a full, detailed, and completely candid explanation covering the entire period of the delay. The Court looks at an interrelated mix of factors. These include: (a) The degree of lateness; (b) The explanation for the delay; (c) The prospects of success of the appeal on the merits; and (d) The degree of prejudice to the respondent.

13.A slight delay coupled with a mediocre explanation may be overlooked if the prospects of success are stellar. Conversely, if the delay is excessive and the explanation is non-existent, the Court will refuse condonation without even looking at the merits of the case. General, vague, or sweeping statements do not qualify as reasonable. The explanation must be chronological. The applicant must account for every single stage of the delay. If there are gaps in the timeline where nothing was done and no explanation is provided, the explanation fails. (See Grootboom vs. NPA 2014 (2) SA 68 (CC)). To successfully merit an extension of time, the reason given must be objective, unexpected, and out of the party's immediate control.

14.The germane reason provided by the applicant is that the applicant's advocates spouse was sick, which disrupted his work, hence the four (4) day delay. Counsel provided hospital parking tickets dated 15th and 16th May 2026. The respondent's counsel took issue with these dates arguing that the above dates are before the judgment date, which is 21st day of May 2026. True, the receipts are dated five (5) days before the judgment date. In my view, unexpected illness or medical incapacity of a vital participant in the litigation, whether the attorney, the client, or an immediate family member like a spouse is recognized as an objective, bona fide hurdle that can constitute a plausible explanation for a delay. However, illness alone does not grant automatic immunity. The sickness must be explicitly detailed, chronologically linked to the timeline of the default, and preferably corroborated by medical evidence.

15.When an attorney's immediate family member falls seriously ill, the courts recognize that the practitioner's attention is understandably diverted from their practice, providing a plausible explanation for procedural lapses. In M vs. M [2017] ZAGPPHC 1041, the attorney on record explained that the delay to file an appeal was directly caused by the illness of his wife and the urgent medical treatment she required. Coupled with a concurrent illness of the client, the Court evaluated the explanation under the broad principles of fairness and formal justice, and granted condonation for the delay.

16.The reasoning in the above decision mirrors the general common law consensus seen across Commonwealth- influenced jurisdictions, where courts universally accept that physical or mental illness directly impacts an individual's capacity to act promptly, meaning vulnerable or incapacitated individuals should not be unfairly penalized.

17.The guiding threshold is clearly set out in Rule 4 which is “on such terms as may be just” which means the standard is the "interests of justice," which requires balancing the explanation for the delay, the prospects of success, the importance of the case and prejudice to the parties. A plausible explanation, however, is the "key that unlocks the door" to this balancing exercise. If the explanation for the delay is not plausible (i.e., it is weak, contradictory, or non-existent), the Court usually will not exercise its discretion to extend time, even if the appeal has merit. A good explanation for a long delay is often needed to satisfy the "good cause" requirement.

18.I have looked at the reasons provided by the applicant highlighted earlier. The respondent is not contesting the sickness. The respondent’s argument as I understand it is that the documents provided in support of the sickness wereobtained before the judgment was delivered. That may be so, but the difference is barely 5 days. The respondent did not consider the reality that a person discharged from hospital barely 5 days ago, or even longer, could be recuperating at home and the fact that such a person will need attention by the close family members.

19.The respondent also claimed that the applicant did not attach the draft memorandum of appeal, therefore this Court cannot determine whether the appeal has prospects of success. However, this Court has consistently held that the failure to annex a draft memorandum of appeal to an application for a stay of execution or an extension of time is not fatal to the application, as an arguable appeal can be discerned directly from the supporting affidavit and other supporting facts. (SeeRotich vs. Rono (Sued as the legal representative of the Estate of Andrew Kipngeno Rono) & Another (Civil Application E079 of 2024) [2024] KECA 1552 (KLR) (4 November 2024) (Ruling)).

20.When analyzing an application under Rule 4 of the Court of Appeal Rules, 2022, (for extensions of time) or Rule 5 (2) (b) (for stay of execution), the Court looks for an "arguableappeal". It does not mandate that the grounds must appear exclusively in a separate, annexed draft memorandum. This Court in Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd & 2 Others (Civil Application No. 124 of 2008) established the cornerstone rule on this specific point. The Court declared that while attaching a draft memorandum of appeal is standard practice to illustrate the presence of an arguable appeal, its absence does not defeat the application. If the grounds of grievance, triable issues or structural errors of the lower court are comprehensively detailed within the body of the supporting affidavit or supplementary affidavits, the court will safely extract and gauge the arguability of the intended appeal from those statements. I say no more.

21.In conclusion, I am persuaded the scales of justice tilt in favour of exercising my discretion and allow this application. I see no prejudice on the part of the respondent if the application is allowed. Accordingly, I allow the application dated 10th June 2026 and grant the applicant extension of time to file her appeal against the judgment delivered on 21st May 2026 in Naivasha Environment and Land Case Number ELC LA E010 of 2025. I direct the applicant to file the appeal within 30 days from today. I also order that the notice of appeal filed on the 9th day of June 2026 be deemed as properly filed. The costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF SEPTEMBER, 2026.J. MATIVOJUDGE OF APPEALI certify that this is a true copy of the original.Signed.DEPUTY REGISTRAR

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